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## Zygote Zeitgeist: Legal Complexities in the Expanding Practice of Embryo Donation

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## Zygote Zeitgeist: Legal Complexities in the Expanding Practice of Embryo Donation

### Cover Page Footnote

J.D., May 2016, Loyola Law School, Los Angeles.

# ZYGOTE ZEITGEIST: LEGAL COMPLEXITIES IN THE EXPANDING PRACTICE OF EMBRYO DONATION

*Noah Geldberg\**

*In recent decades, individuals and couples facing the issue of infertility have been able to achieve parenthood through advances in assisted reproductive technology (ART), such as embryo donation. This Article evaluates the current law governing embryo donation, considers the different approaches courts and legislatures have taken to regulate embryo donation, and advocates for an approach that best balances the policy arguments underlying those approaches. Ultimately, this Article argues that contract law, rather than laws surrounding adoption, should govern embryo donations. This Article further argues that state legislatures should clarify the effectiveness of contract law within the field of embryo donation by defining embryos as property for purposes of contract law and establishing requirements associated with clinical consent forms that ensure that ART patients make informed and binding decisions about embryo disposition prior to undergoing treatment.*

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\* J.D., May 2016, Loyola Law School, Los Angeles.

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## I. INTRODUCTION

In recent decades, many individuals and couples with infertility issues have been able to achieve parenthood thanks to advances in assisted reproductive technology (ART).<sup>1</sup> While the practice of gamete donation<sup>2</sup> has existed for some time, donated embryos have, in recent years, become available as a result of the fact that many unused embryos are created as byproducts of other ART procedures.<sup>3</sup> Embryo donation is the transferring of legal rights to cryogenically-stored, unused human embryos that remain following the administration of ART treatments.<sup>4</sup> The original owners of the embryo (“progenitors”) consent to this transfer; the recipients thereby obtain legal ownership of the embryo.<sup>5</sup> If the recipients are themselves ART patients, they will have the embryo implanted and gestated in hopes of producing a live child.<sup>6</sup> Some donors and recipients prefer the term “embryo adoption.”<sup>7</sup>

Embryo donation/adoption and other forms of frozen embryo disposition<sup>8</sup> raise a host of legal and ethical issues that have not yet been resolved by courts and legislatures.<sup>9</sup> This Article will focus on two of these issues: namely whether embryo donations should be regulated in exactly the same manner as gamete donations or in ways more akin to adoptions, and whether progenitors who have embryos in storage should be legally bound to dispositional choices they made before the embryos were even created.

A hypothetical is helpful to illustrate how one or both of these issues might arise in the context of a typical couple’s ART experience. A couple with infertility issues decides to undergo ART treatment. During the couple’s first visit to the fertility clinic, they

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1. See, e.g., Marsha Garrison, *The Technological Family: What’s New and What’s Not*, 33 FAM. L.Q. 691, 692–94 (1999) (discussing use of ART in the United States).

2. Gamete donation refers to the use of donated human sperm or egg cells in the conception of a child. See Michelle L. Anderson, Comment, *Are You My Mommy? A Call for Regulation of Embryo Donation*, 35 CAP. U. L. REV. 589, 598–600 (2006).

3. *Id.* at 598–602.

4. See *id.* at 600–02.

5. *Id.* at 600.

6. See *id.* at 601.

7. Maggie Davis, *Maryland “Embryo Adoption”: Religious Entanglement in the Maryland Stem Cell Research Act of 2006*, 17 U. PA. J.L. & SOC. CHANGE 291, 318–20 (2014).

8. These other disposition options are typically: leaving the embryos frozen in storage, donating them for research, or having them destroyed. See CAL. HEALTH & SAFETY CODE § 125315(b) (West 2014).

9. See Anderson, *supra* note 2, at 593–95.

are presented with a voluminous stack of paperwork to complete. Among many forms relating to everything from health risks to payment terms is a document that prompts the couple to select the manner in which they would like to dispose of any embryos remaining after their ART treatments have concluded. Without giving it much thought—since there is so much paperwork to fill out, and since the notion of having to dispose of excess embryos seems extremely distant in this earliest stage of the ART process—the couple decides that donating their excess embryos seems like the charitable thing to do. Accordingly, they select embryo donation on the disposition consent form. Years later, after the couple has had a child and long forgotten about the paperwork that made him possible, they receive a phone call from the fertility clinic. The clinic informs them that someone has expressed interest in acquiring one of their unused embryos. Should the couple now be able to revoke their consent and prevent the clinic from handing their embryo over to strangers? If the couple is still comfortable with allowing their excess embryos to go to someone else, should they have a right to control who gets the embryo or how much contact the couple will have with the ultimate recipient? What about the child that results from the embryo? Should that child have a right to learn the identities of his or her biological parents?

This Article evaluates the existing statutory and decisional law governing embryo donation as it applies to both donors and recipients. Part II presents background information on the history of embryo donation. Part III explains different approaches to regulating embryo donation, discusses the legal implications of each approach, and proposes an ideal solution for regulating the practice. Part IV details the ways in which judicial decisions have construed clinical consent forms indicating embryo disposition options and discusses the policy arguments underlying these various determinations. Part IV also advocates for an approach that best balances these competing policy considerations.

Ultimately, this Article will argue that contract principles rather than adoption-like principles should govern embryo donations and that state legislatures should clarify the effectiveness of contract law within the field of embryo donation by both (1) defining embryos as property for purposes of contract law, and (2) establishing requirements associated with clinical consent forms that ensure that

ART patients make informed and binding decisions about embryo disposition prior to undergoing treatment.

## II. HISTORY OF EMBRYO DONATION

Though some ART methods have been around for centuries, sophisticated techniques are a relatively recent phenomenon. The earliest form of ART was artificial insemination, a method which dates back as far as the eighteenth century.<sup>10</sup> This procedure simply involves injecting the sperm of a man into the uterus of a woman by means other than coitus.<sup>11</sup> Artificial insemination remained the only technological method of achieving conception for many decades.<sup>12</sup> By the late 1970s, however, scientists had made great strides in the field of ART.<sup>13</sup>

The year 1978 marked the first live birth of a human child conceived by way of in vitro fertilization (IVF).<sup>14</sup> IVF involves extracting egg cells from a female and combining them with sperm in a laboratory setting to produce human embryos.<sup>15</sup> Doctors implant these embryos in the female's uterus, where one or more of them ideally develops into a child. Since its inception, IVF has become a very effective means of facilitating conception.<sup>16</sup> In fact, it has become so popular in the United States that more than 1 percent of babies born in America each year are products of IVF.<sup>17</sup> Because of IVF treatments, however, many couples find themselves with unused embryos left in cryogenic storage.<sup>18</sup>

Due to the expense, emotional hardship, and potential for medical complication involved in the process of harvesting oocytes and implanting embryos, it is standard practice for IVF practitioners to prepare multiple embryos for implantation.<sup>19</sup> Un-implanted embryos are cryogenically stored for future attempts should the

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10. Davis, *supra* note 7, at 309.

11. *Artificial Insemination*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/definition/american\\_english/artificial-insemination](http://www.oxforddictionaries.com/definition/american_english/artificial-insemination) (last visited Oct. 27, 2014).

12. *See* Davis, *supra* note 7, at 309.

13. *See id.* at 310.

14. *Id.*

15. Paul C. Redman II & Lauren Fielder Redman, *Seeking a Better Solution for the Disposition of Frozen Embryos: Is Embryo Adoption the Answer?*, 35 TULSA L.J. 583, 584–85 (2000).

16. Davis, *supra* note 7, at 310.

17. *Id.*

18. *See id.*

19. *See* Redman & Redman, *supra* note 15, at 586.

initial embryos fail to result in a viable pregnancy.<sup>20</sup> Typically, however, some embryos remain unused once IVF treatment has proven successful.<sup>21</sup> Thus, couples who find themselves with surplus embryos in storage are generally presented with a number of options as to how to dispose of them. Couples may keep the embryos in storage, have them destroyed, donate them to scientific research, or donate them to others who are seeking to start families via ART.<sup>22</sup> Each of these options has unique legal and moral implications.<sup>23</sup>

Embryo donation is the process by which those who possess unused embryos may transfer their legal rights to them to others who wish to become parents.<sup>24</sup> Researchers achieved the first viable pregnancy resulting from an embryo transfer in 1983 and saw the first live birth of a child developed from a donated embryo in 1985.<sup>25</sup> Though doctors have been able to transfer embryos between fertility patients for years, the practice has attracted attention only recently as certain political groups have begun to argue that embryo transfers should be regulated similarly to traditional adoptions.<sup>26</sup>

Traditional adoptions differ from embryo donation transactions in that they involve numerous legal formalities and procedures designed to evaluate the fitness of prospective parents and to protect the best interests of affected children. Embryo donations, conversely, are typically effectuated through private arrangements between consenting parties and are subject to much less scrutiny by government agencies.<sup>27</sup> In recent years, however, certain adoption agencies, have begun to offer “embryo adoptions.” Embryo adoptions are embryo transfer transactions that are arranged similarly to traditional adoptions, and that accordingly include the various screening procedures characteristic of traditional adoptions.<sup>28</sup>

Embryo adoptions differ from true adoptions in that the procedural requirements that define them are voluntarily

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20. *See id.*

21. *See* Davis, *supra* note 7, at 310.

22. *See* Redman & Redman, *supra* note 15, at 586–87.

23. *Id.*

24. Anderson, *supra* note 2, at 600.

25. Jennifer Baker, Comment, *A War of Words: How Fundamentalist Rhetoric Threatens Reproductive Autonomy*, 43 U.S.F. L. REV. 671, 686–87 (2009).

26. *See* Aaron Zitner, *A Cold War on Embryo Adoptions*, L.A. TIMES, Mar. 22, 2002, <http://articles.latimes.com/2002/mar/22/news/mn-34140>.

27. *See* Anderson, *supra* note 2, at 607.

28. Polina M. Dostalick, Note, *Embryo “Adoption”? The Rhetoric, the Law, and the Legal Consequences*, 55 N.Y.L. SCH. L. REV. 867, 873 (2011).



implemented by private agencies.<sup>29</sup> Thus, in most cases, only prospective parents who actively wish to acquire embryos through an adoption-like procedure need subject themselves to screening procedures akin to those associated with traditional adoption. Many couples who choose such arrangements do so for religious reasons.<sup>30</sup> The term “embryo adoption” however is problematic because it mischaracterizes the legal significance of embryo transfer transactions.

In 1997, John and Marlene Strege became the first couple to “adopt” an embryo.<sup>31</sup> Marlene, who had been diagnosed with premature ovarian failure,<sup>32</sup> did not wish to conceive a child by combining her husband’s sperm with a donor egg.<sup>33</sup> As she put it, “[h]aving donor eggs fertilized by my husband would bring a third person into our marriage.”<sup>34</sup> The Streges received ethical counseling about the notion of adopting an embryo from Dr. James Dobson.<sup>35</sup> They then worked with their long-time family friend, Ron Stoddart to arrange the donation of an embryo which was implanted in Marlene’s uterus.<sup>36</sup> On December 31, 1998, Marlene gave birth to her daughter, Hannah, the world’s very first “Snowflake Baby.”<sup>37</sup>

Stoddart, a trained adoption attorney, was director of Nightlight Christian Adoptions in Orange County, California at the time.<sup>38</sup> In helping the Streges, he saw the potential to bring many more frozen

29. See Davis, *supra* note 7, at 319–20.

30. See *id.* at 320–21.

31. See Rick Monroe, *Family Shares of Incredible Journey from Frozen Embryo to Snowflake Teen*, LIVE ACTION NEWS (Aug. 11, 2012, 1:50 PM), <http://liveactionnews.org/family-shares-of-incredible-journey-from-frozen-embryo-to-snowflake-teen>.

32. Rob Blackhurst, *Would You Adopt an Embryo?*, INDEPENDENT.IE (Oct. 28, 2013, 9:30 PM), <http://www.independent.ie/life/family/mothers-babies/would-you-adopt-an-embryo-29704187.html>.

33. See Monroe, *supra* note 31.

34. *Id.*

35. See *Meet the First Snowflake! (Embryo Adoption)*, CHRISTIAN LIFE RESOURCES, <http://www.christianliferesources.com/article/meet-the-first-snowflake-embryo-adoption-1317> (last visited Apr. 20, 2015). Dr. James Dobson is a notable Christian activist who founded an organization known as Focus on the Family, which strives to provide families with resources to maintain healthy relationships. See *Our Founder—Dr. James Dobson*, FOCUS ON THE FAMILY, [http://www.focusonthefamily.com/about\\_us/james-dobson.aspx](http://www.focusonthefamily.com/about_us/james-dobson.aspx) (last visited Apr. 20, 2015).

36. See Monroe, *supra* note 31.

37. *Id.* “Snowflake Baby” is a term that Marlene Strege coined to refer to babies born as a result of embryo adoption. She chose this term because she felt that embryos are like snowflakes: each frozen, unique, and never again to be created. *Id.*

38. *Id.*

embryos to life.<sup>39</sup> Nightlight has facilitated the births of hundreds of Snowflake Babies since Hannah.<sup>40</sup> The agency distinguishes its “embryo adoption” program from the embryo donation services offered by fertility clinics, explaining that Nightlight takes care to execute embryo transfers in a manner analogous to traditional adoptions.<sup>41</sup> Nightlight ensures that potential embryo recipients undergo home studies,<sup>42</sup> and that families who choose to donate their embryos are able to select the parents with whom those embryos will ultimately be placed.<sup>43</sup>

Many organizations have followed in Nightlight’s footsteps, offering “embryo adoptions” rather than simple transfers of embryo ownership from donor to recipient.<sup>44</sup> Couples seeking an “embryo adoption” “must complete an application, traditional adoption home study, adoption education program, undergo health checks, and pay a fee.”<sup>45</sup> In most states, none of these steps are legal requirements for obtaining ownership of an embryo.<sup>46</sup> Thus, a couple that simply wants to obtain a donated embryo can do so from a fertility clinic without submitting to any comparable screening procedures.

Donors too may choose whether to donate their embryos through agencies offering “embryo adoptions” or fertility clinics.<sup>47</sup> If they decide on the latter option, a clinic may post anonymous information about the genetic characteristics of the donors’ embryo on its website for interested embryo seekers to peruse. If prospective parents who desire the embryo are deemed a match for it after basic

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39. *See id.*

40. *Id.*

41. *See Frequently Asked Adoption Questions–FAQs*, NIGHTLIGHT CHRISTIAN ADOPTIONS, <https://www.nightlight.org/faqs> (last visited Oct. 28, 2014).

42. A “home study” is a two- to four-month process designed to instruct and evaluate a couple looking to become adoptive parents. Home studies consist of education, interviews, and paperwork intended to build parenting skills in those seeking to adopt, and to help both the prospective parents and the adoption agency determine the couple’s preparedness to become the parents of an adopted child. *Id.*; *Home Study Services and Family Assessments*, NIGHTLIGHT CHRISTIAN ADOPTIONS, <https://www.nightlight.org/home-study-services/> (last visited Jan. 12, 2015).

43. *Frequently Asked Adoption Questions–FAQs*, *supra* note 41.

44. *See Embryo Adoption Agencies*, EMBRYO ADOPTION AWARENESS CENTER, [http://www.embryooption.org/adoption\\_agencies/embryo\\_adoption\\_services\\_matrix.cfm](http://www.embryooption.org/adoption_agencies/embryo_adoption_services_matrix.cfm) (last visited Mar. 11, 2015).

45. Dostalík, *supra* note 28, at 874.

46. *See id.*

47. Sarah Elizabeth Richards, *Get Used to Embryo Adoption*, TIME (Aug. 24, 2013), <http://ideas.time.com/2013/08/24/get-used-to-embryo-adoption>.

physical and psychological testing, they will acquire the embryo anonymously.<sup>48</sup>

An “adoption” approach gives donors much more control over the recipients of their embryos. It also enables donors to maintain contact with the adoptive family should they choose to do so, a feature which many donors seem to desire.<sup>49</sup> Indeed, a representative for the National Embryo Donation Center recently reported that more than half of donors prefer at least some degree of openness in their donation transactions.<sup>50</sup> Whichever approach participants choose, embryo donation is an attractive option for many couples hoping to become parents because it enables mothers to experience pregnancy, and it is relatively inexpensive as compared to other forms of ART.<sup>51</sup> Thus, embryo donation is likely to continue to grow in popularity.<sup>52</sup>

### III. CONTRACT PRINCIPLES VERSUS ADOPTION PRINCIPLES: WHICH SHOULD CONTROL EMBRYO DONATION TRANSACTIONS?

#### A. *Present State of the Law*

Currently, a lack of clear and consistent regulation has forced families to rely on private contracts to delineate rights they acquire in donated embryos.<sup>53</sup> Further, little directly applicable precedent is available to guide courts in resolving disputes that arise from such contracts.<sup>54</sup> These circumstances have led to tremendous uncertainty in the law.<sup>55</sup>

The difficulty of regulating embryo donation begins with the uncertain legal status of embryos.<sup>56</sup> This varies by jurisdiction and is

48. *Id.*

49. *Id.*

50. *Id.*

51. Dostalík, *supra* note 28, at 874 (“The average cost of adopting an embryo, not including fertility clinic charges and medical fees for implantation, is approximately \$4,500. It is less expensive than both IVF and traditional adoption, which can cost as much as \$15,000 and \$30,000, respectively.” (citations omitted)).

52. With the number of frozen embryos remaining in cryopreservation across the United States now exceeding 600,000 by some estimates, this problem is significant. *Did You Know?*, EMBRYO ADOPTION AWARENESS CENTER, [http://www.embryoadooption.org/videos/vp\\_Did\\_You\\_Know.cfm](http://www.embryoadooption.org/videos/vp_Did_You_Know.cfm) (last visited Oct. 30, 2014). The current number of stored frozen embryos represents a 54 percent increase since 2002. *Id.*

53. *See* Dostalík, *supra* note 28, at 869.

54. *Id.*

55. *See* Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 *VILL. L. REV.* 169, 176 (2004).

56. *See* Dostalík, *supra* note 28, at 875.

often unclearly defined.<sup>57</sup> Three basic views exist as to the personhood of embryos.<sup>58</sup> The first view is based on the notion that life begins at conception, a position that underlies political movements opposing abortion, stem cell research, and similar issues.<sup>59</sup> Under this ideology, an embryo possesses the same legal status as a living human being.<sup>60</sup> At the other end of the spectrum is the view that embryos are mere property, no different than any other possessions.<sup>61</sup> Finally, there exists a moderate position that considers embryos to be a form of property deserving of “special respect” due to their potentiality for life.<sup>62</sup> The legal status of embryos has a critical influence on the way in which embryo transfer transactions are regulated. If embryos are nothing but ordinary property then they are clearly subject to contract law; if they occupy the same legal status as human beings, however, then an argument exists that prospective parents must acquire them through adoption-like procedures.<sup>63</sup> Finally, if embryos are property deserving of “special respect,” it is unclear what legal principles should apply to them.<sup>64</sup>

Louisiana is the only state to have expressly embraced the embryo-as-person stance,<sup>65</sup> having passed a statute that defines an embryo as “a juridical person . . . recognized as a separate entity apart from the medical facility or clinic where it is housed or stored.”<sup>66</sup> Other states, however, have enacted statutes suggesting similar consideration of embryos.<sup>67</sup>

Though no state statutes embody the embryo-as-property position, many courts have embraced it.<sup>68</sup> The Oregon Court of Appeals, for example, has held that “the contractual right to possess or dispose of . . . frozen embryos is personal property that is subject

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57. See Davis, *supra* note 7, at 318.

58. See *id.*

59. See *id.* at 317–18.

60. *Id.* at 318.

61. *Id.*

62. *Id.*

63. Dostalík, *supra* note 28, at 878.

64. Angela K. Upchurch, *A Postmodern Deconstruction of Frozen Embryo Disputes*, 39 CONN. L. REV. 2107, 2123 (2007).

65. Dostalík, *supra* note 28, at 876.

66. LA. REV. STAT. ANN. § 9:125 (1986).

67. See, e.g., MO. REV. STAT. § 1.205 (2010) (“The life of each human being begins at conception; [u]nborn children have protectable interests in life, health, and well-being . . .”).

68. Dostalík, *supra* note 28, at 877.

to a 'just and proper' division."<sup>69</sup> Other courts have applied contract law to the disposition of embryos, and thus implicitly held similarly.<sup>70</sup>

The Tennessee Supreme Court's decision in *Davis v. Davis*<sup>71</sup> exemplifies the intermediate position that embryos are to be accorded a legal status somewhere between people and property.<sup>72</sup> *Davis* involved a divorce dispute in which a wife sought custody of embryos that she and her husband had had prepared during their marriage.<sup>73</sup> The wife wished to retain custody of the embryos so that she could use them to become pregnant after the divorce, while the husband wanted the embryos to remain frozen.<sup>74</sup> The trial court decided that embryos were human beings from the moment of fertilization, and it accordingly granted custody of the embryos to Mrs. Davis.<sup>75</sup> The appellate court reversed this decision, however, and the Tennessee Supreme Court affirmed the reversal.<sup>76</sup> As that Court explained, "[w]e conclude that pre-embryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."<sup>77</sup>

### *B. Issues Raised by the Competing Approaches*

Each of the three approaches that states have taken in defining the personhood of embryos carries with it distinct legal advantages and disadvantages. Because the legal status of embryos dictates the principles that will control transfers of embryo ownership, this section will explain the relative merits of the approaches.

#### 1. The Embryo as a Person

Early American common law did not accord any degree of personhood to embryos.<sup>78</sup> Before the late nineteenth century,

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69. *In re Marriage of Dahl & Angle*, 194 P.3d 834, 839 (Or. 2008).

70. *See Szafranski v. Dunston*, 993 N.E.2d 502, 506–10 (discussing application of contract law to the disposition of frozen embryos, and recognizing that "the contractual approach has been applied/endorsed in five states").

71. 842 S.W.2d 588 (1992).

72. *See Dostalick, supra* note 28, at 876–77.

73. *Id.*

74. *Id.* at 876.

75. *Id.* at 876–77.

76. *Id.*

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

78. *See Davis, supra* note 7, at 295.

abortion was legal in the United States prior to the “quickening”<sup>79</sup> stage of pregnancy.<sup>80</sup> Notably, later movements toward the criminalization of abortion in America were fueled not by reverence for the personhood of unborn children, but rather largely by growing societal disdain for “indecent” behavior.<sup>81</sup> Late nineteenth century Americans opposed abortion not because they felt that fetuses were human beings whose rights needed to be protected, but rather because prohibiting abortion would curb promiscuous behavior and promote the societal goal of female chastity before marriage.<sup>82</sup> The Supreme Court addressed the issue of the personhood of unborn children in the landmark case of *Roe v. Wade*.<sup>83</sup> The *Roe* Court stated: “the unborn have never been recognized in the law as persons in the whole sense.”<sup>84</sup>

The Roman Catholic Church views things differently, however, as that institution has expressed its belief that embryos are fully human.<sup>85</sup> Italy has embraced the Vatican’s position, and accordingly that nation’s IVF regulations permit the harvesting of no more than three eggs per IVF cycle, all of which must be implanted in the patient undergoing treatment.<sup>86</sup>

Louisiana’s large Catholic population appears to have influenced the state’s active classification of the embryo as a “juridical person.”<sup>87</sup> While Louisiana’s reverence for human life is admirable, its position on the personhood of embryos is untenable in contemporary America.

First, the “embryo-as-person” position makes little sense in light of *Roe v. Wade*.<sup>88</sup> That case gave women the right to abort nonviable fetuses.<sup>89</sup> Thus, if embryos are to be considered people, a woman would be forbidden to destroy one while it remained cryogenically

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79. Quickening is the time at which a pregnant woman first becomes aware of fetal movement. This usually occurs between the twelfth and sixteenth weeks of gestation. *Id.*

80. *Id.* at 295–96.

81. *Id.* at 296–99.

82. *Id.* at 297.

83. 410 U.S. 113 (1973).

84. *Id.* at 162.

85. Shirley Darby Howell, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, 14 DEPAUL J. HEALTH CARE L. 407, 411 (2013).

86. *Id.* at 411–12. Notably, New Mexico has taken a similar approach to regulating IVF, mandating that all in vitro fertilized eggs be implanted in human female recipients. *Id.* at 412.

87. *See id.* at 412.

88. *See id.*

89. *See Roe v. Wade*, 410 U.S. 113, 154 (1973).

preserved, but she would be permitted to abort it once it had been implanted in her uterus.<sup>90</sup> Second, classifying an embryo as a person implies that destroying it is tantamount to murder.<sup>91</sup> This would very likely inhibit use of IVF in the United States, as IVF providers would surely fear both civil and criminal consequences of harming embryos.<sup>92</sup>

Categorizing embryos as persons could cause further difficulties in the context of embryo disposition disputes, as the “person” designation would force courts to decide such disputes under a “best interests of the child” analysis.<sup>93</sup> Not only would such an approach undermine parties’ reliance interests in any disposition agreement they may have entered prior to undergoing IVF,<sup>94</sup> but also, the efficacy of a “best interests of the child” test being applied to a child who has not yet been born is highly questionable.<sup>95</sup>

Thus, it seems that classifying embryos as human beings will likely prove extremely problematic. Accordingly, the policy that this approach embodies, namely affording the greatest possible protection to potential human lives, is easily outweighed by practical considerations in this context, and states that have not yet codified the legal status of embryos should avoid this flawed approach. Indeed, though the Louisiana and New Mexico statutes have not yet been challenged in court, they have been described as “constitutionally weak and unenforceable as a practical matter.”<sup>96</sup>

## 2. The Embryo as Property

A position that views embryos as mere property subject to the same rules as all other chattels may also bring about undesirable ramifications. Ordinary property may be sold, traded, or destroyed by its owner at his or her will.<sup>97</sup> To suggest that progenitors of embryos have complete freedom to dispose of them in any of these ways is disquieting. To begin with, most ethicists and professional organizations discourage direct payment for embryos, and some

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90. See Howell, *supra* note 85, at 412.

91. Davis, *supra* note 7, at 316.

92. *Id.*

93. Upchurch, *supra* note 64, at 2121.

94. See Howell, *supra* note 85, at 416–17.

95. Upchurch, *supra* note 64, at 2121.

96. Howell, *supra* note 85, at 413.

97. See *id.*

states prohibit such compensation by statute.<sup>98</sup> This strong opposition to the sale of embryos demonstrates that many view them to be inherently distinct from other items of personal property. This is logical considering the biological potential of embryos, and the rigid formalism that characterizes property law.

If embryos have the same legal status as ordinary objects, then ownership disputes would focus solely on the relative rights of claimants.<sup>99</sup> Thus, the interests of a potential child that might result from an embryo would be entirely absent from such a contest, which would boil down to a routine title determination.<sup>100</sup> This framework would lead to further complications related to other aspects of property law. For example, it would be possible for legal and equitable title to an embryo to become vested in different parties, and it would also be possible for an embryo to become part of a decedent's estate, and thus transferable by will or intestate succession.<sup>101</sup> The notion that the rigid rules of property law could create a situation wherein an individual's embryos end up in the possession of someone who was never designated to acquire them, and who was not chosen based on consideration of the best interests of children that could result from the embryos is highly discomfoting.

Thus, subjecting embryos to all aspects of property law is bound to produce numerous ethically questionable results. This approach is also less than ideal, but is perhaps preferable to the "embryo-as-person" position, whose troubling implications seem decidedly more immediate and severe in that they both create a legal paradox and potentially subject IVF practitioners to the risk of criminal liability for negligent conduct.<sup>102</sup>

### 3. The Embryo as an Interim Category Deserving of "Special Respect"

Squarely defining embryos as either people or property creates significant problems when the full scope of rules applicable to either

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98. *Executive Summary of Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy*, N.Y. STATE DEP'T OF HEALTH, [https://www.health.ny.gov/regulations/task\\_force/reports\\_publications/execsum.htm](https://www.health.ny.gov/regulations/task_force/reports_publications/execsum.htm) (last visited Nov. 21, 2014).

99. Kathleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 206 (1997).

100. *See id.*

101. *Id.* at 206–07.

102. *See supra* notes 88–92 and accompanying text.



category is considered. Thus, the intermediate approach to defining the legal status of embryos would seem most sensible. This approach too, however, is not without its imperfections.

In deciding to implement the intermediate approach in *Davis v. Davis*,<sup>103</sup> the Tennessee Supreme Court relied largely on the ethical standards set forth by the Ethics Committee of the American Fertility Society.<sup>104</sup> The *Davis* court cited a report by the Ethics Committee that justified the intermediate view of an embryo's legal status on grounds that an embryo "has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential."<sup>105</sup>

The *Davis* court ultimately stated that embryos "occupy an interim category [between persons and property] that entitles them to special respect because of their potential for human life."<sup>106</sup> Most courts and commentators have embraced this view, but its exact meaning remains somewhat unclear.<sup>107</sup> In practice, the "special respect" status gives embryo progenitors the authority to create contracts concerning the use or disposition of their embryos, and implies that disputes arising from such contracts will be adjudicated in light of the progenitors' constitutional interests in procreation.<sup>108</sup> Stating that embryos are deserving of "special respect" seems to imply that courts would favor preservation or implantation of embryos over their destruction or continued storage, but in fact, the opposite appears to be true.<sup>109</sup>

In favoring an individual's right not to procreate, American courts have relied on two basic grounds. The first is that "the law shall not be used as a mechanism for forcing [family] relationships when they are not desired . . . [because] respect for liberty and privacy requires that individuals be accorded the freedom to decide

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103. 842 S.W.2d 588 (Tenn. 1992).

104. *Id.* at 596. The Ethics Committee of the American Fertility Society is now known as the American Society for Reproductive Medicine Ethics Committee. Alyssa Lechmanik, *Student Work: The Battle Over The Embryo: How West Virginia Should Legally Define the Embryo and Regulate Embryo Adoption*, 116 W. VA. L. REV. 701, 716 (2013).

105. *Davis*, 842 S.W.2d at 596.

106. *Id.* at 597.

107. See Howell, *supra* note 85, at 414.

108. Upchurch, *supra* note 64, at 2123.

109. Howell, *supra* note 85, at 415; see also, e.g., *Davis*, 842 S.W.2d at 604 ("Ordinarily, the party wishing to avoid procreation should prevail . . .").

whether to enter into a family relationship.”<sup>110</sup> The second is that favoring the rights of an individual who seeks to avoid parenthood allows parties who are in conflict about their respective rights to frozen embryos to maintain the status quo by keeping those embryos frozen until they can come to a mutual decision as to how to dispose of them.<sup>111</sup>

A significant problem with the “property deserving of special respect” status as it is currently applied is that it leaves open the possibility that a court may look to any number of different legal standards to resolve a dispute involving embryos.<sup>112</sup> In practice, courts tend to apply principles of property law in adjudicating embryo disputes because analyzing such disputes within a property-like framework enables courts to better manage them within the adversarial legal system.<sup>113</sup> The difference between embryos occupying the legal status of ordinary property and them being designated as “property deserving of special respect,” however, is that courts are not required to adhere to all property principles in such cases.<sup>114</sup> This is problematic because it introduces a degree of unpredictability into embryo disputes.

### C. Proposing a Solution

The fact that any embryo donation transaction involves the transfer of genetic material that has the full potential to develop into a child has prompted many to analogize the practice to traditional adoption. While such a comparison may appear logical at first glance, the parallels between embryo donation and traditional adoption begin to break down upon examination of the essential mechanics of adoption law.

Arguments in favor of regulating embryo transfer transactions under adoption law find their basis in the view that life begins at conception.<sup>115</sup> This position is popular in the religious, pro-life community, and is justified in part by the belief that each embryo has

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110. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000); *but see* CA 2401/95 *Nahmani v. Nahmani* 50(4) *IsrLR* 1 [1996] (Isr.) (embracing contrary reasoning based on biblical teachings).

111. *See In re Marriage of Witten*, 672 N.W.2d 768, 778, 783 (Iowa 2003).

112. *See* Upchurch, *supra* note 64, at 2123.

113. *Id.*

114. *Id.*

115. *See* Baker, *supra* note 25, at 685.

a unique composition.<sup>116</sup> Proponents of embryo adoption argue that treating the embryo transfer process like a traditional adoption affords receiving parents beneficial guidance and counseling, and that it also ensures that donating parents are given more control over the placement of their embryos, which will ultimately grow into children who share their genetic material.<sup>117</sup> While these features may be desirable in the embryo donation context, it is clear that most courts and legislatures remain unconvinced that adoption law should apply to embryos.<sup>118</sup>

While the acquisition of a frozen embryo may seem to resemble an adoption in certain respects, numerous aspects of adoption law are inappropriate in this context.<sup>119</sup> Part of the difficulty involved in attempting to apply adoption principles to embryo donation arises from the fact that a child resulting from this procedure necessarily has at least three biological parents, namely the two individuals whose genetic material comprises the donated embryo, and the mother who ultimately gives birth to the child that develops from the embryo.<sup>120</sup> Adoption law generally assumes that a child has only one set of biological parents, and its purpose is to sever a child's ties to these individuals and to create a new familial relationship between the child and another, distinct set of parents.<sup>121</sup> In an embryo donation scenario, the birth mother is typically the intended mother of the resulting child, and her parentage must thus be maintained.<sup>122</sup>

Other features of adoption law further demonstrate that it is not suitable for application to transactions involving embryos. Most states make it illegal for a mother to consent to adoption before her child is born, and all states recognize a period after the child is born during which the birth mother can rescind her consent to adoption.<sup>123</sup> These basic tenets of adoption law clearly cannot be applied in the context of embryo transfers.

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116. *See id.*

117. *See Frequently Asked Adoption Questions—FAQs*, *supra* note 41.

118. *See Frequent Questions: Adopting Parents*, EMBRYO ADOPTION AWARENESS CENTER, <http://www.embryooption.org/faqs/adopting.cfm> (last visited Nov. 22, 2014) (“In the United States embryos are considered property, not people and therefore the ‘owners’ [the donors] of the embryos transfer the ownership to the recipient family via contract law.”).

119. *See Anderson*, *supra* note 2, at 615.

120. *See id.*

121. *Id.*

122. *Id.*

123. Dostalík, *supra* note 28, at 885–86.

Finally, because fewer than one third of embryo transfers ultimately result in the birth of children, if such transactions were governed by adoption law, most would involve extensive pre-placement procedures that would ultimately prove unnecessary due to the failure of an embryo donation to result in a live birth.<sup>124</sup>

For all these reasons, contract law is much more suitable for the regulation of embryo donations. Moreover, even if contract law controls, the main advantages of adoption law, namely the security and control associated with its extensive screening procedures, are available to donors and recipients who choose to conduct their embryo transfers through agencies that voluntarily implement adoption-like procedures. Current problems with contract law stem from the uncertain legal status of embryos. The fact that some states have either failed to define the personhood of embryos, or have defined it unclearly makes the enforceability of privately drafted embryo transfer contracts uncertain.

It is thus of paramount importance that the enforceability of embryo donation agreements be made predictable. State legislatures could ensure such predictability, while still allowing courts the flexibility to avoid having to make rulings that contravene the policy of giving special deference to the potential for life that embryos embody, by according a contextually variable legal status upon embryos. Legislatures could accomplish this by passing statutes that expressly delineate the manner in which embryos are to be considered in different categories of legal disputes.

Tennessee, for example, has embraced the “property deserving of special respect” view of embryo personhood.<sup>125</sup> Additionally, however, the Tennessee Legislature has passed a statute that expressly subjects transfers of embryo ownership to contract law.<sup>126</sup> Section 36-2-403 of the Tennessee Code explicitly states that embryo transfers may be effected via contract, and thus enables parties to an embryo transfer to arrange the transaction with certainty that contract principles will control it.<sup>127</sup> By taking the simple act of explicitly codifying Tennessee’s position on the applicability of contract law in the embryo donation context, the state’s legislature has greatly

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124. *Id.* at 886.

125. *See supra* Part III.B.3.

126. *See* TENN. CODE ANN. § 36-2-403 (2014).

127. *See id.*

facilitated embryo transactions within its borders by signaling to the practitioners involved which legal principles will govern. Moreover, the state remains free to recognize the “special respect” due to embryos by passing additional statutes that treat embryos differently in other contexts. The legislature could, for example, declare that the best interests of a child that might result from an embryo are to determine its ownership in the event that the embryo must pass by intestate succession.

By passing statutes that dictate the ways in which embryos are to be treated under different bodies of law, state legislatures can embrace an intermediate position on embryo personhood without doing so in a manner that makes the law governing transfers of embryo ownership unclear. Such an approach would greatly improve the legal landscape surrounding embryo donation.

#### IV. THE QUESTION OF WHETHER TO ENFORCE CLINICAL CONSENT FORMS AS CONTRACTS

Many fertility clinics require patients preparing to undergo IVF to sign consent forms by which those individuals indicate an option for the disposition of excess embryos.<sup>128</sup> Such options typically include donation for research, donation for use by another fertility patient, continued storage, or destruction. A few states have even passed statutes requiring clinics to provide such forms.<sup>129</sup> Though these forms are intended to prevent disputes over embryo disposition, their legal effect is often unclear.<sup>130</sup> The manner in which a court will ultimately interpret them thus depends largely on the legal status of embryos within the state where that court sits.

California is among the states requiring fertility clinics to provide embryo disposition consent forms to patients.<sup>131</sup> Section 125315 of the California Health and Safety Code is typical of state statutes governing the provision of embryo disposition consent forms in terms of the options it describes, as well as the fact that it is silent regarding the enforceability of the forms.<sup>132</sup> Section 125315 requires that doctors administering fertility treatments provide their patients

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128. Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIMONIAL L. 57, 58–59 (2011).

129. *Id.* at 59.

130. *See id.*

131. *See* CAL. HEALTH & SAFETY CODE § 125315 (West 2014).

132. *See* Forman, *supra* note 128, at 90.

with “timely, relevant, and appropriate information to allow the individual to make an informed and voluntary choice regarding the disposition of any human embryos remaining following the fertility treatment.”<sup>133</sup> The statute goes on to provide dispositional options to follow a number of potential circumstances, including death of either or both partners in a couple, separation of partners, or abandonment of embryos.<sup>134</sup>

#### A. Current Approaches

State courts have reached opposing decisions on the issue of whether to enforce clinic consent forms as contracts.<sup>135</sup> In *Kass v. Kass*,<sup>136</sup> the New York Court of Appeals became the first to consider a marital dissolution case involving the disposition of embryos in which the parties had signed an agreement with their IVF provider concerning embryo storage.<sup>137</sup> Reasoning that embryos were not to be considered “persons,” and that parties should be encouraged to think through contingencies relating to embryo disposition and to express their wishes carefully in writing prior to undergoing IVF treatment, the *Kass* court held that disposition agreements between embryo progenitors should generally be presumed valid and binding.<sup>138</sup> Many other courts have followed this approach, and one has even gone so far as to enforce a cryopreservation agreement provision mandating the destruction of embryos despite both progenitors’ wishes to the contrary during their divorce proceedings.<sup>139</sup>

In *Litowitz*, the Washington Supreme Court decided an embryo custody dispute between a divorcing husband and wife. The couple had two embryos stored in cryopreservation that had been created from the husband’s sperm and donor eggs.<sup>140</sup> At the time of the litigation, the wife desired to have the embryos implanted in a surrogate, while the husband wanted to make them available for donation.<sup>141</sup> Prior to having their embryos cryopreserved, however,

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133. HEALTH & SAFETY § 125315.

134. *Id.*

135. Forman, *supra* note 128, at 59.

136. 696 N.E.2d 174 (N.Y. 1998).

137. *In re Marriage of Dahl & Angle*, 194 P.3d 834, 839 (Or. 2008).

138. *Kass*, 696 N.E.2d at 179–80.

139. *Litowitz v. Litowitz*, 48 P.3d 261, 271 (Wash. 2002).

140. *Id.* at 262–63.

141. Forman, *supra* note 128, at 63.

the couple had signed a disposition agreement with the storage facility in which they indicated that they wanted their embryos destroyed if the embryos remained in storage five years after the initial date of cryopreservation and the couple did not request that the facility extend the storage period.<sup>142</sup>

In coming to its decision, the *Litowitz* court cited decisions from several other jurisdictions, including *Davis* and *Kass*. Quoting *Davis*, the court stated that

disputes involving the disposition of pre-embryos produced by in vitro fertilization should be resolved, first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the pre-embryos must be weighed.<sup>143</sup>

Since the Litowitzes did not agree on the manner in which their embryos should be disposed of, the court turned to their cryopreservation agreement. It then embraced the reasoning of the *Kass* court: “[a]dvance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision.”<sup>144</sup>

Some courts, however, have taken a “contemporaneous consent” approach to enforcement of embryo disposition consent forms. While these courts also presume such forms to be binding, they will not enforce the disposition provisions in them in disputes between the embryo progenitors where one has changed his or her mind.<sup>145</sup> This approach makes disposition agreements likely to be enforced in disputes between couples and IVF clinics rather than between the embryo progenitors themselves.<sup>146</sup>

The Iowa Supreme Court took the contemporaneous consent approach in *In re Marriage of Witten*.<sup>147</sup> That case concerned a

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142. *Litowitz*, 48 P.3d at 268.

143. *Id.* at 265 (quoting *Davis v. Davis*, 842 S.W.2d 588, 604 (1992)).

144. *Id.* at 267 (quoting *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998)).

145. Forman, *supra* note 128, at 63.

146. *Id.*

147. 672 N.W.2d 768 (Iowa 2003).

couple who had signed a cryopreservation agreement form that required both parties to consent to any use or disposition of the embryos they had in storage. When the couple entered divorce proceedings, the wife sought to have the embryos implanted in her or a surrogate so that she could have a child, while the husband opposed use of the embryos in this manner. The trial court gave effect to the couple's agreement, and thus enjoined both parties from using the embryos.<sup>148</sup> The wife challenged the trial court's ruling on grounds that enforcement of the agreement would violate public policy by allowing the husband to back out of his implicit agreement to have children with her.<sup>149</sup> The court rejected the wife's public policy argument and proceeded to address the question of whether an embryo disposition agreement should be enforced after one party has become uncomfortable with his or her prior decisions as expressed in that agreement.<sup>150</sup>

Reasoning that "judicial decisions and statutes in Iowa reflect respect for the right of individuals to make family and reproductive decisions based on their current views and values . . . [and] reveal awareness that such decisions are highly emotional in nature and subject to a later change of heart," the court held that embryo disposition agreements signed at the time of in vitro fertilization are binding on the parties subject to the right of either party to change his or her mind up to the point of use or destruction of any stored embryo.<sup>151</sup> The court went on to state that if parties to a dispute cannot reach a consensus as to what to do with their stored embryos, those embryos will remain in storage indefinitely with the party or parties opposing destruction held responsible for paying the storage fees.<sup>152</sup>

### *B. Policy Considerations*

Courts that have held IVF consent forms to be enforceable as contracts have done so with the intent of incentivizing embryo progenitors to consider carefully the possible consequences of preserving embryos in cryogenic storage prior to ordering the

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148. *Id.* at 772–73.

149. *Id.*

150. *Id.* at 780.

151. *Id.* at 782.

152. *Id.* at 783.



embryos to be created.<sup>153</sup> Another important justification for enforcing such forms as contracts is the reliance interests of the IVF patients who sign them.<sup>154</sup> If the members of a couple intelligently agree to dispose of their embryos in a specified manner prior to undergoing IVF treatment, each member's assent to that dispositional option may be fundamentally intertwined with his or her agreement to the IVF treatment.<sup>155</sup>

For example, a husband who is uncomfortable with having genetic children outside of his marriage may agree to undergo IVF only because he signed a consent form that assured him that embryos remaining in storage after his death or in the event of a divorce would be destroyed. If a court were later to determine that the consent form did not constitute a binding contract, the husband's expectations would be violated.<sup>156</sup> Essentially, a court's refusal to uphold the provisions of the consent form could lead to the continued preservation of embryos that would never have existed had the husband not believed that the form's provisions would be enforced.<sup>157</sup>

Though decisions regarding embryo disposition can often be a sensitive issue, and progenitors may change their minds for a variety of reasons, scholars have argued that enforcing disposition agreements signed prior to the administration of IVF treatment is the best way to give infertile couples control over what becomes of their embryos.<sup>158</sup> Enforcing such agreements enables the embryo progenitors to direct their futures as parents, while invalidating them enables the courts, strangers to the progenitors, to do so.<sup>159</sup>

While giving effect to embryo progenitors' intent with respect to embryo disposition options is a desirable policy goal, some have argued that enforcing agreements entered into via consent forms signed prior to the administration of IVF is an ineffective way of achieving this goal.<sup>160</sup>

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153. *See, e.g.,* *Kass v. Kass*, 696 N.E.2d 174, 179–80 (N.Y. 1998).

154. *See* Howell, *supra* note 85, at 416–18.

155. *See id.* at 416–17.

156. *See id.*

157. *See id.*

158. *See id.* at 417.

159. *Id.* at 417–18.

160. *See* Forman, *supra* note 128, at 66.

One major problem with IVF consent forms is procedural. Provisions governing embryo disposition often constitute one small part of a voluminous document that fertility clinics give to patients at the beginning of the IVF process.<sup>161</sup> Such a document typically covers various aspects of cryopreservation including risks and benefits of the procedure, storage limitations, and payment terms.<sup>162</sup> This type of consent packet may obscure the significance of embryo disposition provisions by failing clearly to distinguish them from other topics, and by presenting them in technically worded language and a densely printed format.<sup>163</sup>

Even when disposition agreements are presented separately from other forms associated with initiating the IVF process, significant problems still exist. A couple undergoing IVF may be required to sign many consent forms in a single day, and the overwhelming volume of information presented by all these documents may hinder the couple's ability to consider each one thoughtfully.<sup>164</sup> This phenomenon is particularly problematic in the context of initiating a fertility treatment, as patients typically experience heightened emotions while they concentrate on having a child, and may be unable to consider seriously all manner of worst-case scenarios as they focus on becoming parents.<sup>165</sup> While it is true that many transactions in today's world entail the execution of numerous forms whose combined content may be difficult for a signer to grasp fully, IVF consent forms present unique dangers, as they prompt couples to consider numerous complicated hypothetical scenarios that would arise from traumatic changes to a couple's relationship.<sup>166</sup> The variety and complexity of such scenarios, as well as the remoteness of these scenarios at the time of signing can make it very difficult for IVF patients to consider their consent paperwork with the degree of intelligence that it demands.

Aside from the procedural defects associated with fertility clinic consent forms, embryo disposition agreements entered into prior to administration of IVF suffer from extreme substantive

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161. *Id.* at 67.

162. *Id.*

163. *Id.*

164. *Id.* at 68–69.

165. *Id.* at 69–70.

166. *See id.*

deficiencies.<sup>167</sup> To begin with, numerous studies have shown that fertility patients find embryo disposition decisions to be exceedingly difficult on moral and emotional levels.<sup>168</sup> Further, research has demonstrated that patients' views toward embryo disposition often change significantly over time.<sup>169</sup>

The instability of fertility patients' attitudes toward disposition is attributable to numerous factors. First, these attitudes are strongly influenced by patients' experiences with IVF.<sup>170</sup> Prior to initial treatment, patients may not seriously consider dispositional options because they do not know how many IVF cycles it will take to achieve pregnancy, and they are thus unable fully to grasp the implications of keeping excess embryos in storage.<sup>171</sup> Because patients who have not yet undergone IVF do not fully appreciate the consequences of their dispositional decisions, they tend to feel a relatively high level of confidence in these decisions.<sup>172</sup>

Studies indicate that things change significantly once IVF treatment has been administered.<sup>173</sup> At this stage, couples more frequently feel conflicted over their dispositional decisions, and partners more frequently experience conflict with each other.<sup>174</sup> The birth of a child as a result of IVF treatment often has particularly significant effects on fertility patients' attitudes toward embryo disposition.<sup>175</sup> For example, while patients often wish to donate their embryos to research or to other childless couples prior to and during treatment, once patients have succeeded in having children, they are more inclined to prefer that their embryos be discarded.<sup>176</sup>

The extreme difficulty that couples face in arriving at decisions related to embryo disposition and the susceptibility of these decisions to change exacerbate the significant procedural deficiencies associated with IVF consent forms. Thus, enforcing consent forms as contracts appears to be a less than ideal method of effectuating the

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167. *See id.* at 70.

168. *See id.* at 70–71.

169. *Id.* at 71.

170. *Id.* at 72.

171. *Id.*

172. *Id.*

173. *Id.* at 73.

174. *Id.*

175. *Id.*

176. *Id.*

parties' true intentions with regard to the fate of their frozen embryos.

### C. *Striking a Balance*

An effective way in which to approach the enforcement of consent forms may be to address the issue of how informed the progenitors were at the time at which they signed. In *J.B. v. M.B.*,<sup>177</sup> the New Jersey Supreme Court declined to enforce an embryo disposition agreement entered by way of an IVF clinic consent form.<sup>178</sup> Despite this, though, the court stated that it would enforce embryo disposition agreements entered at the time of IVF treatment if such agreements were written in plain language, adequately explained to the parties prior to execution, and made subject to the right of either party to change his or her mind prior to the use or destruction of embryos.<sup>179</sup>

In February 2008, the American Bar Association introduced its Model Act Governing Assisted Reproductive Technology ("Model ART Act") that embodies an approach similar to that endorsed by the *J.B.* court.<sup>180</sup> Article 5 of the Model ART Act states that "[b]inding agreements executed prior to embryo creation must be entered into a record by intended parents as to . . . [i]ntended use and disposition of embryos."<sup>181</sup> The Model ART Act also provides that "[s]uch agreements may be amended at any time prior to transfer of an embryo or the death of either intended parent."<sup>182</sup> Further, the Model Act takes measures to ensure that IVF patients intelligently consent to the conditions of their disposition agreements.<sup>183</sup>

The ART Model Act's informed-consent provisions mandate that prior to treatment, ART providers advise patients regarding the need for them to enter binding agreements regarding embryo disposition.<sup>184</sup> The Act functions to make this need intelligible to patients by stipulating that it must be communicated to them both

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177. 783 A.2d 707 (N.J. 2001).

178. *Id.* at 713–14.

179. *Id.* at 719.

180. Dostalick, *supra* note 28, at 869.

181. ABA MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 501 (2008), <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

182. *Id.*

183. *See id.* §§ 201–202.

184. *Id.* § 201(2)(j).

orally and in plain-language writing.<sup>185</sup> By insisting that patients receive clear notice regarding the legal effect of the disposition agreements they must sign, the Act reduces the problem of defective consent that is often present in the context of IVF clinical consent forms.

The ABA has also created a proposed model act to govern the licensing of ART agencies.<sup>186</sup> This document may implement further measures to ensure that ART patients sign clinical consent forms intelligently. Though the ABA's Family Law Section has not yet approved this new act, the current draft addresses some deficiencies in the Model ART Act. Section 304 of the new act, for example, enumerates a number of counseling requirements that an agency must comport with prior to administering ART treatment to a patient.<sup>187</sup> Under section 304, ART agencies must advise their patients to "seek advice from medical, psychological, legal, and any other relevant third party professionals to discuss the potential risks and outcomes of the process."<sup>188</sup> Agencies must also give each patient an opportunity to consult with an attorney before treatment.<sup>189</sup>

The ABA has also stated that it intends to supplement its Model ART Act "with a statement of necessary provisions and standards of best practice for drafting the informed consents and various ART agreements suggested or required by this Act and, to the extent possible, develop model forms."<sup>190</sup>

Should the ABA fully approve the new act and follow through with its intentions to supplement its model statutes, the result will likely be extremely beneficial to the practice of embryo donation. ABA approved embryo donation consent forms would help to set standards for legally effective language, while newly-imposed ART agency counseling requirements would ensure that IVF patients execute their consent forms thoughtfully, and would thus cause these

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185. *Id.* §§ 201(2), 202(1)(a).

186. ABA MODEL ACT GOVERNING ASSISTED REPROD. TECH. AGENCIES (Proposed Draft 2013), <http://lawprofessors.typepad.com/files/aba-model-act-agency-regulations-2.pdf>.

187. *Id.* § 304.

188. *Id.* § 304(1)(f).

189. *Id.* § 304(1)(b).

190. ABA MODEL ACT GOVERNING ASSISTED REPROD. TECH., *supra* note 181, Prefatory Note.

forms to be more reflective of progenitors' actual intent with respect to embryo disposition questions.

If state legislatures passed statutes based on the ABA's Model ART Act, many of the problems created by current consent forms could be reduced. States that have already enacted statutes requiring parties to execute some kind of consent form prior to commencing IVF treatment could amend these laws to impose additional requirements on disposition agreements that would make them better reflect the intentions of the parties that enter them.

A statute could, for example, require that fertility clinics not only compel patients to sign plain-language disposition agreements prior to commencing IVF treatments, but that these clinics also provide legal counsel to the patients, who must make sure that the patients fully understand every provision of these agreements prior to signing. Statutes could further state that if clinics comply with their provisions, the disposition agreement consent forms signed by IVF patients become presumptively enforceable as contracts. It seems logical for states that already require IVF patients to sign consent forms to incorporate such language, as its continued omission appears to contravene the policy goals of these statutes.

Legislatures could then mandate that only state—or ABA—approved disposition agreements create a presumption of contractual enforceability when presented to patients in the manner proscribed by statute. The combined effect of state-approved agreements and legislatively-mandated counseling would go a long way toward making embryo disposition consent forms more effective tools for expressing parties' intent and preventing protracted litigation in embryo disputes.

#### IV. CONCLUSION

The practice of embryo donation is sufficiently widespread that state legislatures and high courts have begun to address its legal implications. Despite their efforts to date, however, embryo transfers are still fraught with a great deal of uncertainty for all parties involved. This uncertainty could be greatly reduced if states would explicitly embrace contract principles as the controlling standards to govern embryo donations.

While the notion of "embryo adoption" seems to be gaining popularity, traditional adoption law remains ill-suited for application

to transactions involving embryos. Because the primary concern of adoption law is the welfare of a living child, many of its basic tenets do not make sense in the context of embryo donation. Accordingly, embryo donation is more properly regulated according to contract principles, and state legislatures should take measures to ensure that contract law will function to regulate embryo donations as predictably as possible.

Even if contract law is fully applicable to embryo transactions, however, the issue of whether clinical consent forms signed prior to IVF treatment should be enforced as binding contracts still remains. In answering this question, important factors to be considered include the reliance interests of the parties involved, as well as the degree to which those parties are informed of the potential consequences of their consent at the time of signing. The ABA's Model ART Act presents an ideally balanced approach.

Embryo donation is a promising method of countering infertility, but the present dearth of settled law governing the practice leads all too often to bitter disputes between embryo progenitors. Basic remedies for some of the core problems that complicate this practice have begun to emerge, however, and if more jurisdictions actively implement them, the difficulties peculiar to embryo donation can be reduced, and this form of ART can begin to achieve its full potential.

