A DIFFERENT KIND OF LIFE ESTATE: THE LAWS, RIGHTS, AND LIABILITIES ASSOCIATED WITH DONATED EMBRYOS

"[N]arrow is the way, which leadeth unto life . . . ."[1]

"For if a law had been given that could impart life, then righteousness would certainly have come by the law."[2]

Sex was not working. Mr. and Mrs. Jones, like many other couples, had difficulty getting pregnant.[3] Their struggle to achieve pregnancy was a painful experience that occasionally strained their otherwise blissful marriage. Mrs. Jones's cousin, Mr. Peterson, also had difficulty with his wife in achieving pregnancy. Sharing this struggle with each other brought courage and comfort to both couples. The Petersons eventually were successful in achieving pregnancy through *in vitro* fertilization treatments.[4] The embryos that the Petersons used for their pregnancy were created by using Mr. Peterson's sperm and eggs that were donated by an anonymous egg donor. At the time of their treatment, the Petersons signed an egg donor agreement as the "Intended Mother" and the "Intended Father." They did not use all of the embryos that resulted from their treatment, so the remaining embryos were cryopreserved.[5]

After much consideration and because of Mr. and Mrs. Jones's difficulty in getting pregnant, the Petersons donated five cryopreserved embryos to Mr. and Mrs. Jones to assist them in the pregnancy process. The Petersons and the Joneses executed a written donation document; no money was given for the embryos, making it a true donative transfer. After thawing the five embryos, Mr. and Mrs. Jones learned that three of the five embryos were viable, and all three viable embryos were

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1 *Matthew* 7:14 (King James).

2 *Galatians* 3:21 (New International).

3 The people and their stories in this Note are based on a hypothetical situation posed by the Embryo Adoption Awareness Campaign, Problem Presented for Essay Response, http://www.embryolaw.org/winners.asp (last visited Nov. 21, 2008).

4 *In vitro* fertilization is the medical procedure by which egg cells are extracted from a woman's ovaries and fertilized with sperm cells. The fertilization takes place outside of the body; thus it is also known as test-tube conception. After fertilization, the zygote (or embryo, depending on whether the cell division process has advanced to that stage) is inserted into the woman's uterus. If cell division continues and the embryo implants into the uterine wall, pregnancy is achieved. 6 THE NEW ENCYCLOPÆDIA BRITANNICA 276 (15th ed. 2007).

5 Cryopreservation is the "preservation (as of cells) by subjection to extremely low temperatures." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/cryopreservation (last visited Nov. 21, 2008).

transferred to Mrs. Jones by a licensed fertility clinic. Implantation was a success, and pregnancy was achieved. Mrs. Jones is now six months into the pregnancy.

Mrs. Peterson recently found a copy of the egg donor agreement that she and Mr. Peterson had signed when she received *in vitro* fertilization treatments. The agreement had been arranged three and a half years earlier by an egg donation facility between the Petersons and the anonymous egg donor. Contact between the Petersons and the anonymous egg donor never occurred, and the egg donation facility subsequently went out of business. The following two clauses in the agreement—which the Petersons did not notice at the time of execution of the agreement—likely surprised them in light of their recent embryo donation to Mr. and Mrs. Jones and the resulting pregnancy:

> Egg donor understands that as of the date of the ova retrieval, Intended Mother and Intended Father [Petersons] shall be the owners of the ova and any resulting embryos as joint tenants with rights of survivorship. They shall have complete control and authority over the disposition of the ova and resulting embryos . . . [.]
>
> Notwithstanding the foregoing, the Intended Parents [Petersons] shall not donate, sell or otherwise transfer any donated ova, pre-embryos, or embryos that result from the Procedure to another person or couple (other than a gestational surrogate working with the Intended Parents) for the purpose of conception.[6]

The Petersons' donation of the five cryopreserved embryos to Mr. and Mrs. Jones for the purpose of conception is clearly a violation of the second clause. The second clause limits the Petersons' options in regard to their use of the embryos: the Petersons may (1) personally use the embryos at a later time for conception; (2) donate the embryos for research purposes; or (3) thaw the embryos and have them destroyed. The clause forbids the Petersons from transferring the embryos to any other person or couple for the purpose of conception, whereas the first clause grants to the Petersons unfettered, complete control and authority over the disposition of the embryos as joint tenants with rights of survivorship.

This contradiction between the first clause and the second establishes the foundation for this Note. With the number of cryopreserved embryos in the hundreds of thousands and continually increasing,[7] there is a need for germane guidance that the courts may follow in determining the rights and liabilities associated with embryo

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[6] *Supra* note 3.

[7] David I. Hoffman et al., *Cryopreserved Embryos in the United States and Their Availability for Research*, 79 FERTILITY & STERILITY 1063, 1063–68 (2003); *see also* Liza Mundy, *Souls on Ice: America's Human Embryo Glut and the Unbearable Lightness of Almost Being*, MOTHER JONES, July–Aug. 2006, at 38, 39–40.

donation. Part I of this Note lays out the existing laws that pertain specifically to embryo donation. Part II focuses on existing laws that provide guidance to the courts in interpreting egg donor agreements as they relate to embryo donation. Part III discusses the rights, liabilities, and remedies associated with donated embryos as they relate to the parties under the egg donor agreement.

I. EXISTING EMBRYO DONATION LAWS

Regulations governing the issues involved specifically with embryo donation have arisen both statutorily and judicially. Twelve states have legislatively regulated the issues surrounding embryo donation,[8] and seven states have judicially addressed questions relating to assisted reproduction.[9]

A. Statutory Law

State legislatures in twelve states have specifically regulated aspects of embryo donation.[10] These statutory codes should serve as a model for other states that have not yet adopted such statutory provisions.

Of the twelve states that have specifically regulated embryo donation, six of them have nearly identical provisions.[11] These states have provided that "'[a]ssisted reproduction' means a method of causing pregnancy other than sexual intercourse. The term includes . . . [the] donation of eggs . . . [and the] donation of embryos . . . ."[12] In explicating the parental status—and thus also the parental rights and liabilities—of donors, these states have determined that "[a] donor is not a parent of a

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[8] *See* DEL. CODE ANN. tit. 13, §§ 8-102, 8-702 to -703 (Supp. 2006); FLA. STAT. ANN. §§ 742.11, .13–.14, .17 (West 2005); LA. REV. STAT. ANN. §§ 9:121–122, :124, :126–127, :129–130, :132 (2008); N.H. REV. STAT. ANN. §§ 168-B:13, :15 (LexisNexis 2001); N.D. CENT. CODE §§ 14-20-02, 14-20-60 to -61 (Supp. 2007); OHIO REV. CODE ANN. § 3111.97 (LexisNexis Supp. 2008); OKLA. STAT. ANN. tit. 10, § 556 (West 2007); TEX. FAM. CODE ANN. §§ 160.102, .702–.703, .7031 (Vernon 2002 & Supp. 2008); UTAH CODE ANN. §§ 78B-15-102, -702–703 (West 2008); VA. CODE ANN. §§ 20-156, -158 (Supp. 2008); WASH. REV. CODE ANN. §§ 26.26.011, .705, .710 (West 2005); WYO. STAT. ANN. §§ 14-2-402, -902–903 (2007).

[9] *See* York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989); Del Zio v. Presbyterian Hosp., No. 74 Civ. 3588, 1978 U.S. Dist. LEXIS 14450 (S.D.N.Y. Nov. 9, 1978); Jaycee B. v. Superior Court, 49 Cal. Rptr. 2d 694 (Ct. App. 1996); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 783 A.2d 707 (N.J. 2001); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002).

[10] *See supra* note 8.

[11] The six states with nearly identical provisions are Delaware, North Dakota, Texas, Utah, Washington, and Wyoming.

[12] *See, e.g.*, UTAH CODE ANN. § 78B-15-102 (West 2008). For the five other states' similar statutory section defining assisted reproduction, see *supra* notes 8 and 11.

child conceived by means of assisted reproduction."[13] Thus, any donor of eggs or embryos in these states is restricted from asserting any parental rights, interests, or authority in connection with any child resulting from assisted reproduction. Conversely, any donor of eggs or embryos in these states is not liable to pay child support or assist in the upbringing of any child resulting from assisted reproduction.

These six states also provide regulation establishing the paternity of children resulting from assisted reproduction.[14] Washington's statutory language provides that "[i]f a husband provides sperm for, or consents to, assisted reproduction by his wife . . . he is the father of a resulting child born to his wife."[15] The words "husband" and "wife" are used in Washington, Texas, and Utah's statutes because of each state's preference for the traditional family and marriage being between a man and a woman.[16] Delaware, North Dakota, and Wyoming statutorily establish paternity outside of the marriage context, establishing that "[a] man who provides sperm for, or consents to, assisted reproduction by a woman . . . with the intent to be the parent of her child, is the parent of the resulting child."[17] With paternity being statutorily established, the father in such a case is liable to assist in all parental responsibilities, and he is also granted all the parental rights, interests, and authority in conjunction with the resulting child.

Maternity is established in all six of these states by the same method: "[t]he mother-child relationship is established between a woman and a child by . . . the woman giving birth to the child."[18] Except as provided otherwise in surrogacy cases,[19] the woman who gives birth to the child is considered the mother of the child. She is granted all the parental rights, interests, and authority in connection with the child.[20]

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[13] *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-702 (Supp. 2006). For the five other states' similar statutory section restricting a donor's parental status, see *supra* notes 8 and 11.

[14] *See* DEL. CODE ANN. tit. 13, § 8-703 (Supp. 2006); N.D. CENT. CODE § 14-20-61 (Supp. 2007); TEX. FAM. CODE ANN. § 160.703 (Vernon 2002); UTAH CODE ANN. § 78B-15-703 (West 2008); WASH. REV. CODE ANN. § 26.26.710 (West 2005); WYO. STAT. ANN. § 14-2-903 (2007).

[15] WASH. REV. CODE ANN. § 26.26.710 (West 2005); *see also* TEX. FAM. CODE ANN. § 160.703 (Vernon 2002); UTAH CODE ANN. § 78B-15-703 (West 2008).

[16] *Compare supra* note 15, *with supra* note 17.

[17] DEL. CODE ANN. tit. 13, § 8-703 (Supp. 2006); N.D. CENT. CODE § 14-20-61 (Supp. 2007); WYO. STAT. ANN. § 14-2-903 (2007). Texas also has a separate statute establishing paternity outside of the marriage context. TEX. FAM. CODE ANN. § 160.7031 (Vernon Supp. 2008).

[18] TEX. FAM. CODE ANN. § 160.201 (Vernon 2002); *see also* DEL. CODE ANN. tit. 13, § 8-201 (Supp. 2006); N.D. CENT. CODE § 14-20-07 (Supp. 2007); UTAH CODE ANN. § 78B-15-201 (West 2008); WASH. REV. CODE ANN. § 26.26.101 (West 2005); WYO. STAT. ANN. § 14-2-501 (2007).

[19] Consideration of surrogacy cases is beyond the scope of this Note.

[20] *See supra* note 18.

The other six states[21] that have statutorily regulated aspects of embryo donation have done so through statutory provisions that are substantially similar to the provisions just discussed. These states include the donation of embryos as a legitimate form of assisted reproduction.[22] They statutorily declare that donors in the context of assisted reproduction are not parents of the resulting child and thus have no parental rights or liabilities in connection with the resulting child.[23] They also statutorily grant the gestating mother and her consenting husband parentage of the child conceived by assisted reproduction, which necessarily includes the rights and liabilities of such parentage.[24]

Of these six states, Louisiana grants to embryos the greatest status and protection. Louisiana's statute grants to the embryo (as a juridical person[25]) certain rights:[26] the embryo can only be used for "the complete development of [a] human";[27] it cannot be sold;[28] it is entitled to identification;[29] it can sue or be sued;[30] if the intended parents are not identified, then the physician acting as an agent of fertilization will be its temporary guardian;[31] if viable, it may not be intentionally destroyed;[32] and it cannot be owned and is owed a high duty of care.[33] These protections are far reaching for the embryo.

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[21] The other six states that have substantially similar statutory provisions regulating aspects of embryo donation are Florida, Louisiana, New Hampshire, Ohio, Oklahoma, and Virginia.

[22] *See* FLA. STAT. ANN. §§ 742.11, .13–.14, .17 (West 2005); LA. REV. STAT. ANN. §§ 9:121–:122, :124, :126–:127, :129–:130, :132 (2008); N.H. REV. STAT. ANN. §§ 168-B:13, :15 (LexisNexis 2001); OHIO REV. CODE ANN. § 3111.97 (LexisNexis Supp. 2008); OKLA. STAT. ANN. tit. 10, § 556 (West 2007); VA. CODE ANN. §§ 20-156, -158 (Supp. 2008).

[23] *See id.* New Hampshire, however, does not statutorily address parentage of donors specifically in embryo donation cases. *See* N.H. REV. STAT. ANN. § 168-B:13 (LexisNexis 2001).

[24] *See supra* note 22. New Hampshire provides for women who do not have a husband to participate in assisted reproduction. *See* N.H. REV. STAT. ANN. § 168-B:13 (LexisNexis 2001).

[25] LA. REV. STAT. ANN. § 9:124 (2008). A juridical person is "a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being." BLACK'S LAW DICTIONARY 1178 (8th ed. 2004).

[26] LA. REV. STAT. ANN. § 9:121 (2008).

[27] *Id.* § 9:122.

[28] *Id.*

[29] *Id.* § 9:124.

[30] *Id.*

[31] *Id.* § 9:126.

[32] *Id.* § 9:129.

[33] *Id.* § 9:130.

As a result of the collection and corroboration of the existing statutes in the above-mentioned twelve states,[34] the rights and liabilities of donors, men, women, fathers, and mothers are established in the context of embryo donation.

B. Case Law

Courts in seven states have addressed questions in relation to the disposition of embryos.[35] These judicial decisions explicate the policies of the states; but of these seven states, only two of them have statutorily regulated embryo donation.[36]

1. New York—*Del Zio v. Presbyterian Hospital*

The court in *Del Zio v. Presbyterian Hospital* shed some light on considerations pertaining to embryos.[37] Mr. and Mrs. Del Zio desired to have a child together.[38] Because of medical problems, Mrs. Del Zio could not achieve pregnancy, so she underwent three operations.[39] The operations did not cure the problem and the Del Zios could not naturally become pregnant.[40] Their physician, Dr. Sweeney, recommended an innovative procedure—*in vitro* fertilization.[41] After obtaining consent from the Del Zios and undergoing much preparation, Dr. Sweeney performed the procedure with the help of Dr. Shettles, a physician at the defendant hospital.[42] Mrs. Del Zio's egg was withdrawn, and Mr. Del Zio's semen was obtained; the two materials were prepared in a culture and placed in an incubator at the defendant hospital, where it was to remain for four days.[43]

Dr. Vande Wiele, an employee of the hospital and supervisor of Dr. Shettles, discovered the culture and its purpose the day after the test-tube was placed in the incubator.[44] He felt it was his ethical duty to destroy the culture, and after consulting with hospital officials, he "effectively terminated the procedure and destroyed the culture."[45] Dr. Vande Wiele informed Dr. Shettles, who in turn notified Dr. Sweeney

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[34] *See supra* notes 10–33 and accompanying text.

[35] *See supra* note 9.

[36] The two states are Virginia and Washington. *See* VA. CODE ANN. §§ 20-156, -158 (Supp. 2008); WASH. REV. CODE ANN. §§ 26.26.011, .705, .710 (West 2005).

[37] No. 74 Civ. 3588, 1978 U.S. Dist. LEXIS 14450 (S.D.N.Y. Nov. 9, 1978).

[38] *See id.* at *1.

[39] *Id.* at *1–2.

[40] *Id.* at *2.

[41] *Id.*

[42] *Id.* at *2–3.

[43] *Id.* at *3.

[44] *Id.*

[45] *Id.* at *3.

that the procedure and culture had been destroyed.[46] Dr. Sweeney reported to the Del Zios that the hospital had destroyed their culture and that he believed that this procedure was their last chance to become pregnant.[47] Evidence showed that as a result of the hospital's actions and the loss of opportunity to become pregnant, the Del Zios suffered severe emotional distress.[48] They brought a tort action for intentional infliction of emotional distress and wrongful conversion against the hospital and Dr. Vande Wiele.[49] The jury found for the Del Zios on the intentional infliction of emotional distress claim, but found for the defendants on the wrongful conversion claim.[50]

Presumably, the jury in the *Del Zio* case found for the Del Zios on the emotional distress claim because they viewed the embryo as the only opportunity for the Del Zios to become pregnant and hopefully give birth to a child. Viewing the embryo as the potential for human life is also consistent with the jury's finding for the defendants on the wrongful conversion claim, a claim where it must be proven that "one who, without authority, intentionally exercis[ed] control over the *property* of another and thereby interfere[d] with the other's right of possession . . . ."[51] Presumably, the jury considered the embryo to be human life or the potential for human life, rather than property. Therefore, the jury denied the Del Zios' *property* claim of wrongful conversion.[52]

2. New York—*Kass v. Kass*

Twenty years later, the Court of Appeals of New York, in the case of *Kass v. Kass*, determined that embryos are not considered "persons" for constitutional purposes and that the disposition of embryos is controlled by the contractual agreements of the parties.[53] In *Kass*, the appellant and the respondent were married in 1988 and almost immediately tried to become pregnant.[54] After unsuccessful attempts at natural pregnancy, they decided to attempt to have a child through *in vitro* fertilization procedures.[55]

After several unsuccessful *in vitro* attempts, the couple tried a final procedure, this time involving cryopreservation of any excess embryos

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46 *Id.* at *4.
47 *Id.*
48 *Id.* at *4–5.
49 *Id.* at *1.
50 *Id.* at *11.
51 *Id.* at *10–11 (emphasis added).
52 *Id.* at *11.
53 Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998).
54 *Id.* at 175.
55 *Id.* at 175–76.

that were not transferred in an attempt to achieve pregnancy.[56] Prior to the procedure, the couple signed a number of consent forms determining the disposition of any excess embryos not transferred.[57] The signed consent forms determined that excess eggs would be inseminated and cryopreserved; ownership of the embryos would be determined in a property settlement if a divorce occurred; and if the couple no longer desired pregnancy or could not decide on the disposition, the frozen embryos would be donated to research.[58] After the final attempted procedure was unsuccessful, frozen embryos remained and the couple initiated a divorce proceeding.[59]

The appellant wife typed an uncontested divorce agreement that included a provision that the wife and husband would not claim custody of the embryos.[60] Shortly thereafter, the wife commenced an action to claim sole custody of the embryos in hopes of future implantation and birth of a child.[61] The husband opposed and counterclaimed for specific performance of the parties' agreement found in the consent forms—donating the embryos to research.[62]

In determining the outcome of the case, the court stated that the relevant inquiry was who had dispositional authority over the embryos.[63] The court said that "[b]ecause that question is answered in this case by the parties' agreement, for purposes of resolving the present appeal we have no cause to decide whether the [embryos] are entitled to 'special respect.'"[64] The court determined that honoring the parties' agreement as set forth in the consent forms would most closely effectuate the bargained for intentions of the parties.[65] The consent forms signed by the wife and husband controlled the disposition of the embryos—they were donated to research.[66]

Because human life cannot be exchanged or disposed of through contractual agreements, the court, in effect, leaned away from a life or potential for life view of embryos and toward a view of embryos as property. The court did not attempt to discuss the possibility that

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56 *Id.* at 176–77.
57 *Id.* at 176.
58 *Id.* at 176–77.
59 *Id.* at 177.
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.* at 179.
64 *Id.* (citations omitted).
65 *Id.* at 180–81.
66 *Id.* at 182.

embryos could be something other than property entitled to "'special respect.'"[67]

3. Virginia—*York v. Jones*

Property interests in an embryo were considered in *York v. Jones*.[68] Mr. and Mrs. York were married in 1983 and soon thereafter attempted to become pregnant.[69] Because of problems with Mrs. York's fallopian tubes, they were unable to achieve pregnancy.[70] They underwent the *in vitro* fertilization process after doctors at the Jones Institute in Virginia advised that the procedure would be their best option for achieving pregnancy.[71] They attempted the procedure with the Jones Institute on four separate occasions.[72] All four attempts failed to produce a pregnancy, but before the last attempt, the Yorks consented that if more than five embryos were produced for immediate transfer, any excess embryos would be cryopreserved for future attempts at pregnancy.[73]

Six embryos resulted from the final procedure.[74] Five of the embryos were immediately transferred to Mrs. York, but pregnancy was not achieved.[75] The one extra embryo was cryopreserved for the Yorks to use later to attempt pregnancy.[76] In their contract with the Jones Institute, the Yorks agreed that:

> Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand we may choose one of three fates for our pre-zygotes that remain in frozen storage. Our pre-zygotes may be: 1) donated to another infertile couple (who will remain unknown to us) 2) donated for approved research investigation 3) thawed but not allowed to undergo further development.[77]

One year after the embryo was cryopreserved, the Yorks requested that their embryo be transferred from the Jones Institute to a Los Angeles clinic where the embryo would be thawed and transferred to Mrs. York through *in vitro* fertilization.[78] After the Yorks' request to transfer the embryo was rejected by the Jones Institute, their doctor also

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67 *Id.* at 179 (citation omitted).
68 717 F. Supp. 421 (E.D. Va. 1989).
69 *Id.* at 423.
70 *Id.*
71 *Id.*
72 *Id.* at 423–24.
73 *Id.* at 424.
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.*

requested the transfer.[79] Again, the Jones Institute refused to transfer the embryo to a different clinic.[80]

Because of the Jones Institute's refusal to transfer the embryo to the Los Angeles clinic, the Yorks called upon the court to provide declaratory, injunctive, and compensatory relief.[81] The court focused on the contractual and bailor-bailee relationship that existed between the Yorks and the Jones Institute to determine the disposition of the embryo.[82] The court reasoned that a bailment was created between the parties by their cryopreservation agreement.[83] The court explained:

> [A]ll that is needed [to create a bailment] "is the element of lawful possession . . . and duty to account for the thing as the property of another . . . ." [A] bailment relationship imposes on the bailee, when the purpose of the bailment has terminated, an absolute obligation to return the subject matter of the bailment to the bailor. . . . [O]bligation to return the property is implied from the fact of lawful possession of the personal property of another.[84]

Though not explicitly mentioning a bailment, the Jones Institute acknowledged the bailor-bailee relationship through its references in the agreement to the embryos as the property of the Yorks and its duty to account for the embryos.[85] In such a relationship, the Yorks, not the Jones Institute, had the principal responsibility of deciding the disposition of the embryo.[86]

The Jones Institute argued that the Yorks were limited to the three fates described in the agreement, which did not include transferring the embryo to a different facility.[87] Their argument, however, ignored the limiting condition on the three fates: the three-fate limitation applied only if the Yorks no longer desired pregnancy.[88] This limiting condition was not present; the Yorks wanted the embryo transferred to the Los Angeles clinic in order to attempt pregnancy.[89]

In light of the bailor-bailee relationship, the court easily determined that the Yorks, the bailor biological parents, had dispositional authority that trumped the possessory interest of the Jones Institute, the bailee

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79 *Id.*

80 *Id.*

81 *Id.* at 423.

82 *Id.* at 425–27.

83 *Id.* at 425.

84 *Id.* (quoting Crandall v. Woodard, 143 S.E.2d 923, 927 (Va. 1965)) (citing 8 AM. JUR. 2d *Bailments* § 178 (1980)).

85 *Id.* at 425.

86 *Id.* at 426.

87 *Id.* at 427.

88 *Id.*

89 *Id.* at 424.

storage facility.[90] The court denied all of the Jones Institute's motions to dismiss the Yorks' claims.[91]

Under the bailor-bailee analysis, the court essentially considered the embryo as property that could be subject to a simple property dispute with resolution borrowing from principles of property and contract law.

4. Tennessee — *Davis v. Davis*

The case of *Davis v. Davis* is similar to *Kass v. Kass* in that the parties were a husband and wife who divorced and could not agree on the disposition of their remaining cryopreserved embryos.[92] The important difference between the cases is that, unlike in *Kass*, a contract did not exist between Mr. and Mrs. Davis regarding the disposition of any excess cryopreserved embryos.[93] Because the parties did not execute a written agreement, the court had to consider alternative legal doctrines to determine the rights of the parties regarding the disposition of the embryos. The court declined to rely on implied contractual obligations to determine the outcome of the case.[94] Instead, the court considered principles of constitutional law, existing state public policy regarding unborn life, scientific knowledge in relation to reproductive technology, and ethical considerations in response to such scientific knowledge.[95]

The Davises were married in 1980 and shortly thereafter became pregnant.[96] Their pregnancy did not result in the birth of a child because the pregnancy was tubal,[97] thus resulting in the removal of Mrs. Davis's right fallopian tube.[98] After four subsequent tubal pregnancies, she was unable to become pregnant naturally.[99] Mr. and Mrs. Davis attempted to adopt a child, but the birth mother withdrew her consent to the adoption.[100] Other options for adoption were too expensive, so the Davises turned to *in vitro* fertilization as a final attempt to become parents.[101]

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90 *Id.* at 426–27.

91 *Id.* at 427.

92 Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992).

93 *Id.* at 590.

94 *Id.* at 598.

95 *Id.* at 591.

96 *Id.*

97 A tubal pregnancy is an "ectopic pregnancy in a fallopian tube." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/tubal%20pregnancy (last visited Nov. 21, 2008).

98 *Davis*, 842 S.W.2d at 591.

99 *Id.*

100 *Id.*

101 *Id.*

After six failed attempts to achieve pregnancy by means of *in vitro* fertilization, the Davises decided to wait to go through the procedure again until the clinic was prepared to cryopreserve any excess embryos.[102]

Once the clinic was prepared to cryopreserve any excess embryos, the Davises moved forward with another *in vitro* fertilization cycle.[103] They did not sign any consent forms, and there was "no discussion, let alone an agreement, concerning the disposition [of the embryos] in the event of a contingency such as divorce."[104] Nine embryos were produced from this cycle; some of them were immediately transferred to Mrs. Davis, while others were cryopreserved for future use.[105] Again, pregnancy was not achieved through this cycle.[106] Two months later, Mr. Davis filed for divorce.[107]

Throughout their separation and divorce, Mrs. Davis sought dispositional control of the couple's cryopreserved embryos.[108] She initially wanted the embryos in order to attempt pregnancy again.[109] Later, she sought the embryos so that she could donate them to another childless, infertile couple.[110] Mr. Davis was not sure that he wanted to become a parent outside the marriage relationship, but he was sure he did not want to donate the embryos to another couple.[111] His preference was to have the embryos discarded.[112]

The trial court considered the embryos persons, and thus, the only option was to permit the embryos to be implanted and potentially develop into children.[113] In turn, the trial court awarded custody to Mrs. Davis because she was the party seeking this outcome for the embryos.[114] The appellate court rejected the finding that embryos are persons.[115] While not explicitly holding that embryos are property, the appellate court nonetheless gave the Davises a shared interest in the embryos, implying that "it is in the nature of a property interest."[116] Recognizing

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[102] *Id.* at 591–92.
[103] *Id.* at 592.
[104] *Id.* at 592 & n.9.
[105] *Id.* at 592.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 589–90.
[109] *Id.* at 589.
[110] *Id.* at 590.
[111] *Id.* at 589–90.
[112] *Id.* at 590.
[113] *Id.* at 589.
[114] *Id.* at 594.
[115] *Id.*
[116] *Id.* at 595–96.

that Mr. Davis had a constitutional right not to become a parent, the appellate court remanded the case for entry of an order giving the Davises joint control over the disposition of the embryos.[117] Ultimately, the Supreme Court of Tennessee held that embryos "are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[118]

The Supreme Court of Tennessee cited many state statutes and cases to explain the state's policy that because of the lack of personhood, protection of the embryos was not a state interest that could justify overriding the dispositional control of the Davises.[119] In great detail, the court explained the state and federal constitutional rights of privacy, which include individual, parental, and procreational autonomy.[120] While explaining the right of procreational autonomy, the court recognized "two rights of equal significance—the right to procreate and the right to avoid procreation."[121]

Because no prior agreement existed regarding the disposition of the embryos, the court weighed the competing interests of Mr. and Mrs. Davis.[122] On the one hand, Mr. Davis did not want to become the father of a child who would not live with both parents.[123] If Mrs. Davis was allowed to donate the embryos to another couple to bear a child, it would impose upon Mr. Davis unwanted genetic parenthood and the accompanying psychological and financial obligations.[124] On the other hand, Mrs. Davis wanted her previous efforts in producing the embryos to be of value.[125] She wanted to donate the embryos to another couple and enable them to achieve pregnancy so that the difficulties of the *in vitro* fertilization procedures she experienced would not be futile.[126] The court conceded that permitting Mr. Davis to destroy the embryos to avoid unwanted parenthood would not be "an insubstantial emotional burden" on Mrs. Davis, but the court determined that Mr. Davis's interest in avoiding unwanted parenthood outweighed the interest of

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[117] *Id.* at 589.

[118] *Id.* at 597.

[119] *Id.* at 594–95, 597, 602 (citations omitted). "[Tennessee]'s interest in potential human life is insufficient to justify an infringement on the gamete-providers' procreational autonomy." *Id.* at 602.

[120] *Id.* at 598–603.

[121] *Id.* at 601.

[122] *Id.* at 604.

[123] *Id.*

[124] *Id.* at 603.

[125] *Id.* at 604.

[126] *Id.*

Mrs.[127] Davis in donating the embryos to help another infertile couple become pregnant.[128] Thus, Mr. Davis's desire to avoid parenthood was honored.

While introducing the facts and history of the dispute, the court made mention of important factors, or the lack thereof, in relation to the disposition of cryopreserved embryos:

> [I]t is important to note the absence of two critical factors that might otherwise influence or control the result of this litigation: When the Davises signed up for the [*in vitro* fertilization] program . . . they did not execute a written agreement specifying what disposition should be made of any unused embryos that might result from the cryopreservation process. Moreover, there was at that time no Tennessee statute governing such disposition, nor has one been enacted in the meantime.[129]

The court recognized the controlling influence that either state statutes or contractual agreements would have on the dispositional outcome of cryopreserved embryos, thus reducing the burden of litigation and the number of unanswered questions in such cases.

5. Other Cases

The Massachusetts case of *A.Z. v. B.Z.* was a dispute over the disposition of embryos between a husband and wife that were separated and then divorced.[130] After determining that the parties' written instruments were unenforceable, the court used constitutional and public policy rationale similar to that used in *Davis* to determine the disposition of the embryos, affirming the issuance of a permanent injunction prohibiting the wife from using the embryos was deemed necessary to protect the husband's overriding procreative right to avoid parenthood.[131] In summary, the court stated, "[a]s a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement."[132]

The case of *J.B. v. M.B.* from New Jersey is markedly similar to *A.Z. v. B.Z.*[133] The dispute in *J.B.* was between a divorced couple who could not agree on the disposition of their cryopreserved embryos.[134] The court resorted to constitutional and public policy grounds for determining the

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[127] *Id.*

[128] *Id.*

[129] *Id.* at 590.

[130] 725 N.E.2d 1051, 1053 (Mass. 2000).

[131] *Id.* at 1052, 1056–59.

[132] *Id.* at 1057–58.

[133] J.B. v. M.B., 783 A.2d 707 (N.J. 2001).

[134] *Id.* at 710.

disposition of the embryos.[135] After balancing the wife's right to avoid parenthood against the husband's right to father children, and in light of the husband's fertility and ability to procreate, the court found that the wife's interest was more deserving of protection and granted her wish that the embryos be destroyed.[136] The court, citing *Davis*, agreed that "the scales '[o]rdinarily' would tip in favor of the right not to procreate if the opposing party could become a parent through other reasonable means."[137]

Washington's Supreme Court was also called upon to determine the disposition of the cryopreserved embryos of a divorced couple who had a cryopreservation agreement in the case of *Litowitz v. Litowitz*.[138] The Litowitzes entered into a cryopreservation agreement with a storage clinic, which provided in part that if their embryos had been maintained at the clinic for five years after the initial date of cryopreservation and the Litowitzes did not request a storage extension period, the embryos would be thawed but would not undergo further development.[139] In other words, after five years of storage, absent a storage extension request, the embryos would be destroyed and discarded.

In their divorce action, the Litowitzes could not reach an agreement regarding the disposition of the embryos.[140] Mr. Litowitz wanted to put the embryos up for adoption.[141] Mrs. Litowitz wanted to implant the embryos in a surrogate mother so that she could personally raise any resulting child as her own.[142] The court based its decision "solely upon the contractual rights of the parties under the . . . cryopreservation [agreement]."[143] The court determined that the five-year storage period had expired and that if the embryos had not already been destroyed by the clinic, thawing and discarding the embryos would be proper under the terms of the cryopreservation agreement.[144] In the absence of any factual determination whether the embryos still existed, the court declined to disturb the clinic's contractual dispositional authority over the embryos despite the contrary desires of the intended parents.[145]

In the California case of *Jaycee B. v. Superior Court*, the intended father under a gestational surrogacy contract tried to avoid paying child

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135 *Id.* at 715–19.
136 *Id.* at 716–20.
137 *Id.* at 716 (citing Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992)).
138 48 P.3d 261 (Wash. 2002).
139 *Id.* at 263–64.
140 *Id.* at 270–71.
141 *Id.* at 264.
142 *Id.*
143 *Id.* at 271.
144 *Id.*
145 *Id.* at 269, 271.

support to the intended mother of the resulting child.[146] In a usual surrogacy agreement, the intended parents provide the eggs and sperm, and thus are also the genetic parents.[147] Their resulting embryos are then implanted in a surrogate mother who carries and delivers the child.[148] After birth, the child is turned over to the genetic, intended parents, and the surrogate mother has no rights or liabilities to the child.[149] In this case, the intended parents entered into a written contract with a surrogate mother and her husband.[150] The surrogate mother had implanted within her an embryo that resulted from *in vitro* fertilization of an egg and sperm from anonymous donors, not from the intended parents.[151] The procedure successfully resulted in the birth of a child, and the child was released from the hospital to the intended mother under the contract.[152]

Approximately one month prior to the birth of the child, the intended parents separated and a divorce proceeding commenced.[153] The wife sought temporary child support from the husband until a final adjudication of the divorce proceeding could be reached.[154] "The husband was willing to stipulate that he had signed the contract," but he claimed that the family law court lacked jurisdiction to award temporary child support.[155] The appellate court explained that "the most likely *legal* result based on the undisputed fact of [the husband]'s signing the surrogacy agreement is that [the husband] will be held to be Jaycee's father."[156] Further, the court stated, "it is enough that [the husband] admits he signed the surrogacy agreement which, for all practical purposes, *caused* Jaycee's conception every bit as much as if he had caused her birth the old fashioned way."[157] Because of the existence of the surrogacy contract and the husband's stipulation that he had signed it, the wife was able to make a sufficient showing that the husband would be found to be the father of the child.[158] As a result the appellate court affirmed the family court's jurisdiction to award temporary child

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146 49 Cal. Rptr. 2d 694, 696 (Ct. App. 1996).

147 *Id.* at 695.

148 *Id.*

149 *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 785–87 (Cal. 1993) (holding that surrogate mother had no parental rights under either California or constitutional law).

150 *Jaycee B.*, 49 Cal. Rptr. 2d at 696.

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.* at 702.

157 *Id.*

158 *Id.* at 696, 702.

support to the wife until final adjudication could be reached regarding the husband's parenthood.[159]

6. Summary of Case Law

Resulting from the case law in these seven states are a number of approaches to determine the rights and liabilities of the parties. These approaches fall generally within two categories: first, where no contract exists or an existing contract is unenforceable as repugnant to public policy, constitutional interests of the parties are balanced generally in favor of the party seeking to avoid parenthood; second, written contracts between the parties that manifest the parties' previous intent will control the rights and liabilities of the parties.

II. LAWS THAT ASSIST IN INTERPRETING AGREEMENTS AS THEY RELATE TO EMBRYO DONATION

Where statutes regulating embryo rights have not been enacted, courts can look to other states' statutory regulations and case law, as well as legal principles from other areas of law, to interpret egg donor agreements in relation to embryo donation. In the Petersons' case,[160] principles from property, contract, and constitutional law can shed light on the rights and liabilities of the parties implicated in the egg donor agreement.

A. Property Law

Laws regarding bailment are germane to the Petersons' contract with the anonymous egg donor and the egg donation facility. The bailment relationship requires that the bailee exercise due care when in possession of the bailor's property; when the bailor requests that the property be returned, the bailee must return the property.[161] The bailor, the true owner of the property, has dispositional control of the property.[162] The Petersons, as the true and full owners of the embryos under the egg donor agreement, should have full dispositional authority over the embryos.

Secondly, the principle of free alienation of property can be of help in determining the parties' rights and liabilities. John Gray, in his treatise *Restraints on the Alienation of Property*, stated, "A condition or conditional limitation on alienation attached to a transfer of the entire

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[159] *Id.* at 696–97.

[160] Embryo Adoption Awareness Campaign, *supra* note 3.

[161] *See* discussion *supra* Part I.B.3.

[162] *See id.*

interest in personalty, is as void as if attached to a fee simple in land."[163] More directly to the point, Gray stated, "[A]n absolute interest in personalty cannot have a condition against alienation attached to it."[164] Further, "the right of transfer is a right of property, and if another has the arbitrary power to forbid a transfer of property by the owner, that amounts to an annihilation of property."[165] Central, then, to the bundle of property rights is the right of alienation.

The Petersons contracted with the egg donor, and the egg donor facility conveyed the eggs to the Petersons as "the owners of the ova and any resulting embryos," giving them "complete control and authority over the disposition of the ova and resulting embryos."[166] But the second clause put a restraint on the alienation rights of the Petersons despite their "complete control and authority"; they were not to "donate, sell or otherwise transfer any donated ova . . . or embryos . . . to another person . . . for the purpose of conception."[167] Such a restraint is repugnant to the principle of free alienation of property and thus should be held invalid. The Petersons should be permitted to freely donate the resulting embryos to another couple for the purpose of conception.

B. Contract Law

Generally, contracts that are freely entered into will be enforceable between the parties to the contract. But courts will not enforce the agreements of private contracting individuals when those agreements are violative of public policy or constitutional rights.[168] Contracts that create or terminate familial relationships, or place unreasonable restraints on trade, are often found to violate public policy or constitutional rights and thus are unenforceable.[169]

The Supreme Judicial Court of Massachusetts declared, "As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement. It is well established that courts will not enforce contracts that violate public policy."[170] The Supreme

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[163] JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY 15 (Boston, University Press 1883).

[164] *Id.* at 16.

[165] Penthouse Props., Inc. v. 1158 Fifth Ave., Inc., 11 N.Y.S.2d 417, 422 (App. Div. 1939) (quotation omitted).

[166] Embryo Adoption Awareness Campaign, *supra* note 3.

[167] *Id.*

[168] *See* A.Z. v. B.Z, 725 N.E.2d 1051 (Mass. 2000); *see also* J.B. v. M.B., 783 A.2d 707 (N.J. 2001).

[169] *See, e.g.*, *A.Z.*, 725 N.E.2d at 1057–58; *J.B.*, 783 A.2d at 717–20; *see also* Sherman Act, 15 U.S.C. §§ 1–7 (2000 & Supp. V 2006); Clayton Act, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2000).

[170] *A.Z.*, 725 N.E.2d at 1057–58.

Court of New Jersey added, "[T]he laws of New Jersey also evince a policy against enforcing private contracts to enter into *or terminate familial relationships*."[171] The restrictive clause in the Petersons' egg donor agreement would effectively require Mrs. Jones to terminate her pregnancy that resulted from the Petersons' donation of embryos. Such a result is repugnant to public policy, and as such, the restrictive clause of the agreement should be unenforceable as violative of public policy.

"A bargain in restraint of trade is illegal if the restraint is unreasonable."[172] In effect, the egg donor agreement's restrictive clause is an unreasonable restraint of trade as an unreasonable non-competition clause benefiting the egg donation facility. The only party to benefit from the restrictive clause is the facility. The anonymous egg donor has been compensated for her services, and her rights and liabilities to the eggs and any resulting embryos or children have been terminated by the agreement. Reserving any rights, liabilities, or benefits for the anonymous egg donor would "burden her with 'responsibilities' she never contemplated and [would be] directly 'contrary to her expectations.'"[173] The restrictive clause does not benefit the Petersons because it places limitations on their ability to transfer any embryos.

In effect, the clause requires that services and the resulting payment for embryo transfer and conception must be solely performed and collected by the egg donation facility, similar to what the Jones Institute was forbidden to do in *York v. Jones*.[174] By limiting the restriction to the prohibition of transferring the embryos to another couple *for conception*, the facility's intent to deprive any other of receiving a benefit is made clear. By coupling this restriction against transferring for the purpose of conception with the restriction against *donating* the embryos, the restrictive clause becomes unreasonable. If the Petersons were prohibited only from *selling* the embryos for the purpose of conception, such a restriction might be found reasonable and thus enforceable. But because the restriction includes a prohibition against donation, the restrictive clause is unreasonable and unenforceable.

Even if such a restraint of trade was found to be reasonable and enforceable, the purpose of the restraint no longer existed when the egg donation facility went out of business. At such time, the restrictive clause against transferability should have become void.

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[171] *J.B.*, 783 A.2d at 717 (emphasis added).

[172] RESTATEMENT (FIRST) OF CONTRACTS § 514 (1932).

[173] Jaycee B. v. Superior Court, 49 Cal. Rptr. 2d 694, 701 (Ct. App. 1996) (quoting Johnson v. Calvert, 851 P.2d 776, 783 (Cal. 1993)).

[174] *See* discussion *supra* Part I.B.3.

Additionally, because the egg donation facility has subsequently gone out of business since the time the agreement was executed, the Petersons should be discharged from performing the terms of the contract. The circumstances have changed dramatically, causing an unanticipated termination of the relationship between the Petersons and the egg donation facility; and because the egg donor was anonymous and already compensated, continued performance of the agreement should not be required of the Petersons.

C. Constitutional Law

While constitutional protections are not directly at issue in the Petersons' situation because an egg donation facility, not a governmental agency, is attempting to restrict them, some constitutional principles are helpful in understanding the relationship of the parties. The privacy rights of individuals, specifically procreational autonomy, were extensively discussed in *J.B. v. M.B.*[175] Individuals have the right to make personal, intimate decisions regarding whether to marry and have children; the choice of parenthood is reserved for the individual.[176]

This privacy right is codified in New Hampshire in the context of surrogacy contracts: "There shall be no specific performance for a breach by the surrogate of a surrogacy contract term that . . . [r]equires her to become impregnated . . . [r]equires her to have an abortion[] or . . . [f]orbids her to have an abortion."[177]

Whereas the Petersons have already donated their embryos to Mr. and Mrs. Jones, and Mrs. Jones is now pregnant as a result of implanting the donated embryos, compelling the termination of the pregnancy against the will of Mrs. Jones is impermissible. Requiring such would be an unconscionable violation of her privacy rights.

III. THE RIGHTS, LIABILITIES, AND REMEDIES ASSOCIATED WITH DONATED EMBRYOS

Mr. and Mrs. Jones and Mr. and Mrs. Peterson, the parties involved in the egg donor agreement and subsequent transfer of embryos, each have differing rights, liabilities, and remedies at the various stages of the donor and transfer process. When the Petersons executed the initial egg donor agreement, they became the full owners of the eggs and resulting embryos. As such, they enjoyed the rights of ownership, possession, enjoyment, exclusive use, and transfer. They were liable to use reasonable care. These rights and liabilities, which attached to the

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[175] 783 A.2d 707, 715–17 (N.J. 2001).

[176] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); *J.B.*, 783 A.2d at 715–17.

[177] N.H. REV. STAT. ANN. § 168-B:27 (LexisNexis 2001).

five embryos, transferred to the Joneses as a result of the donative transfer of the embryos. Prior to receiving the embryos from the Petersons, Mr. and Mrs. Jones had no rights or liabilities relating to the embryos or eggs. After the embryos were transferred to Mrs. Jones and implantation occurred, full rights and liabilities vested in her and her husband. They enjoy the rights of ownership, possession, enjoyment, exclusive use, and bodily integrity. They also enjoy the right of privacy. The only liability Mr. and Mrs. Jones should have is that of reasonable treatment of the implanted embryo.

The anonymous egg donor had privacy rights, ownership rights, and the right to bodily integrity in relation to her eggs prior to donating the eggs. In the agreement, the egg donor consented and intended to relinquish all her rights and liabilities as a genetic parent. Being anonymous, she had no intention of having any connection to the eggs or any resulting embryos or children. When she executed the contract, she gave up her rights and liabilities to the eggs in exchange for compensation for her services. In the unusual case that she brings a suit against the Joneses or the Petersons, no remedy will be available to her because specific performance and an injunction are impermissible after the pregnancy has occurred. Further, she has already been reasonably compensated for her services and therefore she may not receive money damages.

The egg donation facility's only rights were monetary compensation for their services and the right of possession until the owner requested the eggs or embryos. The facility is obligated to use reasonable care in storing, preserving, and transferring the eggs and embryos. Similar to the egg donor's remedies, specific performance and an injunction are not available. Expectation, reliance, and restitution damages may not be awarded because the facility has gone out of business and it was already paid for the services that it had previously provided.

In this unique situation, no remedy would be legally sound or equitable, which strengthens the argument that an unlimited restriction against donating the embryos to another couple for conception should be unenforceable.

CONCLUSION

Difficult questions arise when legal disputes involve procreation, marriage, and family relationships. In the case of embryo donation, some states have attempted to settle the dispute by looking at the agreement between the parties and strictly adhering to the dispositional intent found therein. Other states solely consider constitutional and public policy grounds when determining the dispositional outcome of the dispute. Because of the weight of the decisions that control parenthood and embryo donation, parties considering embryo donation or transfer

deserve clarity and uniformity so that they can fully understand their relationships, rights, and liabilities before proceeding. Clarity and uniformity can be provided through the enactment of state statutory regulations that are similar to the few existing state statutes that control embryo donation.[178] The existing state statutes, however, lack regulation concerning the status, rights, and liabilities of donation facilities. With the addition of legislation determining that facilities are only bailees with no dispositional control superseding the intended parents, clarity and uniformity through state statutes would be available to donors, donation facilities, and intended parents.

Jonathan Penn

[178] *See* discussion *supra* Part I.A.