Embryo Disposition Agreements: The Effect of Personal Autonomy, Constitutional Rights, and Public Policy on Enforceability, Damages, and Remedies

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EMBRYO DISPOSITION AGREEMENTS: THE EFFECT OF PERSONAL AUTONOMY, CONSTITUTIONAL RIGHTS, AND PUBLIC POLICY ON ENFORCEABILITY, DAMAGES, AND EQUITABLE REMEDIES

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I. INTRODUCTION

Many people each year enter into agreements to give frozen embryos to third-party donees. Progenitors give for a variety of reasons, but in the typical case, they give because they have finished their procreative process and have excess embryos remaining. In these cases, a fertility clinic typically stores the excess embryos, in a cryogenically frozen state, until the progenitors decide how they wish to use them. The progenitors have three options: 1) save the embryos for future use, or keep them frozen indefinitely; 2) allow the embryos the thaw, thus destroying them; or 3) give or sell the embryos to a third-party, allowing the third-party to use the embryo for family building or research.

The third option presents the most appealing for many progenitors. Storing the embryos is a costly practice, and evidence suggests that embryos become less likely to survive the longer they remain frozen. Further, freezing the embryos only provides a temporary solution, as eventually the progenitors must, either because of death or expense, choose one of the other

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4 See Erin P. George, The Stem Cell Debate: The Legal, Political and Ethical Issues Surrounding Federal Funding of Scientific Research on Human Embryos, 12 ALB. L.J. SCI. & TECH. 747, 751 (2002) (“When there are surplus embryos, there are a number of things that can happen: (1) the left over embryos can be donated by the couple for research; (2) the embryos can be destroyed; (3) they can keep the embryos frozen (however, the couple will have to pay the expense) or; (4) they can give the embryos anonymously to another couple.”); Sherylynn Fiandaca, In Vitro Fertilization and Embryos: The Need for International Guidelines, 8 ALB. L.J. SCI. & TECH. 337, 364 (1998).
options. Thawing, and thus destroying, the embryos also presents an undesirable outcome to many progenitors who consider life to begin at conception, believe embryos are people, and that destruction of embryos is unacceptable. Additionally, the progenitors expend considerable time, money, and emotion in creating the embryos, and often wish to see them used, even if by an unrelated third-party.

Embryo donation and adoption have become an increasingly popular resolution to this situation. Several groups have recently advertised and advocated for increased recognition and regulation of the practice, and seek to continue to encourage this practice. These groups seek to serve as a “matchmaking” service, and facilitate embryo transfers by providing the parties to a transfer with a draft agreement stating their rights and obligations. These adoption or donation agencies and their customers, the progenitors, therefore rely on the agreements they provide to be enforceable.

This memorandum discusses the enforceability of, and available remedies under, one such draft agreement. The agreement considered here provides:

1. By signing this agreement, donors hereby agree to forever relinquish and terminate any legal or parental rights they may have to the embryos which are the subject of this agreement.

2. Recipient couple agrees that all embryos which survive the thawing process shall be transferred into the recipient mother.

3. Since damages would be difficult, if not impossible, to assess in the event that either party breaches this agreement, the parties hereto agree that liquidated

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5 See Developments in the Law – Medical Technology and the Law, 103 HARV. L. REV. 1519, 1540 (1990) (“IVF is complicated, time consuming, and physically taxing at virtually every step.”).

6 This paper refers to the gamete donors, the man and woman whose sperm and egg create the embryo, as “progenitors.” It refers to as the couple seeking to receive the embryos as “donees.”

7 This draft agreement was provided by Nightlight Christian Adoptions as part of its 2011 Embryo Adoption Writing Competition. For more information, visit: http://www.embryolaw.org/index.asp.
damages in the amount of $25,000 is a reasonable sum to be assessed to either party who breaches this agreement.

Each of these contractual provisions presents unique legal issues. Although general contract and property principles will presumptively govern disputes under these provisions, potential disputes will also present substantial constitutional, privacy, and public policy considerations that may render the clauses unenforceable. The following memorandum, therefore, individually analyzes each clause, its likely enforceability, and how a court would interpret the clause or resolve a dispute if it finds the clause unenforceable.

Current law does not adequately address the potential issues related to embryo disposition agreements. Several states have adopted statutes regulating embryo donation, but these statutes are generally limited in scope and have been accepted only by a minority of states. To date, law has developed in related fields, such as state adoption law, surrogacy contracts, sperm, organ, and tissue donation, and has resolved disputes regarding embryo disposition agreements between the progenitors themselves. No court, however, has directly addressed the enforceability of agreements regarding the conveyance or donation of embryos from progenitors to donees. Although a court will look to these analogous fields in deciding whether to enforce

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9 Susan L. Crockin, *The “Embryo” Wars: At The Epicenter of Science, Law, Religion, and Politics*, 39 FAM. L.Q. 599, 613 (2005) (Noting that, as of 2005, “no court has ruled on the enforceability of gamete or embryo donation contracts ...”).
13 See infra.
14 Crockin, *supra* note 8, at 613 (Noting that, as of 2005, “no court has ruled on the enforceability of gamete or embryo donation contracts ...”).
an embryo disposition agreement, it must also recognize the differences presented by the distinct
procreative rights of the progenitors and donees, and the progenitors' continuing privacy rights.\textsuperscript{15}

In crafting law in this developing field, courts must balance several competing policy
considerations.\textsuperscript{16} First, the law recognizes as very important every person's right to control their
future procreation.\textsuperscript{17} This right, for instance, severely limits the government's ability to prevent
a woman from aborting her pregnancy,\textsuperscript{18} and prevents the government from controlling an
individual's medical choices.\textsuperscript{19} Additionally, most courts refrain from deciding disputes between
private parties concerning their procreation decisions.\textsuperscript{20} Courts will not, for example, recognize
prenuptial agreements limiting future family decisions, and thus leave the parties free to change
their decisions any time.\textsuperscript{21}

The law also recognizes the importance of providing private parties certainty in ordering
their affairs.\textsuperscript{22} Enforcing private contracts and agreements provides the parties with
predictability, which lowers transactional costs and avoids litigation.\textsuperscript{23} Enforcing agreements
based on the parties' original intent is equitable, allowing parties to plan for the future and rely

\textsuperscript{15} See, e.g., Davis, 842 S.W.2d at 597.
\textsuperscript{17} Roe v. Wade, 410 U.S. 113, 162 (1973); Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).
\textsuperscript{18} Roe, 410 U.S. at 162; Planned Parenthood v. Casey, 505 U.S. 833 (U.S. 1992).
\textsuperscript{19} Union P. R. Co. v. Botsford, 141 U.S. 250 (1891).
\textsuperscript{20} See, e.g., In re Marriage of Witten, 672 N.W.2d 768, 776 (Iowa 2003) ("reproductive decisions are … not proper matters of judicial inquiry and enforcement.").
\textsuperscript{21} Crockin, supra note 8, at 613.
\textsuperscript{22} See, e.g., Schiff, supra note 15, at 279-280 (Explaining that, "[a] legal system that enforces the parties' intentions supports enabling people to plan their familial lives with some degree of certainty. Those participating in an arrangement involving gamete donation do so with defined expectations arising from negotiated roles. In fact, the essence of such an arrangement lies precisely in the deliberate allocation of roles designed to bring about the desired conception and birth. The participants rely, both financially and emotionally, on the continuing validity of this initial designation of roles. Uncertainty regarding parental status carries a high cost for all parties involved. For one party to change his or her mind and thus to override the legitimate expectations of the other party is destructive of the autonomy interest at stake - namely, the capacity to shape one's reproductive future.").
\textsuperscript{23} Harco Nat'l Ins. Co. v. Grant Thornton LLP, 2009 NCBC 11, 32 (N.C. Super. Ct. 2009) (noting that clear rules provide "greater certainty, thus reducing transaction costs and lowering the overall cost of … services.").
on each others’ promises.\textsuperscript{24} Equally important, enforcing preplanned agreements requires the parties to think carefully and seriously about how their decisions will affect them in the future, thus instilling in the parties the seriousness of their undertaking.\textsuperscript{25} The law, however, has always limited peoples’ ability to contract by refusing to enforce agreements that violate public policy or intrude on domestic courts’ decisionmaking regarding children.\textsuperscript{26} Certainty, predictability, and the presumption favoring enforceability in private contract therefore represents only the starting point in the enforceability analysis.\textsuperscript{27}

Courts regularly disregard private agreements when they negatively affect the well being of children or otherwise affect familial relationships.\textsuperscript{28} Divorce courts, for example, decide custody and support issues based on the best interests of the child, giving pre-divorce agreements little or no consideration in the decision.\textsuperscript{29} In the adoption context, some courts have ignored or

\textsuperscript{24} Schiff, \textit{supra} note 15, at 279-280.
\textsuperscript{25} Schiff, \textit{supra} note 15, at 279-280 (“In regulating egg donation, a prime concern should be to ensure that all parties thoroughly consider and weigh the decision to enter into the arrangement and make a fully informed decision.”); Kass v. Kass, 696 N.E. 2d 174, 180 (N.Y. 1998) (“Knowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process.”).
\textsuperscript{26} See, e.g., Rest., Contracts, § 583 (1932) (“a bargain by one entitled to the custody of a minor child to transfer the custody to another person, or not to reclaim custody already transferred of such child, is illegal unless authorized by statute.”); Rainer v. Rowlett, 255 Ark. 794, 796 (Ark. 1973) (“The custody of a child is not the subject of gift or barter …. Such agreements are against public policy and are not strictly enforceable.”); RCW 26.09.070 (Washington statute allows the court to invalidate a “separation contract [that is] unfair at the time of its execution…”).
\textsuperscript{27} \textit{Moore v. Regents of the University of California} , 793 P.2d 479, 511 (Cal. 1990).
\textsuperscript{28} Willey v. Lawton, 8 Ill. App. 2d 344, 346 (1956) (“[A]n agreement between the natural parent and adopting parents whereby the latter for a consideration payable to them agree to adopt a child or children of the natural parent, is contrary to the public policy and therefore void.”); McGuire v. McGuire, 157 Neb. 226, 237 (Neb. 1953) (refusing to recognize wife’s suit for separate maintenance when husband and wife remain living together).
modified pre-adoption agreements between the biological and adoptive parents regarding visitation, again applying the best interests of the child standard.\textsuperscript{30}

In a similar fashion, courts do not apply pure property principles to organ and tissue donation.\textsuperscript{31} Instead, courts often weigh the moral and societal considerations in fashioning a remedy that avoids labeling tissue property for legal analysis.\textsuperscript{32} Courts, therefore, generally do not enforce private contracts for organ donation, and resolve disputes based on equitable and moral values.\textsuperscript{33} Although the outcome may be similar to the outcome under property principles in many cases, this solution sacrifices predictability as the court may diverge from property principles in cases in which it finds it equitable to do so.\textsuperscript{34}

Precedent therefore exists to validate or to ignore the provisions of an embryo disposition agreement in a dispute between progenitors and donees.\textsuperscript{35} Because the case and statutory law varies starkly by jurisdiction, the likely outcome of any case depends on what law the court applies. Under most state conflict of laws rules, the forum court will respect choice-of-law provisions in the contract.\textsuperscript{36} In drafting the model agreement, therefore, the agency should include a choice-of-law clause stating that the law of a jurisdiction willing to enforce such

\textsuperscript{30} Groves, 1999 MT at P28 (Upholding the trial court's decision to award visitation based on the best interests of the child, although the biological parents and adoptive parents specifically bargained for the right of visitation and voluntarily signed a written, notarized agreement providing the visitation arrangement.).

\textsuperscript{31} See, e.g., Perry, 886 F. Supp. 1551 at 1563 (Refusing to recognize a breach of contract claim when a hospital harvested more parts of a decedent's body than the decedent's family agreed to).

\textsuperscript{32} See, e.g., Moore, 51 Cal. 3d at 145.


\textsuperscript{34} Moore, 51 Cal. 3d at 134.

\textsuperscript{35} In re Marriage of Dahl & Angle, 194 P.3d 834, 839-42 (Or. Ct. App. 2008) (finding that the contractual right to dispose of frozen embryos was personal property); c.f. Davis, 842 S.W.2d at 597 (rejecting a pure property analysis and holding that preembryos are an "interim category": neither "persons' nor 'property.'").

\textsuperscript{36} Mo Zhang, Contractual Choice of Law in Contracts of Adhesion and Party Autonomy, 41 Akron L. Rev. 123, 130 (2008) (“A well-established rule in the conflict of laws is that the law chosen by the parties governs their contract and the choice will be respected absent obstacles to its enforceability.”).
agreements will be applied to the contract. This will provide the fertility clinic the best predictability and certainty, therefore lowering its liability risks and its clients' litigation costs.

This paper restricts its analysis to the enforceability of the above agreement between the progenitors and donees, and the remedies available if the either party fails to honor the agreement. It assumes the progenitors have created excess embryos, and that the fertility clinic providing the agreement currently possesses the embryos in a cryogenically frozen state. It further assumes that the parties have read and signed the agreement. The paper then seeks to determine what law a court adjudicating a dispute would likely apply, and the likely outcome of such a suit. It also recommends the best course of action the court could take in light of the underlying policy considerations unique to frozen embryo disposition agreements between progenitors and third parties.

Section II of this paper discusses whether the parties can transfer parental rights and obligations by agreement, or whether adoption law controls these rights. Section III discusses whether a donee could be forced to accept an embryo transfer under the agreement, and, if not, what the remedy should be when she refuses in contravention of the agreement. Section IV discusses whether, and under what circumstances, a liquidated damages clause will be enforceable in this context.

II. THE ENFORCEABILITY OF AN AGREEMENT TO RELINQUISH THE PROGENITORS' RIGHTS

The first clause of the agreement states, “[b]y signing this agreement, donors hereby agree to forever relinquish and terminate any legal or parental rights they may have to the embryos which are the subject of this agreement.”

37 Id.
38 Id.
The enforceability of this provision initially depends on whether the court defines the embryos as “property,” “people,” or something in between. If the court categorizes the embryos as property, the donors may validly transfer their rights to the embryos through private contract or gift law. If, however, the court declares the embryos legal people, it will apply state adoption law to determine the enforceability of the agreement. More likely, absent statutory instruction otherwise, the court will adopt an intermediate categorization, allowing the court to carefully consider all of the circumstances, policy implications, and the parties' interests in determining whether to enforce the agreement.

This section will first analyze the outcome under the property, personhood, and intermediary approach, and explain the likelihood the court would apply each model. The two diametric legal theories, personhood and property, represent the extremes the court could apply in fashioning the law regarding embryo disposition agreements. If the court considers embryos people, the court will award “custody” under state adoption laws, applying the “best interests of the child” approach. If, however, the court considers embryos property, it will apply traditional property law, which generally allows private parties to freely transfer ownership through contract or gift. Because it avoids ethically and morally questionable labels, and provides consistency

39 George, supra note 3, at 763-764.
40 See, e.g., Davis, 842 S.W.2d at 594 (Tenn. 1992) (discussing the two theories and concluding that embryos are neither people nor property, but that progenitors have an interest in the nature of ownership).
41 John A. Robertson, Gestational Burdens And Fetal Status: Justifying Roe v. Wade, 13 AM. J. L. AND MED. 189, 198 (1987) (“Some view all postfertilization stages of prenatal human life as the life of persons, to which the respect accorded born individuals is due. Accordingly, they view personhood as beginning at fertilization when a new genetic unity is formed, even though it lacks cognitive capacity and may even split into two individuals, they consider fertilized eggs, embryos and fetuses to be persons with all the rights of persons under the Constitution.”).
42 See, e.g., O.C.G.A. § 19-8-42 (d) (2009) (Georgia statute requiring adoption procedures for embryos).
43 See, e.g., Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002) (strictly enforcing contract to destroy embryos after five years, although neither party requested the embryos be destroyed at the time of the suit).
with Supreme Court precedent regarding the legal status of the unborn, a court addressing the issue will likely place the embryos in an intermediate category.\textsuperscript{44}

The intermediate approach will allow the court to recognize the unique nature of embryos,\textsuperscript{45} including the progenitors' interest in controlling their procreation, the donees' need in the embryos to facilitate their procreation, the parties' emotional attachments,\textsuperscript{46} and the original expectations of the parties in creating a flexible rule that resembles property principles but considers these special interests.\textsuperscript{47} The court would then likely fashion a rule favoring the progenitors' right to avoid procreation,\textsuperscript{48} thus avoiding state involvement in infringing on the progenitors' constitutional rights to control their procreative activities.\textsuperscript{49}

This section will then discuss the issue of timing, explaining that the rights of the parties starkly differ before and after the embryos' transfer to the donee woman. Because courts

\textsuperscript{44} See Jessica L. Lambert, Developing a Legal Framework for Resolving Disputes Between “Adoptive Parents” of Frozen Embryos: A Comparison to Resolutions of Divorce Disputes Between Progenitors, 49 B.C. L. REV 529, 539 (2008) (“Seeking to avoid the rigid extremes of the embryo as person and the embryo as property approaches, many courts and commentators have embraced an intermediate approach that classifies embryos as neither persons nor property. This definition is currently the most widely accepted, and it first gained judicial approval in 1992 by the Supreme Court of Tennessee in Davis v. Davis.”).


\textsuperscript{46} Michelle L. Anderson, Are You My Mommy? A Call for Regulation of Embryo Donation, 35 CAP. U.L. REV. 589, 594 (2006) (“... couples with surplus embryos are reluctant to donate them to other childless couples because the embryo donors will then have other genetic children besides those they are raising. The possibility that their children will have genetic siblings is great if the couple decides to donate their surplus embryos. The couple therefore goes through the same emotional decisionmaking process as is done before giving an infant up for traditional adoption.”).

\textsuperscript{47} Isasi, Knoppers, Singer, Daar, Legal and Ethical Approaches to Stem Cell and Cloning Research: A Comparative Analysis of Policies in Latin America, Asia, and Africa, 32 J.L. MED. & ETHICS 626, 632 (2004) (Noting that in the embryo research context, “[p]ragmatic approaches to policy development seek to balance moral values on the status of the human embryo with the therapeutic promises offered by pursuing embryo research. They are characterized by their flexibility.”).

\textsuperscript{48} See Crockin, supra note 9, at 1181 (“the courts have tended to enforce couples' prior agreements that did not involve procreation (e.g., agreements to discard or donate for research), but have refused to enforce what the Massachusetts court first termed "forced procreation": agreements to allow one spouse to use (or in the New Jersey and Washington cases to donate to another couple) the preembryos to attempt a pregnancy over a contemporaneous change of mind and objection by the other.”).

\textsuperscript{49} Lior Jacob Strahilevitz, The Right To Destroy, 114 YALE L.J. 781, 837 (2005) (“The right to destroy frozen embryos is deemed a paramount right because of its linkage to a constitutional privacy right to avoid procreating.”).
zealously protect every person's right to avoid procreation, the court will seek to allow the
progenitors to retain rights to prevent a transfer to a donee, even when the progenitors have
previously agreed otherwise.\textsuperscript{50} After the donee woman receives the embryo transfer, however,
she gains a strong personal autonomy right that prevents the progenitors from interfering with
her pregnancy. After transfer, whether the agreement extinguishes the progenitors' parental
rights and obligations depends on application of state adoption laws, assuming the donee woman
carries the implanted embryo to term.

Eight states currently regulate embryo donation by statute.\textsuperscript{51} Each of these statutes
explicitly dissolve the progenitors' parental rights and responsibilities, and transfer the parental
rights to the donees once the embryos are transferred.\textsuperscript{52} These statutes, however, vary in
applicability. Some only apply to married donees, or to donees who bring an embryo to term in
wedlock.\textsuperscript{53} Oklahoma also requires court approval of the donation agreement.\textsuperscript{54} Louisiana, in
contrast, treats embryos as juridical people, and provides an adoption system to decide
disposition issues. In these states, therefore, the court would apply the statute in determining the

\textsuperscript{50} \textit{Davis}, 842 S.W.2d at 602-03 (“It is further evident that, however far the protection of procreational autonomy
extends, the existence of the right itself dictates that decisional authority rests in the gamete-providers alone, at least
to the extent that their decisions have an impact upon their individual reproductive status… [N]o other person or
entity has an interest sufficient to permit interference with the gamete-providers' decision to continue or terminate
the IVF process, because no one else bears the consequences of these decisions in the way that the gamete-providers
do. The technological fact that someone unknown to these parties could gestate these preembryos does not alter the
fact that these parties, the gamete-providers, would become parents in that event, at least in the genetic sense. The
profound impact this would have on them supports their right to sole decisional authority as to whether the process
of attempting to gestate these preembryos should continue.”).

\textsuperscript{51} Crockin, \textit{supra} note 9, at 1182.


outcome of the case. Absent statutory instruction, the court would consider the following models in determining enforceability.

A. The Property or Contract Model

The court may apply traditional property law to the dispute if it finds the embryos analogous to blood or sperm, to which courts generally apply property principles. If the court applies traditional property law, the court must further decide whether the agreement constitutes a gift, or whether the parties entered into a contract for the sale of the embryos. Specifically, the court must address whether the parties bargained for the transfer and provided consideration for their agreement, or whether the agreement merely memorialized a gratuitous transfer. The distinction is important because, under gift law, legal title to the embryos transfers to the donees as soon as the requirements for a valid gift are met. Under contract law, however, the donees/buyers will have an enforceable contractual interest in the embryos, but the progenitors could retain possession of the embryos by breaching the contract. Then, the progenitors would be liable for breach of contract, and the court would decide whether to order specific performance of the contract or whether money damages sufficiently compensate the buyers’ loss. Because of the availability of other embryos, which would be equally attractive to most donees/buyers, the court would likely award money damages for the breach, allowing the progenitors to retain the embryos.

If the court applies gift law, it will likely uphold the original agreement as an effective transfer through gift. For an effective transfer, the law requires that the donee prove the donor

55 See, e.g., Kievernagel, 83 Cal. Rptr. 3d. at 311; Hecht v. Superior Court, 20 Cal. Rptr. 2d. 275 (Cal. Ct. App. 1993).
intended to convey the embryo, and actually or symbolically delivered the embryo. The court will look to the progenitors outward manifestations to determine whether they intended to donate the embryos. If the court finds the progenitors intended to donate the embryos, it will then determine whether the progenitors “delivered” the embryos. Delivery generally requires only that the parties take all measures reasonable under the circumstances to transfer possession of the embryos to the donee. If the parties meet the requirements, legal title, and all the attendant property rights, transfer to the donees. If gift law applies, and title transfers to the donees, the donees will have the right to use and control the embryos, and the donor/progenitors will retain no rights to the embryos.

If the court applies gift law, the parties will meet these requirements because the progenitors’ execution of the agreement shows intent, and control by the third-party fertility agency should satisfy the delivery requirement. Because the embryos must remain cryogenically frozen, it is reasonable to consider the embryos “delivered” although they remain with the fertility clinic because actual transfer is impractical. The clinic, in addition, acts as an agent for both the progenitors and the donees, and execution of the agreement should constitute sufficient symbolic delivery. The court would be less likely to uphold the transfer, however, if

56 Lagarde v. Lagarde, 33 So. 3d 1169, 1173 (Miss. Ct. App. 2009) (stating the requirements for a valid inter vivos gift: “(1) that the donor be capable of making the gift, (2) that the act is voluntary on the donor's part, (3) that the donor intends to make the gift, (4) that the gift is complete with nothing left to be done, (5) that the property be delivered by the donor and accepted by the donee, and (6) that the gift be gratuitous and irrevocable.”); although courts may require the donee to accept the gift, the element will normally be presumed. See, e.g., Carter v. Davenport, 175 Ga. App. 830, 832 (Ga. Ct. App. 1985).
57 John McKennan v. Conn. Dep't of Social Services, 2006 Conn. Super. LEXIS 1046 (Conn. Super. Ct.) (the assignment of a mortgage note was sufficient to manifest the intent to immediately transfer title to property).
58 Meyer v. Meyer, 64 So. 420, 424 (Miss. 1914) (“Delivery to be effectual must be according to the nature and character of the thing given, and hence may be actual or constructive according to the circumstances.”).
60 Lagarde, 33 So. 3d at 1173 (holding a gift of an equity interest in land sufficiently delivered by a note symbolizing the gift).
61 Meyer v. Meyer, 64 So. 420, 424 (Miss. 1914).
the progenitors prove that the parties did not actually read the agreement, or that the parties did not consider the agreement to be binding between them, but only binding between the progenitors and the embryo agency.\footnote{A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000) (Invalidating an agreement between progenitors because the woman filled in a blank form previously signed by the man).} Then, the donees could not establish the progenitor’s actual intent based on the agreement, and would have to establish intent through other means.

If the court decides to apply this model, but undertakes a result oriented approach seeking to avoid validating the agreement, it may find the progenitors did not transfer possession of the embryos. But the court should avoid this analysis because it ignores the policy issues underlying the court's decision. The court should instead squarely address the enforceability issues because, by setting precedent that property law applies, future parties would reach a different result by actual transferring possession. Thus, the court would validate future transfers by gift without deciding the underlying policy issues.

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

Absent consideration, the court could also enforce the promise to donate the embryos under a promissory estoppel theory. Promissory estoppel generally requires that one party make a promise to another, that it was foreseeable the other party would rely on that promise, and that the other party reasonably relies on the promise to his or her detriment. Here, the progenitors made a definite promise to donate the embryos. Many such transfers occur each year, and the donees' reliance on the promise is therefore reasonable. Because the donee woman must undergo extensive fertility treatment before receiving the embryos, and may not be able to find adequate replacement embryos during the treatment cycle, the donees detrimentally rely on the promise. The court could, therefore, uphold the contract absent consideration under a promissory estoppel theory.

Several courts, in the context of human material destruction, have treated human genetic material as property. In Kurchner v. State Farm Fire & Cas. Co., for example, the court explicitly held that the destruction of cryopreserved sperm constituted "property damage," as opposed to "bodily injury," under an insurance policy. The court reasoned that, because the sperm was outside the body, it must be property because it was no longer physically part of the person. Similarly, in Polesuk v. CBR Systems, the court held that cord blood, blood taken from

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63 See, e.g., Curtis Lumber Co. v. La. Pac. Corp., 618 F.3d 762, 780 (8th Cir. 2010).
64 Id.
66 Id.
67 Id.
a child's umbilical cord, constituted property.⁶⁸ Precedent therefore exists to apply pure property principles to the current agreement.⁶⁹

Despite these cases, the court will likely reject the property approach because it does not accommodate the ethical and moral considerations inherent in issues regarding human genetic material.⁷⁰ In Moore v. Regents of California, the leading case in human genetic material jurisprudence, the Supreme Court of California explicitly refused to apply property principles to a dispute regarding Moore's spleen.⁷¹ The court instead noted that the law generally treats human organs and tissue “as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property.”⁷² In similar fashion, the Tennessee Supreme Court, in Davis v. Davis, held that “[e]mbryos are not, strictly speaking, either persons or property, but occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest that [the progenitors] have in the [e]mbryos … is not a true property interest.”⁷³ Although courts are willing to apply property-like principles to tissue and embryos, they have generally avoided explicitly calling human genetic material property.⁷⁴

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⁶⁹ See also U.S. v. Garber, 607 F.2d. 92 (5th Cir. 1979) (plasma held property); Moore, 793 P.2d at 509 (Mosk, J., dissenting).
⁷⁰ Witten, 672 N.W.2d at 781 (“Whether embryos are viewed as having life or simply as having the potential for life, this characteristic or potential renders embryos fundamentally distinct from the chattels, real estate, and money that are the subjects of antenuptial agreements.”).
⁷¹ Moore, 793 P.2d at 497.
⁷² Id.
⁷³ Davis, 842 S.W.2d at 597.
⁷⁴ See id.
Even if the court applies the property model generally, it should find that private contracts for the sale of human embryos violate public policy. Federal law currently prohibits the sale of human organs for valuable consideration. Although this law does not expressly apply to embryos, and only prohibits the sale of HIV infected genetic material, several states have expressly forbidden the sale of embryos. The court might extend the prohibition to embryos transferred for valuable consideration for the same reasons the law does not allow organs to be sold, but does allow them to be donated: to prevent the morally repugnant prospect of commodification of human body parts and genetic material.

The current distinction the law draws between the gratuitous transfer of human tissue, which is generally allowed, and its sale, which is generally forbidden, creates an interesting paradox when a third-party retains possession of the material, as the case is here. If gift law applies, the court will likely find the transfer complete at the execution of the agreement. At this point, the donees retain legal title and have the sole right to control, use, or destroy the frozen embryos. If contract law applies, the court will likely find the progenitors' refusal to complete the sale and delivery a breach of contract. The progenitors, however, will retain the embryos because the court will likely not order specific performance of the contract. This distinction

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75 See, Stiver v. Parker, 975 F.2d 261, 269 (6th Cir. 1992) (Noting it appropriate to reference “[s]tatutes not strictly applicable, such as [state] statutes ... and the national organ sale statute [to] supply evidence of public policy relevant to judicial decisions” in the surrogacy contract context.

76 National Organ Transfer Act, 42 U.S.C. § 274e(a) (“It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.”).


shows that inherent flaws exist in applying rigid property principles to embryo disposition agreements, an area not envisioned in the development of traditional property law.\textsuperscript{80}

The court would also likely avoid the contract approach because it would open the door to allow for the uninhibited sale of embryos. Courts will avoid this approach because it could lead to the sale of more “desirable” embryos: this result would encourage the healthy, smart, and athletic to create and market embryos for the sole purpose of resale. Traditional contract law does not, therefore, provide an adequate solution because it fails to recognize the distinction between different types of consideration (profit as consideration v. assurance of due care in disposition as consideration), which remains very important to the moral considerations involved with embryos. Allowing progenitors to ensure, through contract, that donees treat their embryos appropriately would probably not upset society's moral expectations of the law. Allowing full sale, however, arguably would. Traditional contract law does not, in any case, make this important distinction.

The courts that have applied property-like principles and upheld agreements regarding the disposition of embryos have done so in the context of marriage dissolution.\textsuperscript{81} In the divorce context, upholding the agreement often makes practical sense because both parties, husband and wife, were progenitors. In this situation, the courts have upheld the agreement when the agreement would not require either progenitor to become a parent against his or her will. The current agreement differs because a third-party, without a genetic relationship to the embryo,
seeks to use the embryos. The court should distinguish these cases on the basis that third-parties do not have the genetic interest of a progenitor, and thus refuse to apply the property model to this situation.

B. The Personhood Model

If, in contrast, the court considers the embryo a person, it would then apply state adoption law to determine the rights and obligations of the parties.\(^2\) Under adoption laws, courts generally consider the best interest of the child in determining to whom to award custody.\(^3\) Prior agreements, therefore, would not control the court’s decisions regarding which party would be awarded custody of the embryos. Instead, the court would attempt to apply the best interest of the child factors.\(^4\)

Two states, Louisiana and Georgia, have enacted statutes that require embryos to be treated as juridical people.\(^5\) In these jurisdictions, therefore, the court would apply the personhood model. Then, the court would apply the statutory instructions for deciding the embryo disposition. In Louisiana, an embryo may not be purposefully destroyed, and must be stored indefinitely. Absent statutory provisions deciding the outcome, the court applying the personhood model will most likely decide custody based on a modified best interest of the child standard. Precedent therefore also exists to apply the personhood model.

Courts, absent statutory instruction otherwise, will probably not apply the personhood model because it fails to recognize Supreme Court precedent holding that unborn fetuses, a class

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\(^2\) See UMDA § 402

\(^3\) Id.


very similar to embryos, are not “people” under federal law.\textsuperscript{86} The Court, in \textit{Roe v. Wade}, held that "the unborn have never been recognized in the law as persons in the whole sense."\textsuperscript{87} The Supreme Court of Tennessee, in \textit{Davis v. Davis}, applied \textit{Roe} in holding that frozen embryos, like unborn fetuses, do not enjoy constitutional protection.\textsuperscript{88} To hold otherwise would illogically recognize greater constitutional rights in frozen, stored embryos, than in fetuses in a woman's womb.

The court should not consider embryos children within the meaning of divorce or child custody laws because these laws do not adequately apply to embryos.\textsuperscript{89} In most cases, the language and purpose of these statutes make them inappropriate for use in deciding which party should be awarded the embryos. These statutes generally only cover children, and courts have consistently held that the legal meaning of “child” includes only a born child. Courts have additionally recognized that legislatures crafted the best interest of the child standard with born children in mind. The statutes therefore focus on factors such as the child's relationship with the parties, focusing on the “physical, emotional, and psychological well being” of born children.\textsuperscript{90} With an unborn fetus or embryo, many of the factors cannot apply, and applying these statutes would be inappropriate.

C. The Intermediate Model

Finally, if the court considers the embryo property with special interests, it will necessarily formulate a new legal rule to govern such disputes. The court should apply the

\textsuperscript{86} See \textit{Witten}, 672 N.W.2d at 775 (Rejecting argument that divorce custody law should govern frozen embryos; the purpose of custody statute requires finding that embryos are not “children” within the meaning the statute).
\textsuperscript{87} \textit{Roe}, 410 U.S. at 162.
\textsuperscript{88} \textit{Davis}, 842 S.W.2d at 594; see also, \textit{Kass}, 696 N.E.2d at 180.
\textsuperscript{89} \textit{Witten}, 672 N.W.2d at 775 (Rejecting argument that divorce custody law should govern pre-embryos; the purpose of custody statutes require finding that pre-embryos are not “children” within the meaning the statute).
\textsuperscript{90} \textit{Id.} at 780.
intermediary model because it encourages frank discussion and consideration of the policies behind the enforceability of embryo disposition agreements and avoids forcing the court into a doctrinal “straightjacket,” which may accompany the other models and lead to undesirable results.\textsuperscript{91} Several courts have applied an intermediate standard to agreements between the progenitors,\textsuperscript{92} and courts have applied similar models to tissue and organ donation.\textsuperscript{93} The Tennessee Supreme Court explained that this view provides the best outcome because it recognizes that the embryo:

“deserves special respect greater than that accorded to human tissue but not the respect accorded to actual persons. The [e]mbryo is due greater respect because of its potential to become a person and because of its symbolic meaning …. Yet, it should not be treated as a person, because it has not yet developed the features of personhood … and may never realize its biological potential.”\textsuperscript{94}

In formulating a legal framework, the court must decide whether it will adopt a bright-line rule or perform an ad-hoc balancing. Although the ad-hoc balancing approach would allow the court to learn and adapt through experience, it leaves embryo disposition agreements uncertain, making the process more risky and therefore more litigation-prone. The bright-line test, on the other hand, would provide certainty but may, as with the property and personhood models, lead to unforeseen and unacceptable results in certain cases. Balancing these concerns, the court should adopt a general framework but leave some of the details to be resolved in future cases.

\textsuperscript{91} Guzman, \textit{supra} note 78, at 193 (“[R]uling that a frozen embryo is property could make a fertility specialist who destroys it liable for conversion; a holding that a frozen embryo is a person could permit the specialist’s prosecution for negligent homicide.”).

\textsuperscript{92} See, e.g., \textit{Witten}, 672 N.W. 2d at 782-83 (holding that public policy prohibits the enforcing an embryo disposition contract when one of the parties changes his or her mind); \textit{Davis}, 842 S.W. 2d. at 597.

\textsuperscript{93} \textit{Moore}, 793 P.2d at 501.

\textsuperscript{94} \textit{Davis}, 842 S.W. 2d. at 598.
The court should begin with several firm rules and presumptions. First, the court should allow the progenitors to stop any embryo transfer that has not yet occurred. This avoids the procreational rights issues involved with forcing people to become genetic parents against their will. Several courts have taken this approach, finding that “public policy prohibits the enforcement of a contract for the disposition of unused embryos when one of the parties changes his or her mind.” Refusing enforcement of the contract also avoids the political, social, and moral issues of characterizing an embryo because it recognizes that “the interest one has in an embryo is greater than a property interest,” but also allows the court to make “clear that [it] do[es] not intend to give the embryo itself rights.”

Before transfer to the donee woman, the progenitors' interest in avoiding procreation outweighs the donees' interests in forcing the transfer. The Supreme Court has addressed a person's right to avoid procreation in several contexts, and has consistently refused to allow state interference with decisions regarding personal autonomy. The abortion cases represent the most important cases recognizing a woman's right to avoid procreation. In *Roe v. Wade*, the Court recognized a woman's fundamental right to choose whether to carry a pregnancy to term. In *Planned Parenthood v. Casey*, the Court stated that the state may not place an undue burden on a woman’s ability to obtain an abortion. In these cases, the Court recognized that the right to personal autonomy means that a person must retain the personal decision whether to bear a child.

The abortion cases do not definitely answer the enforceability question because the progenitors have already relinquished possession of their embryos, and turned them over to the fertility clinic. In this way, the court could regard the fertilized embryos more like sperm

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donated to a third party for artificial insemination purposes. Once donated, sperm cannot be recovered by the donor. However, the coming together of an egg and sperm creates a unique genetic makeup distinguishable from the sperm. Further, assuming the embryos survive thawing, they remain independently viable, assuming a suitable donor is available. The sperm donation model does not, therefore, adequately address the moral considerations unique to embryos.

The court should extend the Supreme Court's abortion cases and find that, before transfer, the progenitors' constitutional rights in avoiding procreation precludes forcing the progenitors to deliver the embryos to the donees. The court should recognize as paramount each persons' right to avoid procreation. This is a personal and intimate decision that deserves constitutional protection. Also, while the hardship to the donees will vary case by case, and may never in fact materialize, forcing procreation will always cause permanent harm to the progenitor's autonomy interests. Circumstances change, and it is nearly impossible for the progenitors to anticipate their future emotional and psychological reaction to the changes. Although the progenitors agreed to terminate these rights by signing the agreement, the court should therefore ignore the agreement if it would result in forced procreation.

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96 See, e.g., Hall v. Fertility Inst., 647 So. 2d 1348, 1351 (La. App. 1994) (holding posthumous disposition of sperm does not violate public policy; issue is whether decedent had requisite intent to donate).
97 Davis, 842 S.W. 2d. at 593.
98 See id. at 596 (rejecting the view that the embryo should have “a status no different from any other human tissue.”).
99 Id. at 601 (holding that the fundamental right to procreative autonomy includes both the right to procreate and the right to avoid procreation).
100 Id. at 597 (“[N]o other person or entity has an interest sufficient to permit interference with the gamete-providers' decision to continue or terminate the IVF process, because no one else bears the consequences of these decisions in the way that the gamete-providers do.”).
101 Id. at 597.
102 See, J.B. v. M.B., 783 A.2d 707 (N.J. 2001) (allowing either progenitor the right to change his or her mind about the disposition of the embryo until the embryo is actually used or destroyed).
In *J.B v. M.B.*, the Supreme Court of New Jersey interpreted an agreement that purported to transfer all of the progenitors' rights to a fertility clinic.\(^{103}\) The court found the agreement invalid, and instead allowed either progenitor the right to change his or her mind before disposition of the embryo.\(^{104}\) Similarly, in *A.Z v. B.Z.*, the Massachusetts Supreme Judicial Court held unenforceable an agreement to compel biological parenthood.\(^{105}\) The progenitors had agreed to a contract that permitted the implantation of embryos in the future. The court refused to enforce the agreement, finding the contract similar to contracts to marry or to give up a child for adoption before the child's birth.\(^{106}\) In these cases, the courts explicitly held that the progenitors' rights should outweigh the rights of third parties, and that the right of a non-consenting parent to avoid procreation outweighs any right of the other to use the embryo. Here, the court should likewise adopt a bright-line rule allowing the progenitors to block donee insemination anytime before transfer occurs.

Second, the court should refuse to enforce the contract post-transfer. After the embryos are transferred, the court should apply adoption law, determining parental rights and responsibilities in the best interests of the child. Although the court should consider which parents were the intended parents,\(^{107}\) this determination should not be dispositive. As in the case where a surrogate mother changes her mind about giving up her child, the court must resolve a difficult situation between parties that no longer agree on their prior commitments. At this

\(^{103}\) *Id.* at 710.

\(^{104}\) *Id.*

\(^{105}\) 725 N.E. 2d. at 1058.

\(^{106}\) *Id.*

\(^{107}\) See, Miller, *supra* note 94, at 885 (discussing the desirability of adopting an intent-based standard to determine parentage).
point, a baby will be born, and the court should find that providing for the best interests of the future child is paramount over prior agreements.

Third, the court should presume the party not upholding its end of the agreement will be liable in restitution to the other party. In such a case, the court should consider the money, time, and effort the performing party expended in reliance on the other party’s promise. It should then award restitution in a manner sufficient to put that party in its original position, or as close to its original position as money can accomplish. As discussed infra, this presumption encourages embryo donation agreements by removing the potential economic harm to the party that performs as agreed. It also generally fulfills the expectations of the parties while avoiding allowing uninhibited sale of embryos. The court should, however, allow the party that does not fulfill its end of the agreement to rebut this presumption by showing a change of circumstances that warrants decreasing or eliminating restitution. The court should consider factors such as: 1) the amount of time that has passed; 2) written, oral, or implied (as evidenced by the parties’ conduct) modifications to the agreement; 3) the birth of other children to the donees (which may mean the donees will not wish to seek another progenitor and thus avoid additional costs); or 4) other changes to the circumstances that shift the equities of the situation.

III. REMEDIES: SPECIFIC PERFORMANCE AND RESTITUTION

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

This section will explain that the court cannot constitutionally enforce an agreement that would force a woman to accept an embryo transfer. The woman's right to privacy and personal autonomy under the federal Constitution prohibits forcing a person to undergo any medical
procedure against her will, including such forced transfer. The court cannot, as a state actor, order specific performance of the contract if to do so would violate the recipient mother’s constitutional rights. Further, because the woman retains the right to abort the fetus until viability, forcing a woman to initially accept a transfer would be futile. To prohibit a woman from later aborting the fetus would violate her constitutional privacy rights under constitutional abortion jurisprudence.

Although the court would not order specific performance of the agreement or contract, this does not necessarily preclude monetary damages or restitution when a party breaches the agreement. Whether the court would allow monetary compensation depends on the jurisdiction's public policy regarding such agreements. If the court finds the agreement violates public policy, it may find the agreement void ab initio, rendering the agreement wholly without legal effect. The court could alternatively find that, although the court cannot order specific performance, the agreement is enforceable to the extent that money damages or restitution can compensate the non-breaching party. To determine whether public policy voids the agreement, the court will look to the jurisdictions' constitution, legislation, and caselaw to determine the state's public policy. If the agreement does not offend a strong public policy, and is not illegal under the criminal law, the donors should be allowed to recover damages for the breach.

A. The Court Cannot Force the Donee Woman to Accept Transfer; To do so Would Violate the Woman's Right to Privacy and Self-Autonomy under the U.S. Constitution

The court will not order specific performance of the donee woman's agreement to be impregnated with the embryo because the Supreme Court has consistently held that a person may

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108 Davis, 842 S.W. 2d. at n. 19.
110 Witten, 672 N.W.2d at 779-780 (quoting Liggett v. Shriver, 164 N.W. 611, 612-13 (Iowa 1917)).
not be forced to undergo medical procedures against her will. The due process clause of the Fourteenth Amendment to the United States Constitution provides that no person shall be deprived of “life, liberty, or property, without due process of law.”\(^{111}\) The Court, interpreting the amendment, has held that substantive due process protects a person's freedom of personal autonomy, and that forcing a person to submit to medical examinations and procedures violates this right. Additionally, enforcing the agreement may violate the equal protection clause by imposing on the woman a duty that it could not impose on similarly situated men.\(^{112}\)

In *Union Pacific R. Co. v. Botsford*, the Court emphatically stated that "no right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others ...."\(^{113}\) The Court deemed this to be a “right of complete immunity: to be let alone.”\(^{114}\) In *Botsford*, the Court held that a party to a civil personal injury case could not be forced to submit to a medical examination to allow physicians to assess the person's injuries. Similarly, the Court has held that the government may not pump a suspect's stomach,\(^{115}\) surgically remove a bullet from a suspect,\(^{116}\) and must allow a person to refuse medical treatment, even if refusal will lead to the person's death.\(^{117}\) Even prisoners retain the right to refuse medical treatment.\(^{118}\) In essence

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111 U.S. CONST. art. XIV.
112 *Casey*, 505 U.S. at 928 (discussing the equal protection implications involved in restricting the woman's right to an abortion; concluding that because restricting access to abortion would further sexist stereotypes it may violate equal protection principles).
113 141 U.S. at 251.
114 Id. (internal citation omitted).
115 *Rochin v. California*, 342 U.S. 165 (1952) (In the Fourth Amendment context, searches or seizures of the body must be “reasonable” under the circumstances. However, searches that are extremely physically intrusive will rarely be held reasonable, even when there is a strong governmental need to obtain evidence.).
then, the Constitution provides a person protection from any physical intrusion into the that person's body. Forcing a woman to accept a transfer would violate this right.

The Court has also recognized that the right to privacy and self-autonomy includes the right of each individual to control his or her decision whether to bear or beget a child. The Supreme Court, through its abortion cases, has repeatedly reaffirmed the basic principle that procreational autonomy remains with each woman, despite her previous decisions. For example, the Court has never considered whether a woman seeking an abortion became pregnant purposefully in deciding whether the woman retained a right to abort the child. Thus, a woman who voluntarily, and even purposefully becomes pregnant retains the same rights as a woman who becomes pregnant through rape. Additionally, the Court has struck down laws requiring consent from the pregnant woman's husband, as well as laws requiring parental consent to the abortion.

The court addressing this issue will likely apply these cases and hold that the donor woman has an absolute right to avoid a forced embryo transfer. Because the court cannot enforce the agreement and force the woman to accept a transfer, the agreement should be amended to reflect this probability. Otherwise, parties may financially and emotionally rely on the clause, and be surprised when it is later not enforced. Because the agency is providing the draft agreement, it should amend it to avoid its own liability for providing an unenforceable clause on which parties will certainly rely.

B. Although the Court Should Find a Contract for Sale of Embryos Violates Public Policy, The Court Should Award Restitution for Breach of the Agreement in Appropriate Cases

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The court, in looking to federal law prohibiting the sale of human organs, and to relevant state statutes and common law, must first determine whether a contract for the sale of embryos violates a strong public policy. If it does not violate the jurisdiction's public policy, the court should uphold the contract and allow the aggrieved party to recover money damages under the contract. More likely, as discussed supra in section_, the court will hold the contract violates public policy and will therefore not enforce the contract by its terms.

Although the court should find the contract void as against public policy, the court must also determine whether the equities of the situation merit finding the parties in pari delicto, and leave the parties as they were, or whether the court will void the contract but allow one party to recover restitution of the benefits conferred on the other party. To determine the appropriate remedy, the court must weigh the public policy violated against the general policy of avoiding allowing a party to retain a windfall. The court should consider the action it seeks to avoid – the sale of embryos, and the action it seeks to encourage – the donation of embryos.

Although the court should void the contract itself, it should award restitution because to hold otherwise would discourage the productive and beneficial practice of embryo donation. Donors in an embryo donation agreement incur very high costs in creating and maintaining the embryo. The woman bears especially rigorous hardship in the process. She must often administer infertility drugs over a long period of time, which are both expensive and time

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122 See Laporta, 163 F. Supp. 2d at 762.
consuming to administer. She must undergo invasive procedures to remove viable eggs from her ovaries. The progenitors must then have the eggs fertilized, at great expense, by licensed specialists at the clinic. After fertilization, the progenitors must also maintain the embryos indefinitely in a cryopreserved state, an expensive endeavor. The progenitors also incur countless incidental costs, as well as the heavy emotional toll that comes with these medical procedures and the attempted creation of a child.

The donees gain immense benefits from the donation arrangement. The donees do not have to undergo the daunting process of creating the eggs themselves. Often the donees do not even have this choice, as the woman often seeks to use another's embryos because she cannot herself produce viable eggs. The progenitors, therefore, afford the donees an otherwise unavailable opportunity at childbearing, and at an immensely reduced cost.

The arrangement also benefits the progenitors by avoiding the alternative: destruction of the embryos. The legal classification of embryos and the unborn as non-juridical people remains controversial to say the least, mainly because many people consider life to begin at

123 Id. (“[I]n vitro fertilization is a complicated, expensive, and somewhat dangerous process.”)
124 Developments in the Law – Medical Technology and the Law, 103 HARV. L. REV. 1519, 1540 (1990) (“Infertile couples are often emotionally devastated by the incremental nature of IVF treatment. At each stage the couple may succeed or fail; success at one step does not guarantee success at the next. Patients, particularly women, are likely to blame themselves for failures, especially the failure to produce enough eggs, or good enough eggs.”)).
125 See Lambert, supra note 43, at 550 (“[E]mbryo donation presents recipients with the opportunity to experience pregnancy and child-birth. Additionally, because this process often involves the donation of multiple embryos, it affords recipients the opportunity to have multiple children who are biologically related. Embryo adoption is also often less expensive than both traditional adoption and IVF. For couples who have been unable to conceive children naturally or through the IVF process, or for those who do not fit the typically stringent screening guidelines in the traditional adoption process, embryo donation may indeed represent one of the last options for having a baby.”).
126 Id.
127 Id.
128 Id.
129 Id. at 549-50.
conception.\textsuperscript{130} Donating the embryos to a third-party donee provides progenitors with this view with a viable alternative to what they may see as an otherwise unacceptable situation.\textsuperscript{131} These arrangements, in essence, promote many people to undertake the \textit{in vitro} process itself, and allows these people to seek children that they otherwise may not.

The court should therefore allow either party to recover against the donees restitution for their costs when the other party does not follow through with the agreement. This solution appropriately encourages true donation of embryos for the purpose of use in family building, as well as discouraging the private sale of embryos for profit. Through this mechanism, the court will avoid placing an unreasonable financial burden on either party while encouraging the donation of embryos generally.

\textbf{IV. THE ENFORCEABILITY OF A LIQUIDATED DAMAGES CLAUSE}

The final clause of the agreement provides, "[s]ince damages would be difficult, if not impossible, to assess in the event that either party breaches this agreement, the parties hereto agree that liquidated damages in the amount of $25,000 is a reasonable sum to be assessed to either party who breaches this agreement."

If the court holds the agreement an enforceable contract, it will uphold the liquidated damages clause if it finds the clause a reasonable estimation of damages, but will not uphold the clause if it finds the clause to be a penalty with the purpose of discouraging breach of the

\textsuperscript{130} For example, President Bush remarked in 2005, "The children here today remind us that there is no such thing as a spare embryo. Every embryo is unique and genetically complete, like every other human being." Our Faith In Action, U.S. House Votes to Fund Embryo-Killing Research, 238-194; President Bush Vows Veto if Senate Also Approves, \textit{available at} http://www.nrlc.org/killing_embryos/HR810Approval.html.

\textsuperscript{131} Lambert, \textit{supra} note 43, at 550.
contract. If, on the other hand, the court finds the contract void as against public policy, but finds restitution an appropriate remedy, the court could look to the liquidated damages clause for guidance in fashioning a remedy.

To determine whether the clause is an enforceable liquidated damages clause or an unenforceable penalty, the court will look at the clause as it relates to both the time of contracting and the time of the breach. The court will determine the expected difficulty in proving damages and the reasonableness of the advance estimate of damages at the time of contracting. It will also consider the actual harm and compare the anticipated and actual loss at the time of the breach.

The court will likely determine that the expected damages would be difficult for the parties to determine. The progenitors incurred various medical costs throughout the course of their procedures, many of which they may incur while the agreement is in place, and many others that occurred before the agreement. The parties both incur costs for general health checkups, fertility treatment, and the progenitors undergo various types of therapy in determining their

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132 Samule Williston & Richard A. Lord, A Treatise on the Law of Contracts § 65:3 (4th ed. 2004); Restatement Second of Contracts, Section 356, Comment (a) (“The parties to a contract are not free to provide a penalty for its breach. The central objective behind the system of contract remedies is compensatory, not punitive.”); U.C.C. § 1-106 (2001) (generally excluding “penal damages”).
133 If the court applies gift law, the clause will not control because it is not an enforceable contractual provision. As discussed supra, it is unlikely the court will apply this model.
134 Carlos R. Leffler, Inc. v. Hutter, 696 A.2d 157, 162 (Pa. Super. Ct. 1997) (“[L]iquidated damages clauses are enforceable if at the time the parties formed the contract, the amount of the liquidated damages constituted a reasonable approximation of the expected loss.”).
135 Highsmith v. Chrysler Credit Corp., 18 F.3d 434, 438 (7th Cir. 1994) (“[T]here are two relevant time periods to examine when considering the enforceability of liquidated damages clauses of this type: 1) the time of contracting and 2) the time of the injury. If at either time the estimate is reasonable, the clause will be enforced.”) (internal citation omitted).
136 Id.
137 Id.
fitness and ability to undergo the *in vitro* procedure. These medical procedures also cause steep incidental costs that the parties are unlikely to document and therefore will be difficult to prove.

To determine damages, therefore, the parties would have determine when the agreement was formed, which procedures should be attributed to the agreement, and which should be considered prior costs not affected or caused by the agreement. Determining damages also requires the parties to determine whether emotional costs should be compensated. For instance, if the donees destroy the embryos rather than implanting them, should the progenitors recover for the emotional distress caused by knowing their embryos were destroyed? Damages would also be difficult for the parties to predict in any given case because of the unpredictable success rate in the transfer procedure.\(^{138}\)

The court will also compare actual damages to the predicted damages in determining whether it will enforce the clause.\(^{139}\) The closer the actual damages align with the predicted damages, the more likely the court will uphold the clause.\(^{140}\) The fertility clinic, in this case, should therefore carefully study and investigate whether any likely damages will be around the $25,000 mark designated in this clause, and adjust it accordingly. If actual damages turn out remarkably less or more than this amount, the court will likely find the clause unenforceable as a penalty for breach. If $25,000 is a relatively accurate prediction of damages in most cases, the court should uphold the provision.

Regardless of whether the court finds the contract enforceable or that it will allow the aggrieved party to recover restitution, it should give weight to the liquidated damages clause.

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\(^{138}\) Johnson v. Calvert, 5 Cal. 4th 84, 105 (Cal. 1993) (noting that the “expense and low success rate of *in vitro* fertilization”).

\(^{139}\) *Id.*

\(^{140}\) *Id.*
because enforcement will encourage parties to enter agreements to donate embryos. If the parties agree to future damages, the parties can more efficiently obtain relief for their loss, avoiding the litigation costs involved with presenting testimony and evidence. It also avoids the emotional toll that long-term litigation may entail because certainty in damages will facilitate quick settlements between the parties. In essence, the progenitors will more willingly donate embryos if they know the consequences of the donees' breach. Conversely, the donees will more comfortably rely on the progenitors' promise, and undertake the expensive preparation for a transfer, if they know the court will force the progenitors to pay their costs if they back out. In sum, the court should fashion a remedy that promotes these agreements because they serve an important procreative function to both the progenitors and the donees.

V. CONCLUSION

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