

Embryo Adoption: Will Parties' Agreements Be Enforced?

I. Introduction

Embryo adoption¹ is a new field,² with very few laws and very little precedent to guide agencies, attorneys, participants, and courts considering embryo adoption. There is confusion and debate about how embryos should be treated and which laws should govern, making it extremely difficult to ensure that parties' wishes and agreements will be enforced. This paper will look at the enforceability of certain key provisions in embryo adoption agreements.

a. Statement of the Facts³

A non-profit organization matches potential frozen embryo donors with potential embryo recipients, allowing couples with embryos remaining after in vitro fertilization procedures to donate their embryos to other couples to build families through embryo adoption. The non-profit has an agreement that it would like to use as a standard draft for couples participating in embryo adoptions. Couples will be encouraged to consult with independent counsel regarding such

¹ The process of donating embryos to another couple through an agreement such as this will be referred to as "embryo adoption" for the purpose of this paper. "The term 'transfer' as used herein, refers to the medical procedure of inserting human embryos into a woman's womb with the goal of her achieving a pregnancy." Embryo Adoption Awareness Campaign, Problem Presented for Essay Response: 2011 Embryo Law Writing Competition, available at <http://embryolaw.org/problem.asp> (last accessed on Dec. 3, 2010).

² The concept of "embryo adoption" did not come to being until 1997, when Marlene Strege asked Ron Stoddart, of Nightlight Christian Adoptions, if she and her husband could adopt an embryo. Marlene Strege, *Meet the First Snowflake! (Embryo Adoption)*, CLEARLY CARING MAGAZINE, Jan/Feb 2008, Vol. 28, No. 1, available at <http://www.christianliferesources.com/?library/view.php&articleid=1317> (last accessed on Feb. 5, 2011).

³ This fact pattern and the contractual provisions were created by the Embryo Adoption Awareness Campaign as the Problem Presented for Essay Response: 2011 Embryo Law Writing Competition, available at <http://embryolaw.org/problem.asp> (last accessed on Dec. 3, 2010).

agreements, but may use the standard draft. The non-profit would like us to examine and discuss the enforceability of three specific provisions of the 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."

The issue is whether or not courts will enforce these provisions in light of current laws and public policy.

II. Laws Governing Embryos in General.

In order to determine if these provisions are enforceable, it is important to understand some key cases and statutes addressing embryos. In a pivotal case regarding the distribution of embryos, *Davis v. Davis*, one court stated that embryos occupy an "interim category," between persons and property, deserving special respect because of the potential for life.⁴ Placing embryos in an interim or special category has led to confusion about the governing law. Depending on what category embryos occupy, embryo adoptions could be governed by contract, property, or adoption law. The *Davis* court believed that "agreement[s] regarding disposition of any untransferred preembryos. . . should be presumed valid and should be enforced as between the progenitors. . . . [p]roviding that the initial agreements may later be modified by agreement"⁵ Even if embryos were viewed as strictly property, not as an interim category, contractual

⁴ *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992).

⁵ *Id.*

provisions should be sufficient to govern changes in “ownership,” because full ownership of property comes with the rights to “use, enjoy, and dispose of property without limitation.”⁶

However, not all states view embryos as property or even view them as occupying an interim category. Louisiana, for example, has legislation recognizing an embryo as a “juridical person” until it is implanted in the womb or “at any other time when rights attach to an unborn child in accordance with law.”⁷ Georgia and Oklahoma also appear to view embryos as persons, allowing embryos to be legally adopted prior to the birth of the child.⁸

The potential treatment of embryos is broad and uncertain, meaning that that the enforceability of contractual provisions could depend on the language in the provision and the jurisdiction of the court.

III. Analysis of Provisions

a. Provision 1: Relinquishing and Terminating Donors' Parental Rights

The first provision of the agreement at issue is the provision that relinquishes and terminates any legal or parental rights the donors may have to the embryos that are the subject of the agreement. Most courts would likely enforce this provision. However, its enforceability may depend on whether or not the court is located in a jurisdiction with laws clearly addressing embryo adoption or a state with no laws directly on point.

Some states, such as Georgia and Oklahoma, have laws providing for embryonic adoptions.⁹ In states such as these, this provision would be enforced because it complies with the law. For example, Georgia's *Option of Adoption Act* defines the “*legal adoption of rights to*

⁶ Black's Law Dictionary, “perfect ownership” (9th ed. 2009).

⁷ LA. REV. STAT. ANN. § 9:123 (West 2009).

⁸ GA. CODE ANN. § 19-8-42 (West 2010); OKLA. STAT. ANN. tit. 10 § 556.

⁹ *Id.*

an embryo' [as the] the relinquishment of rights and responsibilities by the person or persons who hold the legal rights and responsibilities for an embryo and the acceptance of such rights and responsibilities by a recipient intended parent."¹⁰ Under Georgia's law, such relinquishments can take place "prior to [the] embryo adoption," as long as a written contract is entered into and signed "by the legal embryo custodians and each recipient intended parent prior to embryo adoption."¹¹ This provision would be in complete compliance with Georgia's law because it allows for the donor's relinquishment of rights and responsibilities to the embryos, and, thus, would be enforced. Similarly, under Oklahoma's *Human Embryo Adoption and Donation* law, the physician performing the embryo adoption must receive the written consent of the donating and recipient parents.¹² Such consent terminates any "rights, obligations, or interest" that the donors have with respect to children born as a result of the procedure.¹³ While the provision of this agreement terminates all rights that the donors have to the *embryos*, instead of only terminating rights to resulting children as the Oklahoma law does, it is likely that Oklahoma and courts with similar laws would uphold the provision, because it is in line with the purpose of their law, which is to grant recipient parents all legal and parental rights.¹⁴

Unlike Georgia and Oklahoma, the majority of states do not have laws directly addressing embryo adoption. In such states, the analysis could vary depending on the jurisdiction, because courts could look to adoption or property laws for guidance. First, if courts

¹⁰ GA. CODE ANN. § 19-8-40 (West 2010) (emphasis mine).

¹¹ GA. CODE ANN. § 19-8-41 (West 2010).

¹² OKLA. STAT. ANN. tit. 10 § 556 (West 2010).

¹³ *Id.*

¹⁴ Oklahoma's law requires such consent to be given before the adoption takes place and for it to be approved by a judge with adoption jurisdiction in the state, indicating that it intends to terminate the rights at the point of transfer, not just when children are born as a result of the proceeding. OKLA. STAT. ANN. tit. 10 § 556 (West 2010).

analyzed this provision under adoption laws, they may hold that this provision is enforceable, because adoption laws allow for the voluntary termination or relinquishment of parental rights.¹⁵ In such cases, a court would likely reach its conclusion by finding that when the donors relinquished custody of the embryos, it was as if they were relinquishing custody of the child. Alternately, courts may find that the provision is invalid as a violation of public policy, because most states only allow the termination or relinquishment of parental rights after the birth of the child.¹⁶ However, these courts could probably be convinced that the provision should be upheld because the laws that only allow termination of parental rights after the birth of the child are typically in place to protect the birth mother,¹⁷ and in this situation, the birth mother is the recipient parent.

Courts in jurisdictions without guiding precedent could also look to property or contractual laws to determine whether the provision is enforceable. As stated earlier, property

¹⁵ See e.g., CONN. GEN. STAT. ANN. § 45a-715 (West 2010); see also 1 Donald T. Kramer, LEGAL RIGHTS OF CHILDREN REVISED 2d § 6:5 (2010) (“Before a minor may be adopted, it is necessary either for the minor's natural parent or parents, or his or her guardian, to consent to the adoption, or for the court to find that the natural parents, if known, are unfit, and that therefore their consent to adoption is not needed.” Such consent “must be in writing and signed by the natural parents.”)

¹⁶ “In some states, if the natural parent or parents consented to adoption of their baby before it was born, they may revoke that consent after the child is born, but may not revoke their consent after the child has been adopted. Some states have enacted statutes providing that the natural mother of a child cannot give her consent to adoption of her recently born child until after a certain period of time has elapsed in order to give the mother time to consider her decision. In Kansas, for example, a natural mother cannot consent to the adoption of her child until at least 12 hours after its birth.” See Kramer, *supra* note 15 at § 6.5 (citing Matter of Adoption of J.H.G., 254 Kan. 780, 869 P.2d 640 (1994)).

¹⁷ William P. Statsky, FAMILY LAW: THE ESSENTIALS 324 (2nd ed. 2004) (“All 50 states . . . have laws that prohibit a mother from granting consent to adoption before a child’s birth or for some period of time after birth. . . . However, as with baby-selling laws, consent laws were designed to protect unwed mothers”).

rights generally include the right to “use, enjoy, and dispose of property without limitation.”¹⁸

Thus, if the court treated the embryo as property, the provision would be enforceable because it provides for the termination of property rights, which is consistent with property ownership laws.¹⁹ Furthermore, states that have addressed the donation of embryos to third parties typically only require donors' written consent to terminate rights,²⁰ indicating that courts would uphold provisions terminating donors' rights and obligations.

Due to public policy concerns, courts may not enforce this provision in situations involving gamete donation, where gamete donors specified that they only wanted their gametes used by one couple or where gamete donors did not specifically consent to the transfer of their gametes from one couple to another. Most states do not have laws that address such issues. With a lack of precedent, courts would likely look to other jurisdictions for guidance. They would find that states addressing such issues typically find that gamete donors do not have a right to the embryos or a say in the disposition of such embryos²¹ and, thus, would likely find that the gamete donors relinquished their rights. However, it would still be a good practice for non-profits to ensure that gamete donors relinquished their rights or made their intentions clear.

b. Provision 2: Requiring the transfer of all embryos that survive the thawing process into the recipient mother.

¹⁸ Black's Law Dictionary, “perfect ownership” (9th ed. 2009).

¹⁹ *Id.*

²⁰ *See e.g.*, CAL. PENAL CODE § 367g (West 2010); COLO. REV. STAT. § 19-4-106 (2003); CONN. GEN. STAT. ANN. § 19a-32d (West 2010); FLA. STAT. ANN. § 742.11 (West 2006); OKLA. STAT. ANN. tit. 10 § 556 (West 2010); TEX. FAM. CODE ANN. § 160.305 (Vernon 2004).

²¹ *See e.g.*, LA. REV. STAT. ANN. § 9:130 (West 2010); OKLA. STAT. ANN. tit. 10 § 556 (West 2010). In a Washington case, *Litowitz v. Litowitz*, the court found that the egg donor no longer had rights to the eggs, in part because the eggs no longer existed. 10 P.3d 1086 (Wash. App. Div. 2, 2000).

In determining whether or not to enforce this provision, the courts in almost every jurisdiction will not have precedent or statutes to look to for direction. The exception to this is Louisiana, which has statutes directly on par with this provision.²² Since other jurisdictions would not have on point precedent, courts would likely determine the enforceability of the provision by considering public policy issues, the reasonableness of the provision, and other jurisdictions' laws. Courts would likely hold that this provision is enforceable, because it is in line with other jurisdictions holdings, it does not violate public policy, and it is reasonable.

The one jurisdiction where courts would have relatively clear direction is Louisiana. Under Louisiana law, “[t]he use of a human ovum fertilized in vitro is solely for the support and contribution of the complete development of human in utero implantation.”²³ Furthermore, under Louisiana law, “[a] viable in vitro fertilized human ovum *is a juridical person which shall not be intentionally destroyed* by any natural or other juridical person or through the actions of any other such person.”²⁴ This provision is in line with Louisiana law, because, by requiring all embryos that survive the thawing process to be implanted, the provision ensures that Louisiana’s law is upheld by preventing doctors and couples from destroying embryos by thawing them and leaving them to die.²⁵ Thus, Louisiana courts would likely enforce this provision and would probably encourage the use of such provisions in embryo adoption agreements.

²² See LA. REV. STAT. ANN. §§ 9:122, 129 (West 2009).

²³ LA. REV. STAT. ANN. § 9:122 (West 2009).

²⁴ LA. REV. STAT. ANN. § 9:129 (West 2009) (emphasis mine).

²⁵ Theoretically, this provision also prevents embryos from being refrozen. Refreezing would not violate Louisiana’s law. However, refreezing would lead to the inevitable death of more embryos, because only about 50-75% of embryos survive the thawing process. Embryo Adoption Awareness Center, *Adopter FAQs: The Medical Side of Embryo Adoption*, http://www.embryoadoption.org/adopters/adopting_parent_faq.cfm (last visited on Dec. 1, 2010) [hereinafter *Adopter FAQs*]. Furthermore, refreezing does not need to be an issue, because embryos can be thawed and observed for viability very quickly, meaning that doctors

In other jurisdictions, there is much less direction for courts. The closest thing that such a transfer could be compared to is Organ Donations or Anatomical Gifts.²⁶ However, organ donations are not a close analogy, because an organ only has a short life outside of a body,²⁷ and, thus, organ donations are typically associated with immediacy and time constraints, whereas frozen embryos can be frozen and available for transfer for years.²⁸ Embryos are only thawed and available for adoption once a couple decides they want them transferred in an attempt to start a family.²⁹ In addition, there is not the moral dilemma associated with whether or not the organ in-and-of-itself is a life, whereas such a dilemma exists with embryos. Even if a court was to compare this to an organ transplant, if an organ recipient decided they did not want an organ, it would likely be given to the next person on the list, because the organ donation organization would not want the organ to be wasted.³⁰ This appears to protect against the waste of organs, just like the provision attempts to protect against the waste of embryos. Since there is not

would not need to thaw multiple embryos at a time to ensure that they have viable embryos. *See infra* 33-35 and accompanying text.

²⁶ *See generally* Uniform Anatomical Gift Act (1987).

²⁷ Indiana Organ Procurement Organization, *Frequently Asked Questions*, <http://www.iopo.org/faqs/index.html> (last accessed on Feb. 6, 2011) (“Because of time constraints and the viability of the organ, we make every effort to offer organs to centers closest to Indiana or the organ procurement center where it was procured”).

²⁸ In fact, recently, a child was born from an embryo that had been frozen for twenty years. Rebecca Smith, *Baby Born From Embryo Frozen 20 Years Ago*, *The Telegraph*, <http://www.telegraph.co.uk/health/healthnews/8053726/Baby-born-from-embryo-frozen-20-years-ago.html> (last accessed on Feb. 6, 2011).

²⁹ *See* Georgia Reproductive Specialists, *Human Embryo Cryopreservation*, available at <http://www.ivf.com/cryo.html> (last accessed on Nov. 12, 2010).

³⁰ There do not seem to be cases where recipients were forced to accept an anatomical gift transfer. In circumstances where a recipient decided they did not want such a gift, the laws addressing such circumstances said that the organ could simply be delivered to the nearest hospital for use. *See* Washington’s Unif. Anatomical Gifts Act, available at West’s Revised Code of Washington Annotation § 68.50.570 (repealed by Laws 2008, ch. 139, § 31, effective June 12, 2008).

someone on the list waiting to receive extra viable embryos,³¹ the provision protects against the waste by requiring that any embryos that survive thawing are used and not wasted, having the rest remain frozen so that they can be used in the future. Thus, if the courts analogized this provision to the Uniform Anatomical Gift Act and other organ donation laws, the court would likely uphold this provision.

In jurisdictions without governing law or precedent, courts may decide *not* to analogize embryo adoptions to anatomical gifts, because the embryos themselves are more than an organ. In such cases, courts would likely consider public policy issues, the reasonableness of the provision, and other jurisdictions' laws and decisions. First of all, there is likely a public policy concern about transferring too many embryos into a woman, because of safety concerns for the mother and potential children. Most of us remember the public uproar from two years ago, when Nadya Suleman, also known as "Octomom," gave birth to eight children as a result of an in vitro fertilization transfer.³² Courts could fear that a provision requiring that all surviving, thawed embryos be transferred would lead to octomom-type situations, where too many transferred embryos implant, resulting in dangerous pregnancies. This would likely only be a concern under this provision if an abnormal number of embryos survived the thawing process, and, thus, a large number of embryos had to be implanted. However, this situation could easily be avoided by thawing embryos individually or in pairs. It only takes one to two minutes to thaw an embryo

³¹ Even if there were, a woman's body has to be at just the right point in her cycle to have a successful implantation, so most women on the wait list could not immediately have the embryo transferred, whereas an organ recipient could typically have it transplanted immediately. *See Embryo Freezing and Adoption of Frozen Embryo 2*, Southern Ontario Fertility Technologies, available at <http://www.soft-infertility.com/docs/PIFrozen.pdf> (last accessed on Dec. 1, 2010) [hereinafter *Embryo Freezing*].

³² *See* Ann Cury, Her Side of the Story, MSNBC Dateline, Feb. 10, 2009, available at <http://www.msnbc.msn.com/id/29129311/> (last accessed on Dec. 1, 2010).

and not much longer to assess whether or not the embryo survived the thawing process.³³ While there is always the chance that embryos could twin and multiples could be born, this is the case in any embryo transfer, regardless of how many embryos were initially thawed. Thus, a couple could decide, in conjunction with their doctor, a maximum number of embryos to transfer and could thaw the embryos individually until they had that number to transfer.³⁴ Courts would likely not find a problem in requiring this decision to be made before the embryos are thawed and ready to be transferred. Thus, in spite of this public policy concern, courts would likely find this provision to be reasonable and enforceable.

Courts could also be concerned that this provision would require couples to transfer unhealthy embryos, which could lead to unsustainable pregnancies or birth defects in the potential child. If the transfers lead to unsustainable pregnancies or no implantation, a woman may have to go through multiple cycles before she gets pregnant, which could be taxing on her

³³ See Georgia Reproductive Specialists, *Human Embryo Cryopreservation*, available at <http://www.ivf.com/cryo.html> (last accessed on Nov. 12, 2010) [hereinafter *Georgia Reproductive Specialists*]. Note that this is the case only if embryos are frozen when they are a few days old. If they are frozen at the time of fertilization, they may need to be observed for a couple days to see if they reach a certain developmental stage and are ready for implantation. See Dr. Randy S. Morris, *Frozen Embryo Adoption*, IVF1, available at <http://www.ivf1.com/frozen-embryo-adoption/> (last accessed on Dec. 1, 2010). Most embryos are not frozen until they reach three or five days of age. *Id.*; see also Embryo Freezing, *supra* note 31. As long as the embryos were a couple days old when they were frozen, they can be thawed and transferred (or “replaced” as many doctors refer to it) in line with the day of the woman’s cycle. See *Embryo Freezing*, *supra* note 31 at 2. For example, embryos that were frozen at three days old can be transferred into a woman on the third day after ovulation. See *id.*

³⁴ There is now large support for Single Embryo Adoption (SET) because of the risk of multiples. “[S]tudies have reported similar pregnancy rates and live birth rates following SET compared to double embryo adoption.” Christopher Newton, Valter Feyles, & Joanna McBride, *Single Embryo Adoption in IVF: Helping Patients to Make Informed Decisions*, Infertility Awareness Association of Canada (2007), <http://www.iaac.ca/content/single-embryo-adoption-ivf> (last accessed on Nov. 12, 2010). However, results suggest that this is the best option for younger women with quality embryos. *Id.* Women with embryos that are not top quality may want to consider transferring two.

body. However, transferring the embryos is not nearly as invasive or taxing as full IVF treatments³⁵ and a woman can have frozen embryos transferred without going on disruptive hormonal medication and can instead work with her natural cycle.³⁶ In addition, when considering risks of non-implantation or birth defects, the court should be made aware that even when implanting perfectly healthy embryos, there is no guarantee that they are going to implant the first time³⁷ or that healthy embryos will result in healthy babies.³⁸ Furthermore, “[e]xperience has shown that if the embryo survives [thawing] 50% or more intact, it is worthwhile to [transfer] it. Embryos can accommodate such levels of cellular damage and still establish healthy pregnancies.”³⁹ Considering the potential for life in each embryo, the fact that the woman undergoing the procedure signed this agreement, presumably understanding the implications, and the fact that many damaged embryos result in completely healthy pregnancies, it is likely that the court would uphold the provision based on reasonableness in spite of this public policy concern. However, requiring women to implant embryos that could produce

³⁵ While embryo adoptions to third parties are not as invasive as IVF, because it does not require egg harvest, a woman may have to go onto medication during the process if she doesn’t ovulate properly, which could make the procedure more invasive. *Adopter FAQs*, *supra* note 25.

³⁶ Medication does help the doctors to have more control of the process, but if a woman did not want to go through all the medically induced hormones, the embryos could be transferred during natural cycles. *Id.*

³⁷ “A new study published in the journal *Fertility and Sterility* finds on average 32% of women who use their own embryos deliver to term compared to 35% of women who adopt an embryo. Researcher, Dr. Reg Finger is encouraged by the findings because now doctors have solid information for couples considering embryo adoption.” Embryo Adoption Awareness Center, *Embryo Adoption Study Could Save Lives*, <http://embryooption.com/news/13.cfm> (last accessed on Dec. 2, 2010).

³⁸ “The reality is that healthy children have been born from very 'low quality' embryos and children with birth defects have been born from 'very high quality' embryos.” *Adopters FAQs*, *supra* note 25.

³⁹ See *Georgia Reproductive Specialists*, *supra* note 33.

children with birth defects would likely be a court's biggest concern and could be a reason for a court not to enforce this provision.

A court may also look to other jurisdictions in making its decision. Within the United States, they would likely consider Louisiana's law, which is the only fully on point law in the nation.⁴⁰ Louisiana's law does not allow the intentional destruction of embryos and mandates that they be used "solely for the support and contribution of the complete development of human in utero implantation."⁴¹ Courts may also look to foreign jurisdictions. In doing so, the courts would see that some countries, such as Germany and Italy, have laws limiting the number of embryos created in the IVF procedure, as well as laws requiring that all embryos created be implanted in the woman.⁴² Looking at other countries' laws, in addition to the existing laws in the United States, the court would likely conclude that the provision mandating the transfer of all embryos that survive the thawing process is enforceable.

c. Provision 3: Agreement that "liquidated damages in the amount of \$25,000 is a reasonable sum to be assessed to either party who breaches this agreement."

Courts and legislatures have not addressed liquidated damage clauses in human embryo contracts.⁴³ In addition, courts and legislatures do not appear to have addressed the issue of liquidated damages in adoption proceedings. Thus, there are not similar situations that the court could look to for direction. Without guidance from legislatures or other courts, a court would

⁴⁰ LA. REV. STAT. ANN. § 9:122 (West 2009).

⁴¹ *Id.*

⁴² John A. Robertson, *Commerce and Regulation in the Assisted Reproduction Industry*, 85 TEX. L. REV. 665, 697 (2007) (book review) (citing John A. Robertson, *Protecting Embryos and Burdening Women and Infertile Couples: Assisted Reproduction in Italy*, 19 HUM. REPROD. 1693, 1693-94 (2004)).

⁴³ In one case, *Perry-Rogers v. Fasano*, where one couple's embryos were implanted into another woman, there was a liquidated damages clause in a visitation agreement post-birth, but no liquidated damages agreement relating to the embryos. 276 A.D.2d 67 (N.Y. Ct. App. 2000).

likely apply general contractual principles and look to public policy concerns to determine if this liquidated damages clause is enforceable. According to *Williston on Contracts*, “[u]nder the fundamental principle of freedom of contract, the parties to a contract have a broad right to stipulate in their agreement the amount of damages recoverable in the event of a breach.”⁴⁴

Courts will typically enforce liquidated damages provisions if it is apparent that “the parties intended to liquidate the damages,”⁴⁵ if the amount agreed upon “was a reasonable estimate of the presumed actual damages,”⁴⁶ if “at the time of contracting, it was difficult to ascertain the amount of damages that would result from a breach of the agreement,”⁴⁷ and if the liquidated damages are not deemed to be a “penalty.”⁴⁸ The provision is deemed to be a “penalty” if it coerces behavior or is an amount that is disproportionately large when compared with the actual damages.⁴⁹ If the liquidated damages are determined to be a penalty, they are typically unenforceable as a violation of Public Policy.⁵⁰ However, some courts will still enforce

⁴⁴ 24 *Williston on Contracts* § 65:1 (4th ed.) (internal citations omitted).

⁴⁵ Deborah S. Coldwell, Altresha Q. Burchett-Williams, Melissa L. Celeste, *Liquidated Damages*, 29 *Spring Franchise Law Journal* 211, 211 (2010).

⁴⁶ *See id.*; *see also* 24 *Williston on Contracts* § 65:1 (4th ed.) (“the courts will generally enforce [liquidated damages], so long as the amount agreed upon is not unconscionable, is not determined to be an illegal penalty, and is not otherwise violative of public policy.”)

⁴⁷ Coldwell, *supra* note 45 at 211; *see also* 24 *Williston on Contracts* § 65:1 (4th ed.) (stating that liquidated damages provisions do not violate public policy if “the circumstances are such that the actual damages likely to flow from a subsequent breach would be difficult for the parties to estimate or for the nonbreaching party to prove”).

⁴⁸ Coldwell, *supra* note 45 at 211.

⁴⁹ 24 *Williston on Contracts* § 65:1 (4th ed.) (citations removed). Note that some jurisdictions hold that liquidated damages are a penalty when they are disproportionately large when compared to *anticipated* damages. *Id.*

⁵⁰ Coldwell, *supra* note 45 at 211 (citations omitted).

disproportionate damages⁵¹ if the liquidated damages were a reasonable forecast of anticipated damages.⁵² Furthermore, “[t]he more difficult it is to determine the damages in light of the harm, the more likely” a court is to enforce a liquidated damages provision.⁵³

In most jurisdictions, a court would use these principles to determine if the liquidated damage provision of this agreement is enforceable. However, a court’s analysis would differ depending on the breach of the agreement that led to the question of whether or not the liquidated damages provision would be enforced.⁵⁴ In this situation, there are two potential breaches of the agreement: 1) if the donating couple filed an action to regain custody and legal rights to the embryos (“donor breach”) and 2) if the recipient family does not transfer all viable thawed embryos into the recipient mother, but instead allowed one or more to be destroyed (“recipient breach”).

In the event of a breach, the court would first determine if there was intent to liquidate the damages. The court would likely find that there was intent to liquidate the damages in both

⁵¹ By disproportionate damages in this context, I mean liquidated damages that are disproportionately large as compared to the actual damages.

⁵² See *supra* note 47; see also Coldwell, *supra* note 45 at 212.

⁵³ Coldwell, *supra* note 45 at 211 (citations omitted).

⁵⁴ Note that according to Black’s Law Dictionary, liquidated damages may not be enforced by some courts if the same sum is made payable for a variety of different breaches. Black’s Law Dictionary, “liquidated damages clause” (9th ed. 2009). This is likely because the reasonable estimate of anticipated damages would not be the same for a variety of breaches. See Coldwell, *supra* note 45 at 211 (stating that courts will normally enforce liquidated damages provisions if they are a reasonable estimate of anticipated damages). Since this provision could apply to different breaches, it is necessary to look at the enforceability of the provision in light of each potential breach. See *infra* notes 55-77 and accompanying text (demonstrating that a court would likely find this provision reasonable and enforceable in both potential types of breaches of the agreement).

situations,⁵⁵ because by signing this agreement, the embryo donors and recipients indicated that they understood the agreement and intended to liquidate the damages in the event of a breach.

Secondly, the court would determine if the amount of the liquidated damages was “a reasonable estimate of presumed damages.”⁵⁶ To determine actual damages for both breaches would be extremely difficult, because the majority of damages would be emotional pain and suffering. However, in the event of a donor breach, the recipient couple, who would be seeking liquidated damages, would likely have put money into the adoption prior to the breach. A typical embryo adoption can cost the recipient couple \$3,500-\$12,500⁵⁷ *before* the actual transfer takes place. This does not include shipping fees, medical costs associated with prepping the body to receive embryos, the pain and suffering that would result from losing embryos that the recipients thought would be their children,⁵⁸ or litigation expenses. The court would likely determine that \$25,000 was a reasonable estimate in the event of a donor breach, given the broad range of potential expenses, as well as the difficulty of assessing damages for pain and suffering.

If the recipient family breached the agreement, the donor family would have no actual monetary damages, unless you included the original costs of in vitro fertilization and storing the

⁵⁵ See *supra* note 45 and accompanying text.

⁵⁶ Coldwell, *supra* note 45 at 211.

⁵⁷ Agency fees can range from \$2,500-\$10,000; home studies can range from \$1,000-\$2,500. See *Adopter FAQs*, *supra* note 25 at *Expenses Associated With Embryo Adoption*. This does not include litigation expenses that would result from determining who has rights to the embryo. Note that this also does not include the costs of actually transferring the embryos into the woman, because the claim for rights to the embryos would likely not happen once they have been transferred. In such a case, it would be a claim of rights to the child, not to the embryos. However, if such a claim was to come after the embryo was transferred, the transfer costs would likely be included in the damages and can range from \$2,500 and \$5,000. *Id.*

⁵⁸ Although this breach would likely happen prior to the transfer of the embryo, if the breach happened after the embryos were transferred, there would be additional expenses, as well as intense emotional distress, because the recipient parents would be faced with the potential loss of the child after birth or sharing their child with another set of parents, which could lead to serious emotional suffering.

embryos, because they incurred no costs in donating the embryos to the recipient couple.⁵⁹ The original costs of in vitro fertilization and storing the embryos would likely not be considered an expense for purposes of this agreement, because the embryos were not created for the purpose of being donated to another couple and the embryos were likely created and stored before this agreement ever came into being. Thus, the only injuries for which damages could be awarded to the donor couple are emotional distress, pain and suffering, and, potentially, wrongful death,⁶⁰ because of the destruction of the embryo(s). In determining whether \$25,000 was a reasonable estimate of damages in this situation, the court would have to look to other awards for emotional distress, pain, and suffering. In employment discrimination cases, juries have awarded up to \$100,000 for emotional distress damages.⁶¹ In other situations, where “the evidence [of emotional distress] is limited to plaintiff’s testimony” and does not include medical testimony, \$5,000-\$30,000 awards have been given.⁶² Not only does this demonstrate that it is difficult to estimate such awards, it also demonstrates that a judge could find that \$25,000 was a reasonable estimate of damages. Furthermore, courts are more likely to enforce liquidated damage provisions by awarding the damages when it is “more difficult to determine the damages in light

⁵⁹ Embryo Adoption Awareness Center, *Donor FAQs: Expenses and Legal Requirements*, available at <http://www.embryooption.org/donors/faqs.cfm> (last accessed on Dec. 3, 2010).

⁶⁰ Wrongful death would be a stretch, because there is debate about whether or not the embryo is a living human being. However, in Louisiana this might be a valid claim, because embryos are seen as juridical persons who have rights. LA. REV. STAT. ANN. § 9:123 (West 2009).

⁶¹ 2 Gary Phelan & Janet Bond Arterton, *Disability Discrimination in the Workplace* § 25:9 (2010) (citing *Stallworth v. Shuler*, 777 F.2d 1431, 28 Ed. Law Rep. 1035, 39 Fair Empl. Prac. Cas. (BNA) 983, 38 Empl. Prac. Dec. (CCH) ¶ 35806 (11th Cir. 1985)).

⁶² CHRISTOPHER A. D’ANGELO, *LITIGATION STRATEGY: DAMAGES AND OTHER REMEDIES* 70, (PLI Litig. & Admin. Practice, Course Handbook Series, 2008).

of the harm.”⁶³ In this situation, because the predominant harm is pain and suffering, it is difficult to determine, so the court is likely to enforce the liquidated damage provision.

Thirdly, the court would determine if, when the agreement was reached, “it was difficult to ascertain the amount of damages that would result from a breach of the agreement.”⁶⁴ While some monetary damages could be ascertained in the event of a donor breach,⁶⁵ a large portion of the damages would be for emotional distress, pain or suffering. In the event of a recipient breach, damages would be based solely on emotional distress, pain, and suffering, which are hard to quantify; thus, it would be extremely difficult to determine damages ahead of time without the assistance of a jury or fact-finder. In addition, it would also be difficult to determine the harm and appropriate damages at the time of the breach, requiring much expert and personal testimony. The more difficult it is to quantify the actual harm, the more likely it is that the court will enforce the liquidated damages provision. Since it is difficult to determine damages “in light of the harm,”⁶⁶ because there is psychological harm in both situations, it is likely that the court would enforce the liquidated damage provision.

Lastly, the court would determine if the liquidated damages in this provision were a penalty.⁶⁷ Most jurisdictions find that liquidated damages are a penalty if they are disproportionately larger than the actual damages.⁶⁸ In the event of a donor breach, we do not

⁶³ Coldwell, *supra* note 45 at 211 (citations omitted).

⁶⁴ Coldwell, *supra* note 45 at 211 (citations omitted). Note that “[l]iquidated damages have traditionally provided compensation for the unquantifiable elements of injury, such as psychological pain.” *Inclusion of Damages Under the Age Discrimination Act*, 109 Harv. L. Rev. 319, 327-28 (1995) (citing [Brooklyn Sav. Bank v. O'Neil](#), 324 U.S. 697, 707-08 (1945)).

⁶⁵ See *supra* note 57-58 and accompanying text.

⁶⁶ See *supra* note 53 and accompanying text.

⁶⁷ See *supra* notes 48-50 and accompanying text.

⁶⁸ 24 Williston on Contracts § 65:1 (4th ed.) (citations removed).

know what the *actual* damages would be because the damages for emotional distress, pain, and suffering are not completely monetarily quantifiable. However, if you consider the actual expenses incurred that could be recovered,⁶⁹ in conjunction with damages for emotional distress, pain, and suffering, the court would likely find that this is not largely disproportionate, because the liquidated damages are only for \$25,000. In addition, some jurisdictions state that liquidated damages are only a penalty if they are disproportionately large as compared to *anticipated* damages.⁷⁰ As discussed above, the anticipated damages are difficult to compute in the event of a donor breach, but it is fairly clear that the liquidated damages would not be largely disproportionate from anticipated damages, because potential expenses could be as much as \$12,500,⁷¹ without considering the emotional distress inherent in facing the loss of embryos a couple believed would be their children. Thus, courts in both types of jurisdictions would likely find the liquidated damage provision to be enforceable against the donor couple.

In the event of a recipient breach, it would be difficult for a court to determine whether or not this was a penalty, because a penalty is determined based on actual or presumed damages and the damages in this case would only be for emotional distress, pain, and suffering, which are difficult to quantify.⁷² However, it is likely that the court would uphold the provision if they were in a jurisdiction that based penalties on presumed damages,⁷³ because \$25,000 is a reasonable estimate of damages for such harm.⁷⁴ If courts were in a jurisdiction where the

⁶⁹ See *supra* notes 57-58 and accompanying text.

⁷⁰ *Id.*

⁷¹ See *supra* notes 57 and accompanying text.

⁷² See *supra* notes 59-63 and accompanying text.

⁷³ See *supra* note 46 and accompanying text.

⁷⁴ See *supra* note 61-63 and accompanying text.

liquidated damages provision had to be compared to actual damages,⁷⁵ the court would have to consider situations like this on a case-by-case basis, having a fact-finder determine actual damages, and then deciding if the liquidated damages are reasonable.⁷⁶ It should be noted, however, that the court may not go through the time and expense of such a proceeding, but may just decide to enforce the liquidated damages provision, because “[I]iquidated damages . . . traditionally provide[] compensation for the unquantifiable elements of injury, such as psychological pain,”⁷⁷ which is exactly what this provision is doing. Ultimately, since the damages are extremely difficult to prove and they do not appear to be unconscionable or disproportionate to potential damages, a court would likely uphold the liquidated damages provision and award the \$25,000 in the event of both potential breaches.

IV. Conclusion

In determining the enforceability of the three provisions, a court’s analysis would differ, depending on the court’s jurisdiction. For the first provision, requiring the relinquishment and termination of the donor’s rights and responsibilities to the embryo, courts would likely uphold the provision in states with laws addressing the issue or in states that used property principles.⁷⁸ However, if courts analogized embryo adoptions to current adoption laws, they may waver on enforcing the provision because of consent laws.⁷⁹

⁷⁵ See *supra* note 46 and accompanying text.

⁷⁶ To be reasonable, the damages must not be largely disproportionate. See *supra* note 49 and accompanying text.

⁷⁷ *Inclusion of Damages Under the Age Discrimination Act*, 109 Harv. L. Rev. 319, 327-28 (1995) (citing [Brooklyn Sav. Bank v. O’Neil](#), 324 U.S. 697, 707-08 (1945)). Note also that if a court held that \$25,000 was an appropriate award for such harms and then other courts would have some sort of precedent to follow, so the fact-finder may not come into play in each and every case.

⁷⁸ See *supra* notes 9-21 and accompanying text.

⁷⁹ See *supra* notes 15-17 and accompanying text.

The second provision, requiring the transfer of all embryos that survive the thawing process into the recipient woman, would likely be enforced by Louisiana, because state law does not allow the intentional destruction of embryos.⁸⁰ In other states, without clear statutory guidance, the courts would likely look to public policy, the reasonableness of the provision, and other jurisdictions for guidance.⁸¹ Public policy concerns would focus on requiring the transfer of an unsafe number of embryos or requiring the transfer of embryos that may be damaged.⁸² However, after looking at the thawing process and healthy pregnancy rates with “damaged” embryos, the courts would likely find the provision to be reasonable, especially if both parties signed the provision.⁸³ Furthermore, if courts looked to other jurisdictions, within the United States and internationally, they would find that the requirement of transferring all viable embryos is a normal requirement in areas with laws on point.⁸⁴

In addition, courts would likely enforce the liquidated damages provision in the event of a breach by the donors or the recipients, because the parties intended to liquidate the damages, the provision was a reasonable estimate of potential damages, it was difficult to determine actual damages, and the provision is likely not a penalty.⁸⁵

A few jurisdictions may have concerns with some aspects of these provisions, but it is likely that the majority of courts would enforce all three of these provisions.

⁸⁰ *See supra* notes 23-25 and accompanying text.

⁸¹ *See supra* notes 26-39 and accompanying text.

⁸² *See supra* notes 32-39 and accompanying text.

⁸³ *See supra* notes 32-39 and accompanying text.

⁸⁴ *See supra* notes 40-42 and accompanying text.

⁸⁵ *See supra* notes 43-77 and accompanying text.