

## EMBRYO DISPOSITION AGREEMENTS: ENFORCEABILITY AND REMEDIES

### I. INTRODUCTION

This memorandum discusses the enforceability of the following draft agreement regarding the rights and obligations of the parties<sup>1</sup> to an embryo transfer agreement:

1. By signing this agreement, donors hereby agree to forever relinquish and terminate any legal or parental rights they may have to the embryos which are the subject of this agreement.
2. Recipient couple agrees that all embryos which survive the thawing process shall be transferred into the recipient mother.
3. Since damages would be difficult, if not impossible, to assess in the event that either party breaches this agreement, the parties hereto agree that liquidated damages in the amount of \$25,000 is a reasonable sum to be assessed to either party who breaches this agreement.

Each of these provisions presents unique legal issues. Although general contract and property principles will presumptively govern disputes under these provisions, in addition, constitutional, privacy, and public policy considerations may render the clauses unenforceable.<sup>2</sup> This memorandum analyzes each clause individually, discusses its enforceability, and predicts how a court would resolve a dispute if it finds the clause unenforceable.

Current law does not adequately address the enforceability of embryo disposition agreements.<sup>3</sup> Law has developed in related fields, such as adoption law, surrogacy contracts, and sperm, organ, and tissue donation.<sup>4</sup> The law has also resolved disputes regarding embryo disposition agreements between the progenitors themselves. No court, however, has directly

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<sup>1</sup> This paper refers to the gamete donors as “progenitors,” and the couple seeking the embryos as “donees” or “recipients.” This language is not intended to presuppose or suggest that gift law should apply.

<sup>2</sup> Shana Kaplan, *From A to Z: Analysis of Massachusetts' Approach to the Enforceability of Cryopreserved Pre-Embryo Dispositional Agreements*, 81 B.U. L. REV. 1093, 1112-1113 (2001).

<sup>3</sup> Susan L. Crockin, *The “Embryo” Wars: At The Epicenter of Science, Law, Religion, and Politics*, 39 FAM. L.Q. 599, 613 (2005).

<sup>4</sup> See, *Perry v. Saint Francis Hosp. & Medical Ctr.*, 886 F. Supp. 1551 (D. Kan. 1995); *In re Baby M*, 109 N.J. 396, 422 (N.J. 1988).

addressed the enforceability of agreements regarding the adoption or donation of embryos from progenitors to third-parties.<sup>5</sup> Although a court will look to these analogous fields in deciding whether to enforce the agreement, it must also reconcile the differences presented by the distinct procreational and privacy rights of the progenitors and donees.<sup>6</sup>

In crafting law in this developing field, courts must balance several competing policy considerations.<sup>7</sup> First, the law recognizes every person's right to control his or her future procreation.<sup>8</sup> This right severely limits the government's ability to prevent a woman from aborting her pregnancy,<sup>9</sup> prevents the government from controlling an individual's medical choices,<sup>10</sup> and prevents courts from intermeddling in private parties' procreational decisions.<sup>11</sup> Conversely, the law recognizes the importance of providing private parties certainty in planning their familial lives.<sup>12</sup> Enforcing private contracts and agreements provides the parties with certainty,<sup>13</sup> allows the parties to plan for the future,<sup>14</sup> and instills in the parties the seriousness of their undertakings.<sup>15</sup> The law, however, has always limited the ability to contract by refusing to enforce agreements that violate public policy or intrude on domestic courts' decision making authority regarding children.<sup>16</sup> Thus, predictability, and the presumption favoring enforceability in private contracts, represents only the starting point in the enforceability analysis.<sup>17</sup>

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<sup>5</sup> Crockin, *supra* note 4, at 613.

<sup>6</sup> *See, e.g., Davis*, 842 S.W.2d at 597 (Tenn. 1992).

<sup>7</sup> Compare Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 279-280 (1995) and *Groves v. Clark*, 1999 MT 117, P28 (Mont. 1999).

<sup>8</sup> *Wade*, 410 U.S. at 162; *Davis*, 842 S.W.2d at 597.

<sup>9</sup> *Wade*, 410 U.S. at 162; *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).

<sup>10</sup> *Union P. R. Co. v. Botsford*, 141 U.S. 250, 255 (1891).

<sup>11</sup> *See, e.g., In re Marriage of Witten*, 672 N.W.2d 768, 777 (Iowa 2003).

<sup>12</sup> *See, e.g., Reichman supra*, note 10, at 279-280.

<sup>13</sup> *Harco Nat'l Ins. Co. v. Grant Thornton LLP*, 2009 NCBC 11, 32 (N.C. Super. Ct. 2009).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; *Kass v. Kass*, 696 N.E. 2d 174, 180 (N.Y. 1998).

<sup>16</sup> *See, e.g., Rest. Contracts*, § 583; *Rainer v. Rowlett*, 255 Ark. 794, 796 (Ark. 1973).

<sup>17</sup> *Rainer*, 255 Ark. at 796.

Precedent exists to validate or ignore the provisions of an embryo disposition agreement in a dispute between progenitors and donees.<sup>18</sup> Because the case and statutory law varies by jurisdiction, the outcome of any case may depend on what law the court chooses to apply.<sup>19</sup> Under most state conflict of laws rules, the forum court will respect choice of law provisions in the contract.<sup>20</sup> In drafting the model agreement, therefore, the non-profit organization should include a choice of law clause stating that the law of the jurisdiction that is most likely to enforce the agreement shall apply to the contract.<sup>21</sup> This will provide the organization the best predictability and certainty, thereby lowering its liability risks and its clients' litigation costs.<sup>22</sup>

## **II. THE ENFORCEABILITY OF AN AGREEMENT RELINQUISHING THE PROGENITORS' RIGHTS TO THE EMBRYOS DEPENDS ON THE EMBRYOS' LEGAL CLASSIFICATION AND THE DISPUTE'S TIMING.**

The first clause of the agreement states, “[b]y signing this agreement, donors hereby agree to forever relinquish and terminate any legal or parental rights they may have to the embryos which are the subject of this agreement.” This provision’s enforceability initially depends on whether a court defines the embryos as “property,” “people,” or something in between.<sup>23</sup> This section will first explain the likelihood that a court will apply the various models and analyze the outcome under each. It will then discuss the issue of timing, explaining that the rights of the parties starkly differ before and after the embryos’ transfer to the donee woman.

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<sup>18</sup> In re Marriage of Dahl & Angle, 194 P.3d 834, 839, 842 (Or. Ct. App. 2008); c.f. *Davis*, 842 S.W.2d at 597.

<sup>19</sup> *Dahl*, 194 P.3d at 842; *Davis*, 842 S.W.2d at 597.

<sup>20</sup> Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 130 (2008).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Erin P. George, *The Stem Cell Debate: The Legal, Political and Ethical Issues Surrounding Federal Funding of Scientific Research on Human Embryos*, 12 ALB. L.J. SCI. & TECH. 747, 763-764 (2002).

Eight states currently regulate embryo donation by statute. Each of these statutes explicitly dissolves the progenitors' parental rights and responsibilities and transfers the parental rights to the donees.<sup>24</sup> These statutes, however, vary in applicability. Some only apply to married donees, or to donees who bring an embryo to term in wedlock.<sup>25</sup> Oklahoma also requires prior court approval of donation agreements.<sup>26</sup> Louisiana, by contrast, treats embryos as juridical people, and provides an adoption system to decide disposition issues.<sup>27</sup> In these states, therefore, a court would apply the statute to determine the outcome of the case. Absent statutory instruction, a court would consider the following models in determining enforceability.

#### A. The Property Model

A court may apply traditional property law to resolve an embryo agreement dispute if it finds the embryos analogous to blood or sperm, to which courts generally apply property principles.<sup>28</sup> If a court applies traditional property law, it must also decide whether the agreement constitutes a gift, or whether the parties entered into a contract for the sale of the embryos.<sup>29</sup>

If a court applies gift law, it will likely uphold the original agreement as an effective conveyance by gift.<sup>30</sup> For a valid conveyance, the law requires the donee to prove that the donor intended to convey the embryos, and actually or symbolically delivered them.<sup>31</sup> Delivery

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<sup>24</sup> Fla. Stat. Ann. 742.11-17 (2005); N.D. Cent. Code 14-18-01-07 (2005); Okla. Stat. Ann. Tit. 10, 556 (2005); Tex. Fam. Code Ann. 12.03A-.04 (2005); Va. Code Ann. 20-156-165; Wash. Rev. Code Ann. 26.26.705 (2005).

<sup>25</sup> Fla. Stat. Ann. 742.11-17 (2005); N.D. Cent. Code 14-18-01-07 (2005); Okla. Stat. Ann. Tit. 10, 556 (2005); Wash. Rev. Code Ann. 26.26.705 (2005).

<sup>26</sup> Okla. Stat. Ann. Tit. 10, § 556 (2005).

<sup>27</sup> La. Rev. Stat. Ann. § 9:123 (2006)

<sup>28</sup> See, e.g., *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d. 311 (Ct. App. 2008); *Hecht v. Superior Court*, 20 Cal. Rptr. 2d. 275 (Ct. App. 1993).

<sup>29</sup> *Robertson v. United States*, 343 U.S. 711, 713-714 (1952).

<sup>30</sup> See, e.g., *Meyer v. Meyer*, 64 So. 420, 424 (Miss. 1914).

<sup>31</sup> *Lagarde v. Lagarde*, 33 So. 3d 1169, 1173 (Miss. Ct. App. 2009) (stating requirements for a valid *inter vivos* gift).

generally requires only that the parties take measures reasonable under the circumstances to transfer possession of the embryos to the donees.<sup>32</sup> On meeting these requirements, legal title, and all property rights, transfers to the donees.<sup>33</sup> Thus, the donees will have the right to use, control, and destroy the embryos, and the progenitors will retain no rights to the embryos.<sup>34</sup>

If a court applies gift law, the parties will likely meet these requirements because the progenitors' execution of the agreement shows intent, and control by a third-party fertility clinic will satisfy the delivery requirement.<sup>35</sup> Because the embryos must remain cryogenically frozen, it is reasonable to consider the embryos "delivered" although they remain with the fertility clinic because actual transfer is impractical.<sup>36</sup> Then, the formal execution of the agreement will likely constitute sufficient symbolic delivery.<sup>37</sup>

A court may also apply contract law to the agreement if it finds it non-gratuitous.<sup>38</sup> A valid contract requires offer, acceptance, and consideration.<sup>39</sup> The only disputable issue is whether the donees provided consideration for the embryos. If a court finds contract law applicable to the dispute, it will likely find that the donees provided consideration. Although the consideration issue varies by the facts of each case, because the donees agreed that they would implant all embryos that survive the thawing process, a court will generally find valid consideration. The agreement, therefore, will be seen as promise to give the embryos in return for a promise from the donees to give each embryo the chance to develop into a viable fetus. Although no money changes hands in this initial agreement, a court, if it applied this model and

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<sup>32</sup> *Meyer*, 64 So. at 424.

<sup>33</sup> *Ruffel v. Ruffel*, 900 A.2d 1178, 1188 (R.I. 2006).

<sup>34</sup> *Id.*

<sup>35</sup> *See, e.g., Lagarde*, 33 So. 3d at 1173.

<sup>36</sup> *Meyer*, 64 So. at 424.

<sup>37</sup> *See, e.g., O'Neil v. Vermont*, 144 U.S. 323, 334 (1892).

<sup>38</sup> *Robertson*, 343 U.S. at 713-714.

<sup>39</sup> *See, e.g., Yarnall v. Almy*, 703 A.2d 535, 538 (Pa. Super. 1997).

reached this result, would find that each side provided valuable consideration to transfer a human embryo.

Absent consideration, alternatively, a court could validate the contract under a promissory estoppel theory.<sup>40</sup> For promissory estoppel to apply, one party must have made a promise to the other party, it must have been foreseeable that the other party would rely on the promise, and the other party must have reasonably relied on the promise to his or her detriment.<sup>41</sup> With regard to embryo disposition agreements, progenitors make definite promises to donate their embryos. Many such transfers occur each year, making donees' reliance on such promises reasonable and foreseeable. Because donee women must undergo extensive fertility treatment before receiving embryos, and may not be able to find adequate replacement embryos during their treatment cycle, the donee women detrimentally rely on the promises. Accordingly, a court could uphold such contracts absent consideration under an estoppel theory. Thus, a court applying gift or contract law would likely uphold embryo disposition agreements.

Several courts, in the context of accidental destruction of human material, have treated human genetic material as property.<sup>42</sup> In *Kurchner v. State Farm Fire & Casualty Company*, for example, the court explicitly held that the destruction of cryopreserved sperm constituted "property damage," as opposed to "bodily injury," under a state insurance policy.<sup>43</sup> The court reasoned that, because the sperm was outside the body, it must be property because it was no longer physically part of the person.<sup>44</sup> Similarly, in *Polesuk v. CBR Systems*, the court held that

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<sup>40</sup> See, e.g., *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762, 780 (8th Cir. 2010).

<sup>41</sup> *Id.*

<sup>42</sup> See, e.g., *Kurchner v. State Farm Fire & Cas. Co.*, 858 So. 2d. 1220, 1227 (Fla. Ct. App. 2003).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

cord blood, blood taken from a child's umbilical cord, constituted property.<sup>45</sup> Thus, precedent exists to apply pure property principles to embryo disposition agreements.<sup>46</sup>

Despite these cases, a court may reject a property approach because it does not accommodate the ethical and moral considerations inherent in issues regarding human embryos.<sup>47</sup> In *Moore v. Regents of California*, the Supreme Court of California refused to apply property principles to a dispute regarding Moore's spleen.<sup>48</sup> Instead, the court noted that the law generally treats human organs and tissue "as objects *sui generis*, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property."<sup>49</sup> Similarly, the Tennessee Supreme Court, in *Davis v. Davis*, held that "[e]mbryos 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. It follows that any interest that [the progenitors] have in the [e]mbryos ... is not a true property interest."<sup>50</sup> Courts have, therefore, generally avoided explicitly labeling human genetic material property.<sup>51</sup>

Even if a court applies property principles, it may find that private contracts for the sale of human embryos violate public policy.<sup>52</sup> Federal law currently prohibits the sale of human organs for valuable consideration.<sup>53</sup> Although federal law only prohibits the sale of HIV-infected genetic material,<sup>54</sup> several states expressly forbid the sale of embryos.<sup>55</sup> A court should

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<sup>45</sup> Polesuk v. CBR Sys., 2006 U.S. Dist. LEXIS 71098 (S.D.N.Y. 2006).

<sup>46</sup> See also U.S. v. Garber, 607 F.2d 92 (5th Cir. 1979) (holding plasma property); *Moore*, 793 P.2d at 509 (Mosk, J., dissenting).

<sup>47</sup> See *Witten*, 672 N.W.2d at 781.

<sup>48</sup> *Moore*, 793 P.2d at 509.

<sup>49</sup> *Id.*

<sup>50</sup> *Davis*, 842 S.W.2d at 597 (Tenn. 1992).

<sup>51</sup> *Id.*

<sup>52</sup> See, *Stiver v. Parker*, 975 F.2d 261, 269 (6th Cir. 1992).

<sup>53</sup> National Organ Transfer Act, 42 U.S.C. § 274e(a) (1997) (Banning organ transfer for "valuable consideration").

<sup>54</sup> 18 U.S.C. § 1122(a) (1997).

extend the prohibition to embryos transferred for valuable consideration for the same reason organs may not be sold, but may be donated:<sup>56</sup> to prevent the morally repugnant prospect of the commodification of human genetic material.<sup>57</sup> A court would avoid allowing contracts because it would open the door for the uninhibited sale of embryos, which could lead to a market for “desirable” embryos. This result would encourage the healthy, smart, and athletic to create and market embryos for the sole purpose of resale.<sup>58</sup> Thus, a court may hold that the sale of embryos violates public policy.<sup>59</sup>

The courts that have applied property-like principles and upheld agreements regarding the disposition of embryos have done so in the context of marriage dissolution.<sup>60</sup> In divorce cases, upholding these agreements often makes sense because both parties, husband and wife, were progenitors.<sup>61</sup> The present agreement differs from the marriage dissolution agreements because it is a third-party, without a genetic relationship to the embryos, who seeks to use the embryos.<sup>62</sup> A court may therefore distinguish the marriage dissolution cases, and refuse to apply property principles, because third-parties do not have the genetic interests of progenitors.<sup>63</sup>

## B. The Personhood Model

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<sup>55</sup> See, e.g., Fla. Stat. Ann. 873.05(1) (1994) (prohibiting the advertising or sale of any human embryo); Utah Code Ann. 76-7-311 (1995) (prohibiting the sale or purchase of human fetal tissue); La. Rev. Stat. Ann. 9:122 (1991).

<sup>56</sup> See, Kathleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193 (1997).

<sup>57</sup> *Moore*, 793 P.2d at 509.

<sup>58</sup> See *id.*

<sup>59</sup> *Id.*

<sup>60</sup> See, e.g., *Dahl v. Angle*, 222 Ore. App. 572, 580 (Or. Ct. App. 2008) (“the right to possess or dispose of the frozen embryos is personal property that is subject to a ‘just and proper’ division under” Oregon law).

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., *Davis*, 842 S.W.2d at 597 (Tenn. 1992).

<sup>63</sup> *Id.*

By contrast, if a court considers embryos legal people, it would apply state adoption law to determine the rights and obligations of the parties.<sup>64</sup> Under adoption law, courts generally consider the best interest of the child in determining whom to award custody.<sup>65</sup> Prior agreements, therefore, would not control a court's decisions regarding which party it would award custody of the embryos.<sup>66</sup> Instead, the court would attempt to apply the best interest of the child factors in determining the rights and obligations of the parties.<sup>67</sup>

Louisiana has adopted a statute requiring embryos to be treated as juridical people.<sup>68</sup> In this jurisdiction, therefore, a court would apply the personhood model.<sup>69</sup> It would then apply the statutory instructions for deciding the embryo disposition.<sup>70</sup> Absent statutory provisions deciding the outcome, the court applying the personhood model will most likely decide custody based on a modified best interest of the child standard. Precedent therefore also exists to apply the personhood model.

Absent a statutory instruction otherwise, however, a court will probably not apply the personhood model because it fails to recognize Supreme Court precedent holding that unborn fetuses, a class very similar to embryos, are not "people."<sup>71</sup> The Court, in *Roe v. Wade*, held that "the unborn have never been recognized in the law as persons in the whole sense."<sup>72</sup> The Supreme Court of Tennessee, in *Davis v. Davis*, applied *Roe* to hold that frozen embryos, like

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<sup>64</sup> See, e.g., *In the Interest of T.T.*, 2008 Iowa App. LEXIS 1790 (Iowa Ct. App. 2008)

<sup>65</sup> *Id.*

<sup>66</sup> See *Allen v. Superior Ct.*, 194 Cal. App. 2d 720, 726-727 (1961)

<sup>67</sup> See UMDA § 402; Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 Mich. L. Rev. 2215 (1991).

<sup>68</sup> La. Rev. Stat. Ann. § 9:123 (2006); O.C.G.A. § 19-8-42 (d) (2009).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See *Witten*, 672 N.W.2d at 775 (holding that the purpose of the custody statute requires finding that embryos are not "children" within the meaning the statute).

<sup>72</sup> *Wade*, 410 U.S. at 162.

unborn fetuses, do not enjoy constitutional protection.<sup>73</sup> To hold otherwise would illogically recognize greater constitutional rights in frozen, stored embryos than in a fetus in a woman's womb.<sup>74</sup>

A court should not consider embryos children within the meaning of divorce or child custody laws because these laws do not adequately apply to embryos.<sup>75</sup> In most cases, the language and purpose of these statutes make them inappropriate for use in deciding which party should be awarded the embryos.<sup>76</sup> These statutes generally only cover children, and courts have consistently held that the legal meaning of "child" includes only a born child.<sup>77</sup> Courts have additionally recognized that legislatures crafted the best interest of the child standard with born children in mind.<sup>78</sup> The statutes focus on factors such as the child's relationship with the parties, focusing on the "physical, emotional, and psychological well being" of born children.<sup>79</sup> With an unborn fetus or embryo, many of the factors simply do not apply.<sup>80</sup>

### C. The Intermediate Model

Finally, if a court places the embryo in an intermediary category, it will necessarily formulate a new legal rule to govern such agreements.<sup>81</sup> Court should apply the intermediary model because it encourages frank discussion and consideration of the policies behind the enforceability of embryo disposition agreements and avoids forcing courts into a doctrinal

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<sup>73</sup> *Davis*, 842 S.W.2d at 594; *see also*, *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998).

<sup>74</sup> *Id.*

<sup>75</sup> *Witten*, 672 N.W.2d at 775.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 776

<sup>79</sup> *Witten*, 672 N.W.2d at 780.

<sup>80</sup> *Id.*

<sup>81</sup> *See, e.g.*, *Guzman*, *supra* note 59, at 199.

“straightjacket,” a dilemma which may accompany the other models and lead to undesirable results.<sup>82</sup>

Several courts have applied an intermediate standard to agreements between the progenitors,<sup>83</sup> and courts have applied similar models to organ donation.<sup>84</sup> The Tennessee Supreme Court stated that this view provides the best solution because it recognizes an embryo

deserves special respect greater than that accorded to human tissue but not the respect accorded to actual persons ... because of its potential to become a person and because of its symbolic meaning .... Yet, it should not be treated as a person, because it has not yet developed the features of personhood ... and may never realize its biological potential.<sup>85</sup>

In formulating its rule, a court is likely to begin with several rules and presumptions. First, the court should allow the progenitors to stop any embryo transfer that has not yet occurred.<sup>86</sup> This avoids the procreational rights issues involved with forcing people to become genetic parents against their will.<sup>87</sup> Several courts have taken this approach, finding that “public policy prohibits the enforcement of a contract for the disposition of unused embryos when one of the parties changes his or her mind.”<sup>88</sup> Refusing enforcement of the contract also avoids the political, social, and moral issues of characterizing an embryo because it recognizes that “the interest one has in an embryo is greater than a property interest,” but also allows the court to make “clear that [it] do[es] not intend to give the embryo itself rights.”<sup>89</sup>

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<sup>82</sup> *Id.* (“finding a frozen embryo is property could make a fertility specialist who destroys it liable for conversion; a holding that a frozen embryo is a person could permit the specialist's prosecution for negligent homicide.”).

<sup>83</sup> *See, e.g., Witten*, 672 N.W.2d at 782-83; *Davis*, 842 S.W.2d at 597.

<sup>84</sup> *Moore*, 793 P.2d at 509.

<sup>85</sup> *Davis*, 842 S.W.2d at 602.

<sup>86</sup> *Id.* at 602-03 (“decisional authority rests in the gamete-providers alone.... [N]o other person or entity has an interest sufficient to permit interference with the gamete-providers' decision”).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Molly Miller, *Embryo Adoption: The Solution to an Ambiguous Intent Standard*, 94 MINN. L. REV. 869, 876 (2010).

Before transfer to the donee woman, a court will likely find, on balancing the rights and interests of the parties, that the progenitors' interest in avoiding procreation outweighs the donees' interest in forcing the transfer. The Supreme Court has addressed a person's right to avoid procreation in several contexts, and has consistently refused to allow state interference with decisions regarding personal autonomy. The abortion cases represent the most important cases recognizing a woman's right to avoid procreation. In *Roe v. Wade*, the Court recognized a woman's fundamental right to choose whether to carry a pregnancy to term.<sup>90</sup> In *Planned Parenthood v. Casey*, the Court held that the state may not place an undue burden on a woman seeking an abortion.<sup>91</sup> In these cases, the Court recognized that the right to personal autonomy means that a person must retain the personal decision whether to bear a child.

The abortion cases do not definitely answer the enforceability question because the progenitors have already relinquished possession of their embryos, and turned them over to the fertility clinic. In this way, the court could regard the fertilized embryos more like sperm donated to a third-party for artificial insemination purposes. Once donated, the donor cannot recover the sperm.<sup>92</sup> The coming together of an egg and sperm, however, creates a unique genetic makeup distinguishable from the sperm.<sup>93</sup> Further, assuming the embryos survive thawing, they remain independently viable, assuming a suitable donee is available. Thus, the sperm donation model does not adequately address the moral considerations unique to embryos.<sup>94</sup>

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<sup>90</sup> *Wade*, 410 U.S. at 162

<sup>91</sup> *Casey*, 505 U.S. at 856.

<sup>92</sup> *See, e.g., Hall v. Fertility Inst.*, 647 So. 2d 1348, 1351 (La. App. 1994).

<sup>93</sup> *Davis*, 842 S.W.2d at 593.

<sup>94</sup> *See, Davis*, 842 S.W.2d at 596.

A court confronting this issue will likely extend the Supreme Court's abortion cases and find that, before transfer, the progenitors' constitutional rights in avoiding procreation preclude forcing the progenitors to deliver the embryos to the donees.<sup>95</sup> A court will recognize as paramount each persons' right to avoid procreation.<sup>96</sup> This is a personal and intimate decision that deserves constitutional protection. Also, while the hardship to the donees will vary case by case, and may never in fact materialize, forcing procreation will always cause permanent harm to the progenitors' privacy and autonomy interests. Circumstances change, and it is nearly impossible for the progenitors to anticipate their future emotional and psychological reaction to the changes.<sup>97</sup> Although the progenitors agreed to terminate these rights when they signed the agreement, a court will likely ignore the agreement if it would result in forced procreation.<sup>98</sup>

In *J.B. v. M.B.*, the Supreme Court of New Jersey interpreted an agreement purporting to transfer all of the progenitors' rights to a fertility clinic.<sup>99</sup> The court held the agreement invalid, and allowed either progenitor the right to change his or her mind before disposition of the embryos.<sup>100</sup> Similarly, in *A.Z. v. B.Z.*, the Massachusetts Supreme Judicial Court held an agreement to compel biological parenthood unenforceable.<sup>101</sup> There, the progenitors agreed to implant the embryos in the future.<sup>102</sup> The court refused to enforce the agreement, finding the contract similar to a contract to marry or to give up a child for adoption before its birth, both of

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<sup>95</sup> *Id.* at 601 (right to procreational autonomy includes both the right to procreate and to avoid procreation).

<sup>96</sup> *Id.* at 597 (“[N]o other person or entity has an interest sufficient to permit interference with the gamete-providers’ decision to continue or terminate the IVF process, because no one else bears the consequences of these decisions in the way that the gamete-providers do.”).

<sup>97</sup> *Id.*

<sup>98</sup> *See, J.B. v. M.B.*, 783 A.2d 707, 711 (N.J. 2001) (allowing either progenitor the right to change his or her mind).

<sup>99</sup> *Id.* at 710.

<sup>100</sup> *Id.*

<sup>101</sup> 725 N.E. 2d. 1051, 1058 (Mass 2000).

<sup>102</sup> *Id.*

which courts will not uphold.<sup>103</sup> The court explicitly held that the progenitors' rights outweigh the rights of third-parties, and that the right of a potential parent to avoid procreation outweighs any right of the other to use the embryo.<sup>104</sup> Here, a court will likely adopt a similar bright-line rule allowing the progenitors to block donee insemination anytime before transfer occurs.

Second, the court will likely refuse to allow the contract to alter the rights of the parties post-transfer. After the embryos are transferred, the court will likely apply adoption law, determining parental rights and responsibilities in the best interest of the child. Although the court should consider which parents were the intended parents,<sup>105</sup> this determination should not be dispositive. At this point, a baby will be born, and the court should find that providing for the best interest of the future child is paramount over prior agreements.

Third, a court may allow the party upholding its end of the agreement to recover in restitution from the other party. This outcome encourages embryo donation agreements by removing the potential economic harm to the party that performs as agreed. It also generally fulfills the expectations of the parties while avoiding allowing the uninhibited sale of embryos. A court should, however, allow the party that does not fulfill its end of the agreement to rebut this presumption in favor of restitution by showing a change of circumstances that warrants decreasing, or eliminating, any remedy.

### **III. THE DONEE WOMAN CANNOT BE FORCED TO ACCEPT AN EMBRYO TRANSFER AND BRING THE EMBRYO TO TERM, BUT THE COURT MAY AWARD RESTITUTION OR OTHER EQUITABLE REMEDIES FOR BREACH OF THE AGREEMENT**

The second clause of the agreement provides, “[r]ecipient couple agrees that all embryos which survive the thawing process shall be transferred into the recipient mother.” This section

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *See, Miller, supra* note 92, at 885 (discussing the desirability of an intent-based standard to determine parentage).

will explain that a court cannot constitutionally enforce an agreement that would force a woman to accept an embryo transfer.<sup>106</sup> The woman's right to privacy and personal autonomy under the federal Constitution prohibits forcing a person to undergo any medical procedure against her will, including such forced transfer. Further, because the woman retains the right to abort the fetus until viability, forcing a woman to initially accept a transfer would be futile.<sup>107</sup>

Although a court would not order specific performance of the agreement, this does not necessarily preclude monetary damages or restitution when a party breaches the agreement. If the court finds the agreement violates public policy, it may render the agreement wholly without legal effect.<sup>108</sup> Alternatively, a court could find that the agreement is enforceable to the extent that money damages or restitution can compensate the performing party. If the agreement does not offend a strong public policy, and is not illegal under the criminal law, the court may allow a party to recover under equitable principles.<sup>109</sup>

A court will not order specific performance of the donee woman's agreement to be impregnated with the embryo because the Supreme Court has consistently held that a person may not be forced to undergo medical procedures against his or her will. In *Union Pacific Railroad Company v. Botsford*, the Court emphatically stated, "no right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others ...."<sup>110</sup> The Court deemed this to be a "right of complete immunity: to be let alone."<sup>111</sup> In *Botsford*, the Court held that a party to a civil personal injury case could not be forced to submit to a medical examination

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<sup>106</sup> See, e.g.,

<sup>107</sup> *Davis*, 842 S.W.2d at 588, n. 19.

<sup>108</sup> *Loney v. Primerica Life Ins. Co.*, 231 Ga. App. 815, 819 (1998).

<sup>109</sup> *Witten*, 672 N.W.2d at 779-780.

<sup>110</sup> 141 U.S. 250, 251 (1891).

<sup>111</sup> *Id.* (internal citation omitted).

to allow a physician to assess that person's injuries.<sup>112</sup> Similarly, the Court has held that the government may not pump a suspect's stomach,<sup>113</sup> surgically remove a bullet from a suspect,<sup>114</sup> and must allow a person to refuse medical treatment, even if refusal will lead to that person's death.<sup>115</sup> In fact, even prisoners retain the right to refuse medical treatment.<sup>116</sup> In essence, then, the Constitution provides a person protection from any physical intrusion into his or her body.<sup>117</sup> Forcing a woman to accept a transfer would violate this right.

The Court has also recognized that the right to privacy includes the right of each individual to control his or her decision whether to bear a child.<sup>118</sup> The Supreme Court, through its abortion cases, has repeatedly held that procreational autonomy remains with each woman, despite her previous decisions.<sup>119</sup> For example, the Court has never considered whether a woman seeking an abortion became pregnant purposefully in deciding whether she retains a right to abort the child.<sup>120</sup> Thus, a woman who voluntarily, and even purposefully becomes pregnant retains the same rights as a woman who becomes pregnant as a result of rape.<sup>121</sup> Additionally, the Court has struck down laws requiring consent from the pregnant woman's husband,<sup>122</sup> and restricts the government's ability to require parental consent for a minor seeking an abortion.<sup>123</sup>

A court addressing this issue will likely apply these principles and hold that the donor woman has an absolute right to avoid a forced embryo transfer. Because a court cannot enforce

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<sup>112</sup> *Id.*

<sup>113</sup> *Rochin v. California*, 342 U.S. 165 (1952) (physically intrusive searches rarely reasonable under Fourth Amendment).

<sup>114</sup> *Winston v. Lee*, 470 U.S. 753 (1985).

<sup>115</sup> *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).

<sup>116</sup> *Washington v. Harper*, 494 U.S. 210, 221-22, 229 (1990).

<sup>117</sup> *Id.*

<sup>118</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>119</sup> *See Wade*, 410 U.S. at 162; *Casey*, 505 U.S. at 856.

<sup>120</sup> *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 719 (9th Cir. 1996).

<sup>121</sup> *See id.*

<sup>122</sup> *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 (1976); *Casey*, 505 U.S. at 856.

<sup>123</sup> *Bellotti v. Baird*, 443 U.S. 622, 647 (1979).

the agreement and force the woman to accept a transfer, the agreement should be amended to reflect this probability. Otherwise, parties may financially and emotionally rely on the clause, and be surprised when it is later not enforced. The non-profit organization providing the draft agreement should therefore amend it to avoid liability for providing an unenforceable agreement.

Although a court may avoid strictly enforcing the contract, it should award restitution in appropriate cases because this will encourage the productive and beneficial practice of embryo transfers. Donors in an embryo agreement incur very high costs in creating and maintaining the embryos. The woman bears especially rigorous hardship in the process, as she must administer infertility drugs over a time period, which is both expensive and time consuming. She must also undergo invasive procedures to remove viable eggs from her ovaries, fertilize the eggs, and pay to maintain the embryos in a cryopreserved state, all at considerable expense.

The donees also immensely benefit from the arrangement. They avoid the daunting process of creating viable eggs themselves, and often do not even have this choice, because they seek the embryos due to infertility. The progenitors often afford the donees an otherwise unavailable opportunity at childbearing, at an immensely reduced cost. The arrangement also benefits the progenitors by ensuring use of the embryos. The current legal treatment of embryos and the unborn remains controversial to say the least, mainly because many people consider life to begin at conception. Donating the embryos to a third-party provides progenitors holding this view with a viable alternative to what they may see as an otherwise unacceptable situation.

**IV. THE COURT MAY UPHOLD THE LIQUIDATED DAMAGES CLAUSE IF IT FINDS THAT DAMAGES WERE DIFFICULT TO PREDICT AND THE CLAUSE DOES NOT AMOUNT TO A PENALTY FOR BREACHING THE AGREEMENT.**

The final clause of the agreement provides, “[s]ince damages would be difficult, if not impossible, to assess in the event that either party breaches this agreement, the parties hereto

agree that liquidated damages in the amount of \$25,000 is a reasonable sum to be assessed to either party who breaches this agreement.” If a court holds the agreement enforceable, it will uphold the liquidated damages clause if it is a reasonable estimation of damages, but will not if it finds the provision a penalty that discourages breaching the contract.<sup>124</sup> Conversely, if a court finds the contract void as against public policy, but finds restitution an appropriate remedy, the court could look to the liquidated damages clause for guidance in fashioning a remedy.

To determine whether a clause is an enforceable liquidated damages clause or an unenforceable penalty, a court will look at the clause as it relates to the time of contracting<sup>125</sup> and the time of the breach.<sup>126</sup> It will determine the expected difficulty in proving damages and the reasonableness of the advance estimate of damages at the time of contracting.<sup>127</sup> It will also consider the actual harm and compare the anticipated and actual loss at the time of the breach.<sup>128</sup>

A court will likely determine that the expected damages would be difficult for the parties to determine. The progenitors will incur various medical costs throughout the course of their procedures, many of which they may incur while the agreement is in place, and many others that will occur before the agreement. The parties will incur costs for general health checkups, fertility treatments, and for the various types of therapy in determining their fitness and ability to undergo the transfer procedure. These medical procedures also cause steep incidental costs that the parties are unlikely to document and, therefore, will be difficult to prove.

To determine damages, the parties must prove when the agreement was formed to determine which expenses should be attributed to the agreement and which should be considered

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<sup>124</sup> Samuel Williston & Richard A. Lord, A TREATISE ON THE LAW OF CONTRACTS § 65:3 (4th ed. 2004); RESTATEMENT SECOND OF CONTRACTS, Section 356, Comment (a); U.C.C. § 1-106 (2001).

<sup>125</sup> Carlos R. Leffler, Inc. v. Hutter, 696 A.2d 157, 162 (Pa. Super. Ct. 1997)).

<sup>126</sup> Highsmith v. Chrysler Credit Corp., 18 F.3d 434, 438 (7th Cir. 1994).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

prior costs. Determining damages also requires the parties to determine whether emotional costs should be compensated. For instance, if the recipients destroy the embryos rather than implanting them, should the progenitors recover for the emotional distress caused by knowing their embryos were destroyed? While not impossible, damages would also be difficult for the parties to predict in any given case because of the low success rate in the transfer procedure.

A court will also compare actual damages to the predicted damages to determine the clause's enforceability.<sup>129</sup> The closer the actual damages align with the predicted damages, the more likely a court will uphold the clause.<sup>130</sup> The organization here should carefully study whether damages will be around the designated \$25,000 mark. Here, actual damages may vary considerably based on which party does not to perform as promised. If the recipients allow one or more embryos to thaw, actual damages will be linked to emotional damages, which will be difficult to predict. If the progenitors seek to avoid the agreement, actual damages will depend on the steps the recipients' have taken in reliance. Thus, the organization should determine if \$25,000 is an accurate prediction of damages in both cases, and adjust the clause accordingly.

A court should give weight to the liquidated damages clause because enforcing the clause will encourage parties to enter agreements to transfer embryos. If the parties agree to damages, they can more efficiently obtain relief for losses, avoid litigation costs, and the emotional toll that litigation will entail, as certainty in a remedy will facilitate quick settlements between the parties. The parties will, therefore, more willingly enter transfer agreements when they know the consequences of the others' breach, and that they will be compensated for their losses.

## V. CONCLUSION

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

Embryo disposition agreements between progenitors and recipients raise substantial Constitutional and public policy issues. Because these agreements serve an important function to both the progenitors and the recipients, a court addressing the enforceability of an agreement will likely fashion a rule and remedy that promotes these agreements while respecting the important autonomy and policy concerns. However, an organization should carefully review the law in its jurisdiction before providing a draft agreement to avoid providing an unenforceable agreement.