

**EMBRYO DONATION:
THE ENFORCEABILITY OF EMBRYO DONATION AGREEMENTS IN LAW AND PUBLIC POLICY**

I. Introduction

In recent years, the number of alternative methods of family planning has increased both in terms of variety and availability. *In vitro* fertilization (IVF) is one such method. IVF is a procedure in which ova are extracted from a woman's ovaries and fertilized in a Petri dish prior to being transferred into the woman's uterus or the uterus of a surrogate mother.¹ Upon implantation, the woman becomes pregnant.² In many cases, during the IVF procedure, more ova than necessary to impregnate the intended mother may be fertilized, and then cryogenically preserved ("frozen embryos") for subsequent use if the first procedure does not result in pregnancy.³ If the couple, at any point, decides not to use the excess frozen embryos, they may have them disposed of, allocated for scientific experimentation, or donated to a genetically unrelated woman for implantation.⁴ This latter alternative is commonly referred to as "embryo adoption," although this term is somewhat of a legal misnomer as the majority of courts have refused to apply adoption law principles in this context.⁵ However, there is currently no prevailing majority view among the states as to which body of law *should* be applied.

Despite this lack of consensus, embryo donation is becoming an increasingly common practice within the United States, as are the use of contracts as a means of memorializing the

¹ See *Davis v. Davis*, 842 S.W.2d 588, 591 (Tenn. 1992).

² *Id.*

³ *Id.* at 592.

⁴ Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169, 172 (2004).

⁵ Alexia M. Baiman, *Cryopreserved Embryos as America's Prospective Adoptees: Are Couples Truly "Adopting" or Merely Transferring Property Rights?*, 16 WM. & MARY J. WOMEN & L. 133, 145 (2009); Karin A. Moore, *Embryo Adoption: The Legal and Moral Challenges*, 1 U. ST. THOMAS J.L. & PUB. POL'Y 100, 112 (2007) (maintaining that because state adoption laws generally prevent a biological mother from consenting to adoption prior to the birth of the child, current adoption laws cannot be applied in the case of "embryo adoption").

transaction between the biological and recipient couples.⁶ Consequently, an increasing number of cases involving disputes over embryo donations are being decided by the court system.⁷ As a result, the law applied in such cases reflects the astronomically divergent views of the state judiciaries. This jurisdictional conflict is largely a result of the various courts' interpretation of the ambiguous nature of frozen embryos - is an embryo a "person" or merely the property of the genetic donors? If an embryo is treated as a person, family and adoption law principles apply; if it is property, basic property and contract laws will govern. The current majority of courts have adopted this latter view.⁸

The law generally favors an individual's right to contract.⁹ Thus, it follows that an individual necessarily has a legal right to enter into a binding agreement regarding the disposition of frozen embryos obtained in excess of those implanted through IVF.¹⁰ However, a contract will not be upheld if a court determines that it was entered into in violation of public policy.¹¹ As a general concern, courts are hesitant to enforce contracts regarding family law disputes, including contracts for embryo donation.¹² When contracts regarding the disposition of frozen embryos are brought before a court, the issue thus becomes whether such agreements are

⁶ Kindregan, *supra* note 4, at 177.

⁷ Baiman, *supra* note 5, at 145.

⁸ See generally *Roe v. Wade*, 410 U.S. 113, 158 (1973) (the word "person as used in the Fourteenth Amendment does not include the unborn"); *Doe v. Obama*, 670 F.Supp.2d 435, 442 (Md. 2009) (refusing to grant legal standing to "embryo Plaintiffs" because to do so would require the court to recognize embryos as "human beings"); see also *Doe v. Shalala*, 862 F.Supp. 1421, 1426 (Md. 1994) ("embryos are not persons with legally protectable interests"); but see LA. REV. STAT. ANN. §9:126, 129 (West 1986) (Louisiana statutes declaring fertilized human ovum to be "juridical person[s]" and not the property of the genetic donors).

⁹ See *Mata v. Anderson*, 685 F.Supp.2d 1224, 1260 (N.M. 2010).

¹⁰ See John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 993 (2001) (discussing the advantages of using advance directives and contracts to ensure the future disposition of embryos).

¹¹ See generally *Coppell v. Hall*, 74 U.S. 542 (1868) (discussing judicial authority to invalidate a contract on public policy grounds).

¹² Baiman, *supra* note 5, at 148.

enforceable contracts; or whether they are void as against public policy. The problem posed below requires analysis of this issue.

II. Statement of the Facts

A non-profit organization matches donors of frozen human embryos with potential recipients, giving donors the option to donate their excess frozen embryos to other couples to use in their own family planning. The organization is considering using a standard draft agreement with three significant provisions:

- (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."

Both the donor and recipient couples have the right to review and modify the standard draft agreement with their attorneys. The organization intends to recommend that independent legal counsel is sought by couples, but they believe that many couples will simply rely on the draft language of the agreement.

The organization seeks advice on the enforceability of the three aforementioned provisions of the agreement. More specifically, they question whether the liquidated damages clause would be enforced by the courts if either the donor couple filed an action asserting custody and legal rights to the transferred embryos; or the recipient couple failed to transfer *all* viable embryos into the recipient mother, allowing one or more of the embryos to be destroyed.

III. Issues Presented

The case in question presents two broad issues. The first issue is whether the three stated provisions of the embryo transfer agreement are enforceable as a matter of law and public policy. The second issue presented is whether a court would award liquidated damages in the amount of \$25,000 for breach of the contract terms by either the donor or recipient couple.

IV. Potential Arguments

The most common argument in disputes regarding the disposition of frozen human embryos arises from the fundamental right of *reproductive freedom*, including the right to be free from unwanted parenthood.¹³ Assuming that both the donor and recipient couples breached the embryo transfer agreement in the alleged manner, both couples may potentially assert this right as an argument in their favor. The recipient mother has a legally protected right to prevent unwanted pregnancies.¹⁴ Accordingly, she may assert that any contract forcing her to agree to implantation of *all* viable embryos, each of which may potentially result in pregnancy, is *per se* void as against public policy. On the other hand, the donor couple may argue that creating human embryos and agreeing to have them transferred into a non-biological woman is an exercise of their right of reproductive freedom. Furthermore, at the time the donors entered into the contract, they had a right to control the disposition of their donated genetic material. Thus, to now permit the recipient couple to destroy one or more of the embryos, contrary to the donors' intent, would interfere with their legally protected interests as well.

The recipient couple may also argue that to penalize them for failing to implant all viable embryos would be to endorse contracts *compelling intimate association*.¹⁵ Such contracts, it may be argued, should be rendered void as a matter of public policy. Therefore, to permit the non-

¹³ See Robertson, *supra* note 10, at 1018-19.

¹⁴ See Roe, *supra* note 8.

¹⁵ See Robertson, *supra* note 10, at 1021-22.

profit organization in the instant case to compel the recipient mother to accept for implantation all viable embryos would be to force a parent-child relationship upon that individual.

Lastly, the donor couple may assert equitable principles in support of their contention that the recipient couple should be held liable for failing to transfer all viable embryos. The donor couple relied on the declarations of the recipient couple and the enforceability of the contract provisions as assurance that all excess embryos would be transferred into the recipient mother and would not be destroyed. Thus, the donors may assert the doctrine of *estoppel* arguing that it would be inequitable to permit the recipient couple to violate the terms of the agreement without facing legal consequences.¹⁶

V. Analysis of Law and Public Policy

The majority of states having addressed the issue of the enforceability of embryo donation agreements have refused to recognize a frozen human embryo as a juridical "person,"¹⁷ instead applying property and contract laws in interpreting agreements.¹⁸ To determine the enforceability of the contract provisions in question, the court will likely view the agreement as a simple transfer of "property" governed by basic contract principles.

¹⁶ See *id.*, at 1028-29 (discussing the constitutionality of embryo donation agreements if one party, at the time of implantation, wishes to repudiate the original agreement. The author recognizes that the United States Supreme Court has not yet addressed the question of when such contracts will be enforced based on the doctrine of estoppel).

¹⁷ But see LA. REV. STAT. ANN. §9:126, 129, *supra* note 8.

¹⁸ See generally, *supra* note 8, *Roe*, ("person [as used] in the Fourteenth Amendment does not include the unborn"); *Doe v. Obama* (refusing to recognize "embryo Plaintiffs" as "human beings" for the purpose of granting standing); *Doe v. Shalala* ("embryos are not persons with legally protectable interests").

A. Whether courts will enforce contracts for the donation of frozen human embryos, generally, as a matter of law and public policy.

Unless incapacitated or a victim of unconscionable acts by another party, individuals have a right to contract freely and without interference from the courts.¹⁹ Contract law dictates that so long as the terms of the contract are unambiguous and the intentions of the parties clear, the courts should interpret the contract so as to apply its terms according to their plain meaning, "in an ordinary and popular sense."²⁰ Nevertheless, a court will not enforce contracts made in violation of public policy. Proving that a contract violates public policy is, however, a heavy burden to meet, and a contract will not be held void on public policy grounds, "unless [its terms] are clearly contrary to what the legislature or judicial decision has declared to be the public policy, or they manifestly tend to inure the public in some way."²¹ Courts have consistently recognized the degree of caution that must be exercised in declaring a contract void.²² Such judicial restraint has resulted in the majority of contracts being upheld.

¹⁹ See *Mata*, *supra* note 9, at 1260.

²⁰ *Goetz v. Greater Georgia Life Ins. Co.*, 649 F.Supp.2d 802, 813-14 (Tenn. 2009); see also *Natural Res. Def. Fund v. Kempthorne*, 621 F.Supp.2d 954, 980 (Cal. 2009) ("Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself"); *In re Marriage of Nash*, Not Reported in P.3d, 150 Wash.App. 1029 (2009) (the primary goal of the court in interpreting a contract is to "ascertain and effectuate the parties' intent").

²¹ *Mata*, *supra* note 9, at 1260; see also *Superior Oil Co. v. W. Slope Gas Co.*, 549 F.Supp. 463, 468 (Colo. 1982), *aff'd by*, *Superior Oil Co.*, 758 F.2d 500 (10th Cir. 1985) ("A court is not warranted in voiding a contract unless it is fully and solemnly convinced that an existing public policy is clearly revealed in the laws of the jurisdiction").

²² See *PIC Group, Inc. v. Land Coast Insulation, Inc.*, 718 F.Supp.2d 795, 801 (Miss. 2010) ("The courts must exercise extreme caution in declaring a contract void as against public policy and should do so only in cases free from doubt"); see also *In re Village Homes of Colo., Inc.*, 405 B.R. 479, 483 (Colo. 2009) (citing *F.D.I.C. v. Am. Cas. Co. of Reading, Pa.*, 843 P.2d 1285, 1290 (Colo. 1992)) ("Courts must be cautious in finding contract provisions void as offensive to public policy...because to invalidate a provision of a contract freely entered is to infringe on one of the essential freedoms of citizenry which is the right to bargain and contract").

There are many benefits to entering into contracts regarding the disposition of excess frozen embryos resulting from the IVF procedure.²³ First, many people, based on religious or moral principles, believe that life begins at conception; thus, to permit a fertilized human embryo to be destroyed, would be to destroy human life.²⁴ For many couples, reliance on what they believe to be an enforceable contract preventing the destruction of any excess embryos is crucial to their willingness to undergo IVF.²⁵ Second, contracts that explicitly state the expectations of the parties clarify for the IVF clinic their duties relating to the storage and disposition of the embryos.²⁶ Third, the assumed enforceability of the contract reassures the recipient couple of the finality of the embryo donation and the surrender of legal custody by the donors.²⁷ Thus, in most cases, it is advantageous to all parties involved in an embryo donation arrangement to agree to some sort of contract memorializing the terms of their consent.

In addition, most courts that have ruled on the validity of a contract for the disposition of human embryos recognize the parties' right to enter into such agreements; however, the courts have failed to agree on the amount of deference to afford to such contracts. There are three basic methods of interpretation which have been applied by the courts: the contractual approach, the contemporaneous mutual consent approach, and the balancing approach.²⁸ The jurisdiction in which a suit is brought challenging the validity of the contract determines which model will be

²³ See Robertson, *supra* note 10, at 993 (emphasizing the convenience and reasonableness of advance directives and contracts to resolve questions of embryo disposition).

²⁴ See generally Davis, *supra* note 1, at 594 (discussing the basis of the argument between recognizing human embryos as "persons" or "property").

²⁵ *Id.*

²⁶ Robertson, *supra* note 10, at 993.

²⁷ Elizabeth E. Swire Falker, esq., *The Disposition of Cryopreserved Embryos: Why Embryo Adoption is an Inapposite Model for Application to Third-Party Assisted Reproduction*, 35 WM. MITCHELL L. REV. 489, 519 (2009).

²⁸ Bridget M. Fuselier, *The Trouble with Putting All of Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes over Cryopreserved Pre-Embryos*, 14 TEX. J. ON C.L. & C.R. 143, 148 (2009).

applied. Under the *contractual approach*, contracts made concerning the disposition of frozen embryos are presumed enforceable if not in violation of public policy.²⁹ If applied in the instant case, the judgment would likely result in enforcement of the embryo transfer agreement unless shown that the terms of the contract violate public policy, which, as previously mentioned, is a very difficult burden to meet.³⁰ In jurisdictions where the *contemporaneous mutual consent approach* applies, a contract for the disposition of frozen embryos is upheld only so long as the parties to the contract maintain their mutual consent of its terms.³¹ This approach is justified on public policy grounds: "It would be against public policy...to enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind concerning the disposition or use of the pre-embryos."³² Thus, under this approach, a court would likely rule in favor of a donor couple seeking to reestablish custody of transferred frozen embryos, even if doing so necessarily required the court to reject the express, yet conflicting, terms of a contract.³³ Lastly, under the *balancing approach*, courts will enforce contracts for the disposition of human embryos subject to the donors' right to repudiate the contract at any time prior to their use or destruction.³⁴ Where the parties are subsequently unable to agree and suit is brought, the court must balance the relative interests of each party to determine the ultimate disposition of the frozen embryos.³⁵ In the instant case, the facts suggest

²⁹ *Id.*

³⁰ *See Superior Oil Co.*, *supra* note 21.

³¹ Fuselier, *supra* note 28, at 149.

³² *Id.* at 150 (citing *In re Witten*, 672 N.W.2d 768, 774 (Iowa 2003)).

³³ *Id.* at 149; *See also* Baiman, *supra* note 5, at 151 ("In embryo donation disputes between genetic parents and prospective adoptive parents prior to implantation, it seems unlikely that courts will enforce donation contracts that force genetic parents, who have subsequently changed their mind, to continue with the donation").

³⁴ Fuselier, *supra* note 28, at 149.

³⁵ *Id.*

that the frozen embryos have already been used or destroyed by the recipient couple, and thus, the balancing approach cannot be applied.

B. Whether the provisions of the embryo donation agreement in question are enforceable in light of the divergent views of the state courts in affording deference to such contracts.

The non-profit organization in the instant case desires to use a standard form agreement for the donation of frozen embryos. The validity of two provisions of the contract have been challenged: (1) the donors' relinquishment of all legal and parental rights to the embryos ("Custody Clause"); and (2) the recipients' agreement to have all viable embryos transferred into the recipient mother ("Complete Transfer Clause"). The validity of these provisions must be analyzed in light of the divergent views between the states regarding interpretation and enforceability of embryo donation agreements.

Custody Clause. The Custody Clause of the embryo donation agreement requires the donor couple to relinquish all legal and parental rights over the embryos, mirroring similar conditions required for traditional adoption. In the case of adoption, however, most states prohibit a biological parent from terminating their parental rights until *after* the birth of the child.³⁶ Thus, if the provision in question was subjected to scrutiny under traditional adoption laws, it would be held in violation of state law and thus void. Fortunately for the recipient couple, the courts have held in numerous decisions that embryos are not human beings, and property law - not adoption law - governs their disposition.³⁷ The issue of whether the provision at hand is enforceable thus becomes, not one of child custody, but of the transfer of property.

When viewed merely as property, the legal right of an individual to enter into a contract for the disposition of frozen embryos becomes less controversial. Many states, through

³⁶ Falker, *supra* note 27, at 511 (the laws of forty-nine states prohibit pre-birth relinquishment of parental rights in traditional adoptions).

³⁷ *Supra* note 8.

legislative enactment, have codified their public policy of upholding embryo donation contracts in favor of the recipient couple. Statutes in both Ohio and Oklahoma explicitly state that embryo donors are neither considered the "parent" of a child born as a result of an embryo transfer, nor may they assert any right or interest in that child.³⁸ Georgia also enforces pre-birth embryo donation agreements pursuant to recently enacted statutory law.³⁹ In addition, embryo donation agreements have been compared by some state courts to gestational agreements.⁴⁰ A gestational agreement is a contract between a surrogate mother and the intended parents of the child requiring the surrogate to surrender all legal rights to the child conceived through assisted reproduction; parental rights are effectively transferred upon judicial validation of the agreement.⁴¹ Those who advocate for the enforcement of embryo donation agreements argue that a donor's relinquishment of rights to a frozen embryo should be enforced in the same manner in which courts enforce gestational agreements.⁴² It may likewise be presumed that states applying the contractual model of interpretation - including courts in New York, Tennessee, and Washington - would also support enforcement of the Custody Clause.⁴³

³⁸ OHIO REV. CODE ANN. §3111.97 (West 2006) ("A donor shall not be treated in law or regarded as a parent of a child born as a result of embryo donation. A donor shall have no parental responsibilities and shall have no right, obligation, or interest with respect to a child resulting from the donation"); OKLA. STAT. ANN. tit. 10, §556(C) (West 2000) ("The husband and wife donating the embryo shall have no right, obligation, or interest with respect to a child born as a result..."); *see also* Falker, *supra* note 27, at 522 (discussing the ease by which donors may terminate their parental rights through contract, and the willingness of state legislatures to permit them to do so).

³⁹ GA. CODE ANN., § 19-8-41 (West 2009).

⁴⁰ *See Roman v. Roman*, 193 S.W.3d 40, 49 (Tex. 2006).

⁴¹ *Id.*

⁴² *See generally id*; *see also* Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 169 (2005) (discussing why contracts to donate "spare embryos" should be enforceable).

⁴³ *See Fuselier, supra* note 28, at 148-49 ("contracts entered into at the time of [*in vitro*] fertilization are enforceable so long as they do not violate public policy").

However, this view is not entirely free from criticism. The state of Louisiana has enacted laws recognizing human embryos as "juridical persons" and prohibiting their destruction.⁴⁴ Furthermore, a few state statutes expressly reject consideration of frozen embryos as property, thus limiting the ability of donors to enter into contracts for their disposition.⁴⁵ It has also been recognized that because no court has directly resolved a contested embryo donation dispute, the parties to such a contract should not simply assume that the law permits donors to completely surrender their parental rights prior to the birth of the child.⁴⁶ Additionally, in jurisdictions applying the contemporaneous mutual consent model of contract interpretation, judges may enforce embryo donation agreements *only* so long as both donors express their continued consent to disposition by transfer to the recipient couple.⁴⁷

While opposing opinions and criticisms of the majority viewpoint should be acknowledged by state courts, the prevailing view recognizing frozen embryos as property, and providing for their disposition pursuant to principles of property and contract law, remains persuasive. Accordingly, the Custody Clause in the contract at issue is likely to be upheld.

Complete Transfer Clause. The Complete Transfer Clause of the embryo donation agreement in question requires that *all* viable frozen embryos be transferred into the recipient mother. If this provision were to be upheld by the court, the recipient would thus be legally

⁴⁴ LA. REV. STAT. ANN. §9:129, *supra* note 8.

⁴⁵ LA. REV. STAT. ANN. §9:126, *supra* note 8; *see also* FLA. STAT. ANN. § 63.212(1)(h) (West 2008) (prohibiting the transfer of custody and parental rights of an unborn "fetus" for "valuable consideration" except where such consideration is intended to cover fees, costs, and payments made in accordance with state adoption or foster care laws and agreed to in an adoption agreement).

⁴⁶ *See* Kindregan & McBrien, *supra* note 4, at 174 ("No court has to date resolved a contested embryo adoption dispute. The parties involved, therefore, should not simply assume that an embryo can be legally adopted, thus terminating the donor's legal rights and interests").

⁴⁷ *See* Fuselier, *supra* note 28, at 149 ("The mutual consent model does not permit disposition of the pre-embryo without the contemporaneous mutual consent of both people who created the pre-embryo").

required to permit the implantation of multiple embryos, *even* if she were to subsequently change her mind and seek implantation of only a few of the viable embryos. Whether implantation and pregnancy may be compelled by operation of an otherwise valid contract between a donor and recipient couple depends on the enforceability of the provision on public policy grounds.

In such cases, the main concern of courts appears to be preventing the creation of forced familial relationships and interference with an individual's personal and reproductive autonomy. In prior cases, the courts have recognized this "right of procreation" as essential to the protection of an individual's fundamental right to privacy.⁴⁸ The right of procreation includes not only the right to procreate, but also the right to *avoid* procreation.⁴⁹ The majority of courts that have spoken on the issue of whether a person may be compelled to procreate according to the terms of a contract previously entered into have held in favor of the party wishing to *avoid* enforcement of its terms.⁵⁰ Specifically, the New Jersey courts have held that: "As a matter of public policy, we

⁴⁸ *Davis*, *supra* note 1, at 600.

⁴⁹ *Id.* at 601.

⁵⁰ *See In re Marriage of Witten*, 672 N.W.2d 768, 780 (Iowa 2003) (discussing precedent case law supporting the non-enforcement of procreation agreements when one donor objects because the "objecting party's fundamental right not to procreate outweighs the other party's procreative rights"); *J.B. v. M.B.*, 751 A.2d 613, 618 (N.J. 2000) (discussing the enforceability of a contract between donors providing for the disposition of excess frozen embryos; the court concluded: "Even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen pre-embryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will"); *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-58 (Mass. 2000) (discussing the unwillingness of the court to enforce an agreement compelling one donor to become a parent against his or her will); *Davis*, *supra* note 1, at 604 (setting forth a general rule that the party wishing to *avoid* procreation should prevail against a party advocating for the enforcement of an agreement in which procreation would result).

conclude that forced procreation is *not* an area amendable to judicial enforcement."⁵¹ Various authors and legal scholars also support this contention.⁵²

Furthermore, under both the contractual model *and* the contemporaneous mutual consent model of contract interpretation, the court would likely render void any procreation provision in an embryo donation agreement.⁵³ While the contractual approach generally permits courts to uphold agreements between the interested parties, this is permissible only if the terms of the contract do not violate public policy.⁵⁴ As previously explained, individuals have a fundamental right to avoid procreation; thus any contract infringing upon that right is presumably void. Additionally, the contemporaneous mutual consent model provides for the enforcement of embryo disposition agreements only so long as the parties continue to consent to such means of disposition.⁵⁵ Thus, if a party changes his or her mind at any point prior to disposition, there is no longer mutual consent, and the contract is also rendered invalid.⁵⁶

While the majority of case law has addressed only the issue of whether procreation provisions will be enforced in favor of one donor against the other donor, the reasoning of the court could likewise be applied in a case, like the one at hand, regarding the enforceability of an embryo donation agreement requiring complete transfer of all viable embryos into the recipient

⁵¹ *J.B.*, *supra* note 50 (italics added); *see also Witten*, *supra* note 50, at 781 ("It would be against the public policy of [Iowa] to enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind concerning the disposition or use of the embryos").

⁵² *See generally Baiman*, *supra* note 5, at 151 (discussing the likelihood that courts will refuse to enforce a contract for embryo donation when one donor subsequently expresses the desire to invalidate the contract because enforcing it would require the donor to procreate against his or her will); Berg, *supra* note 42, at 169 (while advocating for the enforcement of contracts governing the disposition of excess frozen embryos, the author acknowledges that contracts forcing "implantation into a currently objecting woman would not be permissible" on the ground of bodily integrity).

⁵³ *See Fuselier*, *supra* note 28, at 148-50.

⁵⁴ *Id.* at 148.

⁵⁵ *Id.* at 149.

⁵⁶ *Id.*

mother. In this context, the same rights - the right of reproductive autonomy, the right to avoid procreation, and the right to protect against forced familial relations - which are of concern to the court in the aforementioned cases, will remain of fundamental importance. In addition, assuming that frozen embryos must, for legal purposes, be treated as property of the donors, it logically follows that, once ownership of the embryos is transferred to another, the transferee should have a legal right to do what they wish with their newly-acquired "property."

However, such views have also not gone unchallenged. For example, in *Davis v. Davis*, the Tennessee Supreme Court recognized the substantial interest that donors have in the donation and subsequent guaranteed use of their excess frozen embryos.⁵⁷ While the donors' right to determine disposition was acknowledged, however, the court compared that right to those at issue when a couple enters into an agreement requiring a woman to seek an abortion in case of pregnancy.⁵⁸ Contracts for abortion are unenforceable based on the woman's fundamental right to privacy and personal autonomy.⁵⁹ Given this distinction, it may be argued that the court's justifications for invalidating abortion contracts are analogous to the arguments in favor of invalidating procreation provisions because, in the latter scenario, the party seeking to avoid procreation would likewise have their right to personal autonomy infringed upon by judicial enforcement of the contract.

In general, the trend of recent court decisions and state legislative enactments shows a refusal to enforce contracts forcing a party to procreate against his or her will.⁶⁰ Thus, a court will likely render void the Complete Transfer Clause in the contract in question.

⁵⁷ See *Davis*, *supra* note 1, at 597 ("The progenitors, having provided the gametic material giving rise to pre-embryos, retain decision-making authority as to their disposition").

⁵⁸ *Id.* (citing *Planned Parenthood v. Dansforth*, 428 U.S. 52 (1976)).

⁵⁹ *Id.*

⁶⁰ See Baiman, *supra* note 5, at 151.

C. Whether, in the case of violation of either provision of the embryo donation agreement in question, the court may award liquidated damages in the amount of \$25,000 for breach of contract to the non-breaching party.

Liquidated damages are damages awarded for a breach of contract, the amount of which is agreed upon by the parties as a "reasonable estimation of actual damages to be recovered by one party if the other party breaches."⁶¹ Liquidated damages provisions will be upheld so long as they constitute a "fair and reasonable attempt to fix just compensation for anticipated loss caused by breach of contract" in which the amount of actual loss is immeasurable at the time of contracting.⁶² A provision providing for liquidated damages is *unreasonable* where the amount awarded is "*grossly* disproportionate to a reasonable estimate of actual damages" foreseeable at the time of contract formation.⁶³ Moreover, liquidated damages will not be awarded if the court determines that the damages clause of the contract is intended to penalize the breaching party, rather than provide just compensation for the amount of loss resulting from the breach.⁶⁴

Whether the liquidated damages provision in the present case is enforceable depends on whether the specified \$25,000 award is the result of a reasonable estimation, made at the time of contract formation, of the actual damages resulting from a breach of the embryo donation agreement. More specifically, the problem poses the question of whether liquidated damages may be awarded, pursuant to the contract, where: (1) the donating couple files a law suit to regain custody and legal rights over the embryos in violation of the Custody Clause; or (2) the recipient couple fails to transfer all viable embryos into the recipient mother causing one or more

⁶¹ BLACK'S LAW DICTIONARY (West 2009).

⁶² *Priebe & Sons v. U.S.*, 332 U.S. 407, 411 (1947).

⁶³ *Kunelius v. Town of Stow*, 588 F.3d 1, 14 (Mass. 2009) (italics added).

⁶⁴ Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties, and the Just Compensation Principle: Some Note on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977); see also *In re Endeavour Highrise, L.P.*, 432 B.R. 583, 642 (Tx. 2010) ("A liquidated damages provision is enforceable and is not a penalty when the harm caused by the breach is uncertain or difficult to estimate and the amount of damages requested is reasonable").

of the embryos to be destroyed in violation of the Complete Transfer Clause. Based on the above analysis, the Complete Transfer Clause will likely be invalidated on public policy grounds, and the donating couple will thus be unable to seek liquidated damages. Therefore, the remaining issue is whether the recipient couple may be awarded liquidated damages in the amount of \$25,000 if the donor couple breaches the embryo donation agreement by filing suit to regain custody of the transferred embryos.

It may reasonably be assumed that, if the donor couple proceeds in filing a suit to reestablish legal custody of the transferred embryos, the recipient couple will be "injured." In taking part in the donation process, the recipient couple has invested both time and money based on their expectations that they will receive the donors' excess frozen embryos. These expectations are supported by the terms of the agreement. Furthermore, if a suit is brought after the embryos have already been successfully implanted into the recipient mother and she has become pregnant as a result, the recipient couple may suffer emotional injuries as well, in addition to the physical harm in which the recipient mother would place herself by continuing with the pregnancy. While these injuries are substantial, they are of the type that the court considers immeasurable and, thus, appropriately remedied by application of a liquidated damages clause. Accordingly, the recipient couple may seek liquidated damages so long as the \$25,000 amount specified in the embryo donation agreement is reasonable.

When interpreting a contract, the court will give substantial deference to its terms in their plain and ordinary sense for the purpose of furthering the parties' intent.⁶⁵ A liquidated damages provision will only be deemed unreasonable if the amount awarded is *grossly* disproportionate to a reasonable estimate of actual damages resulting from breach of the contract.⁶⁶ The cost of an

⁶⁵ See *Goetz*, *supra* note 20, at 813-14.

⁶⁶ *Kunelius*, *supra* note 63, at 13-14.

embryo transfer is approximately \$3,000.⁶⁷ However, assuming, as previously discussed, that the court would not permit the donor couple to reestablish legal and parental rights over the transferred embryos, this amount should not be considered in determining the reasonableness of the amount to be awarded. The amount awarded must instead reasonably reflect the amount of damages suffered by the recipient couple in defending against the donors' law suit. Because the recipient couple would maintain custody of the embryos, the actual damages suffered would be limited to the amount the recipient couple expended in litigation costs and attorney's fees. While an award of \$25,000 may provide excessive compensation for the type of breach in question, whether it is *grossly disproportionate* to the actual damages suffered, when viewed in light of the parties' knowledge at the time the contract was made, is within the discretion of the court. In addition, without knowing the actual amount to be expended by the recipient couple in defending against the law suit, it is impossible to prospectively determine whether this amount would in fact be excessive. Assuming, however, that the judge deciding this matter adheres to the generally recognized principle that the courts should enforce the terms of an unambiguous contract,⁶⁸ the liquidated damages provision in the embryo donation agreement may be upheld.

VI. Conclusion

In vitro fertilization (IVF) offers couples, who may not otherwise be able to conceive a child, a safe and economical alternative to traditional conception, while still providing them the opportunity to experience pregnancy. Because the IVF procedure generally results in excess frozen embryos, the donor couple may choose to store the embryos for their own personal use, allocate them for scientific or medical experimentation, donate them to a genetically unrelated couple for their use in family planning, or simply have them destroyed. In most cases, this

⁶⁷ Moore, *supra* note 5, at 106.

⁶⁸ Goetz, *supra* note 20, at 813-14.

decision is reduced to a contract between the donors and the clinic, organization, or recipient couple who will be taking custody of the embryos. These agreements are generally enforced by the court.

The case at hand challenges the enforceability of three contract provisions inserted into a draft embryo donation agreement between a donor and recipient couple. The first provision requires the *donors* to relinquish and terminate all legal or parental rights to the embryos in favor of the recipient couple. Although most state adoption laws prohibit a biological parent from surrendering legal rights to a child prior to birth, the majority of jurisdictions have held that human embryos are not persons. Thus, property and contract law principles, rather than adoption laws, are applied. Unlike traditional adoptions, many states have, by legislative enactment and common law precedent, developed a public policy in favor of enforcing contracts in which donors surrender their legal rights to human embryos. Accordingly, the provision requiring the donors to relinquish their legal rights to the transferred embryos will likely be enforced.

The second clause requires the *recipients* to agree to transfer all viable embryos into the recipient mother, so that no embryo is destroyed. If upheld, this provision would require the court to force the recipient mother to become pregnant, even if she were to subsequently change her mind. Prior case law provides substantial evidence of the courts' reluctance to enforce contracts interfering with an individual's privacy and personal autonomy. In particular, courts have vigorously defended the right of procreation, which includes not only the right *to* procreate but also the right *to avoid* procreation. Thus, when enforcement of a contract for the disposition of human embryos would require one party to procreate against his or her will, the majority of courts deciding such cases have held in favor of the party wishing to avoid enforcement of the contract. Any decision to the contrary would be a clear violation of established public policy.

Based on this prior precedent, the provision requiring the recipient couple to agree to the transfer of all viable embryos will likely be held void on public policy grounds.

The third provision is a stipulated liquidated damages clause awarding \$25,000 in the event that either party breaches any provision of the agreement. The validity of this provision is at issue. Liquidated damages are appropriate when the amount of actual damages that would be sustained by a breach of contract is immeasurable at the time the contract is made. Such provisions are upheld by the court unless the stipulated amount of liquidated damages is unreasonable because the amount awarded is grossly disproportionate to the estimated amount of actual damages. Because the provision requiring implantation of *all* viable embryos into the recipient mother is void as a matter of public policy, the donor couple will be unable to recover damages for breach of that provision by the recipient couple. On the other hand, because the recipient couple will be forced to pay litigation costs and attorney's fees if the donor couple brings suit to reestablish legal custody of the transferred embryos, the recipient couple may seek damages for breach of contract. Whether \$25,000 in liquidated damages will be awarded pursuant to the embryo donation agreement depends on whether the court, at that time, determines that the amount to be awarded is not *grossly* disproportionate to the amount expended in defending against the donors' law suit. Assuming that it is not, the liquidated damages clause will be upheld.

Issues regarding the disposition of human embryos are arising with increasing frequency, largely because the development of legislation governing their use and disposition is progressing at an agonizingly slow pace. Comprehensive legislation regarding the transfer of human embryos, including statutory law relating to the forfeiture of legal and parental rights, is necessary in order to resolve the fragmented nature of current laws. As the field of alternative

methods of conception continues to broaden, it is important that state legislative bodies work to remain responsive to the needs of the public.