All Your Eggs in One Basket: Why Contract Law Proves Unreliable in Frozen Embryo Adoption Cases

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I. INTRODUCTION

The Risks and Rewards of In Vitro Fertilization

As more couples begin to rely on assisted reproductive technology\(^1\) as a result of increasing subfertility\(^2\) to conceive their children, the question arises what will happen to the remaining frozen embryos once a couple completes its own family. A 2003 study reported that at the time about 400,000 frozen embryos were stored in the United States.\(^3\) About eighty-eight percent were designated for “future family building by the patients who created them” with only two percent to be donated to another family,\(^4\) but what about the remaining embryos after their family is complete? Should that couple have the right to destroy embryos created from its own gametes? Even if the couple from which the embryos were created considers the unused ones its “property,” is it ethical to let what could become a human life be disposed of or expire on a shelf? Should another infertile couple be allowed to adopt the unused embryos? What if the first

\(^{1}\) Charles P. Kindregan, Jr., & Steven H. Snyder, Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology, 42 Fam. L. Q. 203, n.10 (2008) (“A report of the Center of Disease Control indicated that 122,872 ART procedures were started in 2003, resulting in 43,503 pregnancies and 48,758 infants born.”).

\(^{2}\) Austin Caster, Don’t Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime, 10 Conn. Pub. Int. L. J. ___ (2011) (citing NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 1 (2009); K. Bruce-Hickman, L. Kirkland & T. Ba-Obeid, The Attitudes and Knowledge of Medical Students Towards Surrogacy, 29 J. Obstetrics & Gynaecology 229, 229 (2009)) (“Ten percent of Americans have fertility problems, and [e]ach year, about one million people seek some sort of fertility treatment….This decrease in fertility can be attributed to “the increasing tendency to delay parenting, the escalating prevalence of obesity, and the high level of sexually transmitted infections.””).


\(^{4}\) Id.
couple changes its mind or the second couple does not use them all? Based on holdings from cases involving same-sex parent adoptions and surrogacy contracts, judges still seem so conflicted about the public policy implications that, depending on the state, couples cannot be sure until their case climbs the entire chain of appeals—which could be several years after a child is born and very expensive with cryopreservation costs in addition to litigation fees.

Because the United States follows the presumption that family law matters should generally be decided at the state rather than federal level, one of the most rapidly evolving, emotionally charged American law regimes has become one of the least stable and most incongruent. A biological father’s rights to a child he never knew was conceived, a posthumously conceived child’s ability to inherit from both of her parents, or even a couple’s choice to donate or dispose of frozen embryos at all varies dramatically merely by crossing state lines. And for some of the most polarizing issues facing our nation, many states have no laws in place at all.

**Contract Law Does Not Always Translate to In Vitro Fertilization Cases**

In other areas of law if a particular state’s constitution, statutes, and courts remain silent on an issue, private parties with equal bargaining power (absent fraud, duress, or other malfeasance) can enter a contract to safeguard their intents and remedies should a dispute arise

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5 Compare Arkansas Department of Human Services v. Cole, No. 10-840 (Ark. April 7, 2011) (striking down statewide adoption ban on unmarried or same-sex parents), with Adar v. Smith, No. 09-30036 (5th Cir. April 13, 2011) (upholding decision not to reissue a birth certificate with both same-sex parents’ names).
7 Kindregan & Snyder, supra note 1, at n.4 and accompanying text.
8 Id.; Caster, supra note 2, at n.79 (stating that twenty-nine states have no laws regarding surrogacy contracts at all); National Conference of State Legislatures, Embryo and Gamete Disposition Laws, available at http://www.ncsl.org/default.aspx?tabid=14379 (stating only sixteen states have enacted laws regarding the disposition of embryos).
or use a choice of law provision to incorporate another state’s regime. In many contentious modern family law issues, however, without stable legislation in place, judges can strike down an otherwise valid agreement, sometimes because of nothing more than their own political persuasion, individual religion, or morals tells them a particular contract is against public policy.

Those hit hardest by this luck-of-the-draw approach include infertile and same-sex couples. Because these couples cannot have a child on their own for reasons they would argue are beyond their control, they need medical help to fulfill their dreams of becoming parents. Even though courts, social workers, adoption agencies, and legislatures may have a good faith belief they know what is in the best interests of someone else’s child, these barren couples face obstacles even unmarried criminals and adolescents bypass in conceiving and obtaining parental rights as long as they are fertile and heterosexual.

This article will show why infertile couples cannot unequivocally rely on good faith, consensual contracts in cases of assisted reproductive technology because the law is so unsettled. Each section will show why, because of alleged public policy implications, contract doctrines or clauses such as (1) the termination of parental rights, (2) the doctrine of waste, and (3) liquidated damages still remain almost completely unreliable in a matter regarding assisted reproductive

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9 Caster, supra note 2, at n.181–86 and accompanying text (“Though modern scholars still debate its lasting significance, conscionable freedom of contract has historically been recognized under the due process clause of the Fourteenth Amendment of the United States Constitution and was vigorously upheld in *Lochner v. New York*. *Lochner* overturned New York’s Bakeshop Act, which mandated sanitary conditions in bakeries and prevented bakers from working more than ten hours per day or sixty hours per week. Though the Act merely purported to provide safe working conditions based on state police powers, the Supreme Court held in a 5-4 decision that the Fourteenth Amendment protects the right to make contracts, and therefore, unnecessary or arbitrary interference with those contracts would be unconstitutional. Later decisions limited *Lochner*’s absolute right to freedom of contract in cases where the terms were unconscionable or the contracts became tools to the detriment of fellow man, but *Lochner* still has not been explicitly overturned. For example, parties do not have so much freedom of contract that they could make contracts that would violate minimum wage laws, but ‘[t]he general rule is that [the use of property and the making of contracts] shall be free of governmental interference.’”).
technology. Though this uncertainty affects infertile couples trying to complete their families through various methods including adoption, surrogacy, in vitro fertilization, and artificial insemination, this article will focus on cases involving the donation, sometimes referred to as adoption, of frozen embryos.

**Why Are Embryos Frozen?**

Based on standard medical advice and practices upon seeking treatment for infertility, couples create multiple embryos and freeze the unused ones in case the first implantation does not result in conception.\(^\text{10}\) State courts tend to enforce couples’ prior written agreements regarding disposition of frozen embryos as long as the method does not result in procreation (such as destruction or stem cell research), but refuse to uphold “forced procreation,” contracts allowing one spouse to continue with procreation even if the other later objects.\(^\text{11}\) The aforementioned cases do not take into account harm to a third party who adopts the unused frozen embryos, however, if the biological parents subsequently change their mind before implantation. The potential of psychological harm to biological parents who wish to destroy their unused embryos may result in reproductive tourism for a couple in Louisiana, which mandates donation of unused embryos because “[a]n in vitro fertilized human ovum is a biological human

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\(^{10}\) Though not as much of a concern for men, the egg retrieval process can be painful enough that anesthesia is generally administered during the procedure and results in cramping afterward. See Ernest Hung Yu Ng et al., *Paracervical Block With and Without Conscious Sedation: A Comparison of the Pain Levels During Egg Collection and the Postoperative Side Effects*, 75 FERTILITY & STERILITY 711, 711–17 (April 2001); W. H. Cooper et al., *The Psychological Predictors of Pain During IVF Egg Retrieval*, 18 J. REPRODUCTIVE & INFANT PSYCHOL. 97, 97–104 (2000).


\(^{12}\) Crockin, *supra* note 3, at 607.
being which is not the property of the physician which acts as an agent of fertilization, or the
facility which employs him or the donors of the sperm and ovum.”

II. (How Long) Should Termination of Parental Rights Clauses Be Upheld?

“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.”

Above is a typical proposed clause in an adoption of frozen embryos contract, but
depending on the state, court, and judge, not one that is guaranteed to be upheld if the biological
parents change their minds about letting their unused embryos be disposed of or allowed to be
used to start another family. “Regardless of what terminology is used to explain the procedure,
adoption law does not and cannot really apply to donating embryos because many state statutes
specifically invalidate biological parents’ consent to adoption that is given prior to childbirth.”

According to the National Conference of State Legislatures, only sixteen states have enacted
statutes regarding embryo and gamete disposition. Georgia alone has a law that expressly
allows the adoption of embryos.

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14 Embryo Adoption Awareness Campaign, Problem Presented for Response in 2011 Embryo
2, 2011).
15 Charles P. Kindregan, Jr., & Maureen McBrien, Embryo Donation: Unresolved Legal Issues in
16 Id.
17 These include California, Colorado, Connecticut, Florida, Louisiana, Maryland,
Massachusetts, New Jersey, New York, North Dakota, Ohio, Oklahoma, Texas, Virginia,
18 Cynthia S. Marietta, Frozen Embryo Litigation Spotlights Pressing Questions: What Is the
Legal Status of an Embryo and Can It Be Adopted? 6 (April 15, 2010) (unpublished manuscript)
www.law.uh.edu%2Fhealthlaw%2Fperspectives%2F2010%2Fmarietta-
embryolegal.pdf&rct=j&q=frozen%20embryo%20litigation%20cynthia%20marietta&ei=cp_AT
ckNofx0gGSh7D2BA&usg=AFQjCNG7JopD09hMwKSC311alq-qRO21eQ&cad=rja.
In February 2008, the American Bar Association formally adopted The Model Act Governing Assisted Reproduction Technology, but it has failed to gain acceptance from state legislatures. “[T]he ABA’s efforts so far have fared even worse than Article 8 of the Uniform Parentage Act has in terms of state legislative acceptance, leaving many such arrangements in legal limbo for the time being.” The ABA’s proposed measures do seem rational, reasonable, and most importantly feasible, however,

strongly encourag[ing] “intended parents” to enter into a written agreement prior to embryo creation and set forth the following: a) the intended use of the embryos; b) what happens to the embryos in the event of divorce, death, or incapacity; and c) when the embryos will be deemed “abandoned.” The act also clarifies which intended parent may control the embryos in the event of divorce, illness, or death.

**Surrogacy Contracts and Same-sex Adoptions Evidence Uncertain Outcomes**

If surrogacy contracts are any indication, however, without a uniform federal law, embryo adoption concerns will likely result in reproductive tourism to avoid an unfavorable statute, judge, or public policy. In many surrogacy cases across the country, most notably the Baby M. case, valid agreements have been overturned as against public policy citing reasons ranging from marginalization or commodification of women and children to slave labor or fears of baby-selling. In Baby M., a surrogate mother agreed to carry a child for a couple then changed her mind after the baby was born. Because the child was conceived using the intended father’s sperm and the surrogate’s egg rather than the intended mother’s, the New Jersey Supreme Court

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19 Kindregan & Snyder, *supra* note 1, at 203.
21 *Id.*
22 Gonzalez, *supra* note 11.
24 *Id.*
struck down the surrogacy contract as against public policy, and the surrogate received visitation even though she was initially threatening to kill herself and the child if it were taken away.\footnote{Id.}

Other courts have given deference to the intent of the contract and awarded parental rights to the intended parents as planned,\footnote{Johnson v. Calvert, 5 Cal. 4th 84 (1993).} but if a judge can decide in favor of a surrogate mother when one of the intended parents is related to the child, intended parents of a child born using an adopted embryo could suffer the same result when there is no blood connection at all, especially if the embryo has not yet been gestated to full term.

Parental rights eventually terminate in adoption cases, but never before the child is born. In many states there is even a waiting period after the birth before the biological mother can terminate her rights. According to the Uniform Adoption Act, biological parents “may execute a consent or a relinquishment only after the minor is born. A parent who executes a consent or relinquishment may revoke the consent or relinquishment within 192 hours after the birth of the minor.”\footnote{Unif. Adoption Act §§ 2-401(a) (1994).} Consequently, if a mother can change her mind about a live adoption, it seems those rights might logically be able to be extended to adopted embryos as well.

The question then becomes whether frozen embryos equate more with sperm and egg donations or adoptions. In theory, biological parents could possibly argue they changed their minds about terminating their parental rights even after the child was born via another woman who adopted it as an embryo. In that situation the child’s biological mother would not have given birth to it, so the parties could certainly have conflicting claims about who had rights to the child or even what the definition of a “parent” should be. Sperm donors automatically disclaim parental rights preventing them from being sued for child support, but one surrogate mother in
England successfully sued for child support after deciding to keep the child she initially intended to carry for another couple. With surrogacy arrangements, some courts refuse to uphold good faith agreements because, they argue, the biological mother or gestational carrier cannot possibly know how she will feel about giving up the child before it is born. For that reason alone, most reputable surrogacy agencies will not even consider gestational carriers who have never given birth to children of their own.

Recent decisions regarding same-sex parent adoptions should also give couples contemplating embryo adoption cause for concern. Though many states allow adoption by same-sex parents even if it is not specifically allowed or prohibited by law and longstanding bans in

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29 Vicki C. Jackson, *Baby M. and the Question of Parenthood*, 76 GEO. L.J. 1811, 1819, n.19 (1988) (“Giving up a child can be, for some birth mothers, a far more painful and terrible event than they might have reasonably foreseen prior to conception—a severing of an emotional bond whose power and force cannot be recognized fully before the coming into being of the child as a person. For the profound emotional effect of the child’s birth has its roots in the pregnancy itself. Hence some birth mothers—regardless of class or educational background—may be unable to account accurately for their likely feelings (or the ‘value’ thereof) before conception, despite the best and most closely supervised procedural regulation of such contracts.”); Ruth Macklin, *Is There Anything Wrong with Surrogate Motherhood? And Ethical Analysis*, 16 J. L. MED. & ETHICS 57, 60 (1988) (“[I]t has been argued that no one is capable of granting truly informed consent to be a surrogate mother. This argument contends that even if a woman has already borne children, she cannot know what it is like to have to give them up after birth.”).


31 Minnesota law is silent on whether second parent adoption apply to same-sex couples. In sixteen states and the District of Columbia same-sex couples can petition jointly to adopt, but they are prohibited in Mississippi and Utah. Other states including Kentucky, Nebraska, and Ohio do not allow second parent adoptions, and Michigan requires the petitioners be married. Human Rights Campaign, *Parenting Laws: Joint Adoption*, available at www.hrc.org/documents/parenting_laws_maps.pdf.
states such as Arkansas\textsuperscript{32} and Florida\textsuperscript{33} have recently been overturned, other jurisdictions are not as friendly to same-sex couples. The Fifth Circuit recently upheld a decision not to reissue a birth certificate with both same-sex parents’ names.\textsuperscript{34} An appeal in the Fifth Circuit seems likely, but even a state that formerly recognized adoptions by same-sex parents can be overturned. The North Carolina Supreme Court recently voided a lesbian state senator’s adoption of her former partner’s biological son whom she helped raise from birth.\textsuperscript{35} Because her ex-partner’s requirement to terminate her parental rights was initially waived, the court held that “the adoption never occurred in the eyes of the law.”\textsuperscript{36} The holding did allow for visitation, seeing it in the best interests of the child, but this decision points out that even an adoption of a child born almost ten years ago and initially approved by the state can be overturned without uniform federal laws.\textsuperscript{37}

\begin{myquote}
\textit{Recipient couple agrees that all embryos which survive the thawing process shall be transferred into the recipient mother.}\textsuperscript{38}
\end{myquote}

According to the doctrine of waste, a cause of action can be brought against someone who destroys or devalues another’s property, but requiring implantation of too many embryos may result in premature births and greater likelihood of infant death, not to mention practical

\begin{thebibliography}{9}
\item \textsuperscript{32} Arkansas Department of Human Services v. Cole, No. 10-840 (Ark. April 7, 2011) (striking down statewide adoption ban on unmarried or same-sex parents).
\item \textsuperscript{34} Adar v. Smith, No. 09-30036 (5th Cir. April 13, 2011).
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \textit{Supra} note 14.
\end{thebibliography}
matters like having more children than a couple can afford. Other than Louisiana, there may not be laws requiring implantation or adoption of every unused frozen embryo, but public outcry over multiple births has recently punctuated additional ethics concerns in IVF procedures. “Jon and Kate Plus 8” reality television star Kate Gosselin gave birth to sextuplets using IVF when she already had twins then subsequently experienced a litigious public divorce. Nadya Suleman, whom the press nicknamed “Octomom,” was also once married but used IVF and a sperm donor to give birth to eight children out of wedlock in January 2009. Suleman insisted she have six embryos implanted in her uterus despite already having six children because it would be her last time attempting the procedure. Though the likelihood that all embryos will implant is rare, each also has the potential to split into twins.

Director of the Center of Bioethics at the University of Pennsylvania Arthur Caplan argues a doctor should never implant more than four embryos at a time, but unlike European countries that limit the number to three, the U.S. has no uniform regulations. “We know that usually every one of these cases has the kids in a neonatal unit, that disability and learning disorders are common and death can even occur … In my view, the ethical thing to do is to control against the possibility of super multiples occurring.”

But does the concern about multiple births outweigh the ethics issues involved with disposing of embryos that could potentially gestate into a human life? In any other contract involving the doctrine of waste the parties would have the responsibility to mitigate harm to the

41 Id.
43 Id.
subject of the bargain, but when the product is a human embryo the question becomes more
difficult. *Roe v. Wade*, 44 with its timetable modified by *Planned Parenthood v. Casey*, 45 held that
fetuses are not considered humans with constitutional rights until they are gestated to the point
that they can sustain life outside of the womb (roughly the third trimester), but forty years later
*Roe* remains one of the most controversial Supreme Court opinions in American history.
Depending on the poll, 46 with one third to one half of Americans disapproving of abortion
altogether and equal if not greater opposition to stem cell research, it is within the realm of
possibilities to predict a judge might refuse to enforce a contract to dispose of frozen embryos,
despite concerns about complications from multiple births or damages to the parties.

**IV. Would a Liquidated Damages Clause Be Upheld in These Cases?**

> “*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.*”

Some things are more difficult to put a price on than others. Consequently, American tort
law contains three separate categories of damages. Whereas compensatory or actual damages
take into account the quantifiable loss suffered to plaintiffs such as income they would have
earned had they been able to work or repairs to a vehicle, punitive damages function as
deterrence to future tortfeasors. Nominal damages reflect more of a technical harm to the
plaintiff rather than an actual one and consequently are usually a very small or fixed amount. For
example, if a plaintiff complains about a violation of her freedom of speech, she (A) would have

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44 410 U.S. 113 (1973).
47 *Supra* note 10.
difficulty proving it in the first place, and (B) could not really measure in monetary terms any harm suffered, so nominal damages would be her “moral victory.”

A liquidated damages clause recognizes that some damages are more difficult to calculate than others, so the parties stipulate to an agreed award from the outset. The analysis becomes more difficult in the context of embryo adoption, however, because the harm would be so laden with public policy implications. The biological parents might express regret about having a biological child they will not be able to see or cannot afford to raise, but breaching the agreement would certainly result in pain and suffering to the intended parents as well. Additionally, these hypotheticals do not even take into account the astronomical cost of storing the embryos during years of litigation and the duty of care placed on medical professionals during cryopreservation.

**Frozen Embryos: People or Property?**

Of course each scenario will be fact-specific so it is difficult to make a bright line rule, but one judge might consider the embryos already alive whereas another sees them as any other tissue like blood leaked from a paper cut, getting a haircut, or clipping a fingernail. The Tennessee Supreme Court held that embryos were neither people nor property but fell somewhere in between, entitling them to “special respect.”\(^48\) In *Del Zio v. Columbia Pres. Med. Ctr.*,\(^49\) a New York judge awarded a couple fifty thousand dollars in emotional distress damages after their embryo was negligently destroyed by the hospital but did not characterize the embryo as a person or property.\(^50\) A federal district court used property terms to resolve a dispute

\(^{49}\) No. 74-3558 (S.D.N.Y. 1987).
\(^{50}\) Crockin, *supra* note 3, at 604.
between a husband and wife who created embryos together, but stopped short of calling the embryos property.\footnote{York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989).}

Another judge in Illinois allowed a wrongful death suit against a fertility clinic that allegedly discarded nine embryos because “a pre-embryo is a ‘human being’ … whether or not it is implanted in its mother’s womb.”\footnote{Id.} Though the judge cited the Illinois Wrongful Death Act, which lists a fetus as a person, one critic differentiated this case reasoning that a frozen embryo could not sustain life outside of a womb as a late-term fetus could,\footnote{Id.} the standard articulated in \textit{Roe & Casey}. Professor Sherry Colb of Rutgers Law School thought a property destruction claim would be more appropriate because fertility medicine “proceeds on the assumption that embryos are not persons,” and “the deliberate creation of persons with the knowledge of their future destruction would make any participant an accomplice” to murder.\footnote{Id.} Consequently, Colb worried this decision could have a chilling effect on fertility clinics helping people with fertility problems at all. She reasoned that embryos, if implanted, could possibly eventually gestate into a human life with the help of a womb, but speculated a wrongful death charge in this situation would be akin to someone who refused to donate an organ that could save another’s life.\footnote{Id.}

Therefore, without measurable damages or any guarantee that a liquidated damages clause would be upheld or enforced (assuming the breaching party is not judgment-proof), this example illustrates yet another reason why even written contracts in embryo adoption cases may be completely unreliable.

\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
V. Conclusion

Unfortunately with so many variables resulting in such a wide spectrum of outcomes in American IVF litigation, infertile couples seemingly cannot rely on widely adopted, standard contracts law principles. Depending on the jurisdiction, infertile couples should manage their expectations of success in the field of embryo adoption even though some may initially see it as a win-win situation for both couples who do not want to destroy their unused embryos and couples who want a family but cannot afford the in vitro fertilization process from the start. Unless the federal government can agree on some type of national regulation, however, infertile couples should avoid putting all of their eggs in the basket known as contract law.