

*Introduction**

Dr. Margot Rhinehart, the embryologist at the local fertility clinic, has a surplus of abandoned frozen embryos¹ which belonged to six different patients. All of the patients have had at least one live birth using in vitro fertilization (“IVF”) procedures;² however, none of these patients have paid the clinic’s embryo storage fees or had any other contact with the clinic in over seven years.

Four of the original six patients signed agreements prior to creating their embryos stating that they planned to retain the embryos and that their rights to the embryos would cease if they did not provide the clinic with further instructions within five years from the date the embryos were created. All of these patients used their own gametes to create their embryos. One of the original patients used donated sperm and her eggs to create her embryos. Unlike the first set of patients, she did not sign an agreement with the clinic. Further, she has failed to remain in contact with the clinic as she promised. Finally, the remaining patient was a single woman who died over five years ago. She gave the right to decide the disposition of her remaining embryos to her executor who has refused to pay storage fees or make any decision regarding the disposition of the unused embryos.

* This fact pattern was supplied by Nightlight Christian Adoptions for its 2009 Embryo Law Essay Competition. Nightlight Christian Adoptions, <http://www.embryolaw.org/index.asp> (last visited Feb. 6, 2009).

¹ Although the term “preembryo” is the accurate descriptive term for a fertilized egg that has not been implanted in a uterus, for ease of reference, this Comment shall use the term “embryo.” See John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 952 n.45 (1986); see generally Susan Crockin, *What Is an Embryo?: A Legal Perspective*, 36 CONN. L. REV. 1177 (2004). Frozen embryo is a “term of art denoting cryogenically-preserved preembryos.” Jennifer Marigliano Dehmel, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377 n.4 (1995).

² IVF is the process of fertilizing eggs extracted from a female and then implanting the resulting embryo. See Bill E. Davidoff, *Frozen Embryos: A Need for Thawing in the Legislative Process*, 47 SMU L. REV. 131, 134 (1993).

Dr. Rhinehart currently has patients who would accept the donation of any of the abandoned embryos. Dr. Rhinehart is interested in transferring the embryos to these potential recipients; however, she remains concerned about the legal consequences.

This Comment will examine the strengths and weaknesses of the clinic's positions through the lenses of contract, property, probate, and parentage law. It will also identify potential actions the clinic could file to assist in fulfilling its goal of transferring the abandoned embryos and any legal risks the clinic may be subjected to if the original patients, their heirs, or assignees request possession of the embryos after transfer.

I. Contract Law

There are several competing approaches used to determine the disposition of frozen embryos. This section highlights the major approaches and discusses the implications for the situation at hand. In doing so, this Comment suggests that strict contract enforcement is the superior approach because it maximizes judicial efficiency and fairness by providing predictable outcomes focused on the intent of the parties.

A. Strict Contract Enforcement

The strict contract enforcement approach would allow the clinic to transfer the embryos of the four original patients it held agreements with. Although the law in this area remains sparse,³ some courts have specifically recognized signed agreements determining the disposition of unused embryos as presumptively valid enforceable

³ “States currently have little or no law governing [reproductive technologies] leaving lawyers who advise participants, as well as donors, patients, and intended parents in a state of ignorance in regard to status, rights and responsibilities.” James Preston, Chair, ABA Family Law Section, Report to the House of Delegates (2007).

contracts.⁴ In some jurisdictions, a strict contract enforcement approach has been applied to dispose of unused embryos.⁵

In *Kass v. Kass*, a married couple entered into an agreement to donate their unused embryos for research purposes if they could not otherwise reach an agreement.⁶ On divorce, Mrs. Kass sought to retain the embryos for future implantation, while Mr. Kass wanted the agreement enforced.⁷ In upholding the agreement, the court stated that enforcing the existing contract would “minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision.”⁸ While recognizing the unfairness of holding the couple to the agreement when one party has changed their mind,⁹ the court enforced the contract because the advantages of consistency and predictability created by contract adherence would be eliminated if prior agreements could be abandoned by either party.¹⁰

Following this idea of strict contract enforcement, the court in *Litowitz v. Litowitz* found that an agreement between a divorced couple and their fertility clinic was valid and

⁴ See *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992). In *Davis*, although the case did not involve an agreement, in dicta, the court made clear that contracts could be enforced to decide the disposal of frozen embryos, stating; “[w]e believe, as a starting point, that an agreement regarding disposition of any untransferred pre-embryos in the event of contingencies (such as . . . divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors.” *Davis*, 842 S.W.2d at 597. See *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998) (finding the agreement between the parties should be enforced); *Litowitz v. Litowitz*, 48 P.3d 261, 271 (Wash. 2002) (same); *Roman v. Roman*, 193 S.W.3d 40, 54, 55 (Tex. Ct. App. 2006) (same).

⁵ See *Kass*, 696 N.E.2d at 176-77

⁶ *Id.*

⁷ *Id.* at 175-77.

⁸ *Id.* at 180.

⁹ See generally Suchitra J. Satpathi, *Gliding Over treacherous Ice: Fulfillment and Responsibility in the New Reproductive Era; Why Contractual Ordering is Appropriate*, 18 TEMP. ENVTL. L. & TECH. J. 55, 71 (1999) (arguing that binding contracts actually provide more fairness as opposed to having the court decide one’s fate).

¹⁰ *Kass*, 696 N.E.2d at 180. The court stated that, “parties should be encouraged in advanced, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes *in writing*.” *Id.* (emphasis added).

enforceable.¹¹ The agreement directed that any of the couple's unused embryos that remained frozen after five years should be destroyed.¹² In this case, the wife wanted to use the embryos for implantation in a surrogate and the husband wanted to donate them to another couple.¹³ Although neither party wanted the embryos destroyed, the court nevertheless enforced the agreement and ordered the destruction of the embryos because the requisite time period elapsed.¹⁴

Under the strict contract enforcement approach, the original patients could argue that transfer of their embryos would be a breach of contract.¹⁵ The facts indicated four of the patients signed an agreement which stated that they planned to retain their unused embryos for future family building efforts. Therefore, it could be argued that a transfer of the embryos to other patients would breach the agreement. However, a breach of contract claim probably would not carry the day because the agreements also contained a clause stating that the patients' rights ceased if they did not give the clinic further instructions within five years. Here, it has been over seven years since the patients have contacted the clinic.

In an attempt to transfer the embryos, the clinic should seek the court-ordered specific performance¹⁶ of its contracts with the four original patients. In the *Litowitz* case, the court enforced an agreement which neither patient wanted because the requisite

¹¹ *Litowitz*, 48 P.3d 261 at 271. See also *Roman*, 193 S.W.3d at 50 (destroying the embryos according to the agreement of the parties, stating that “[t]hese agreements should . . . be ‘presumed valid and should be enforced as between the progenitors.’” (quoting *Davis*, 842 S.W.2d at 597)).

¹² *Id.*

¹³ *Id.* at 264.

¹⁴ *Id.* at 271.

¹⁵ “A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty.” RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). See *Id.* at § 8 (“An unenforceable contract is one for the breach of which neither the remedy of damages nor the remedy of specific performance is available . . .”).

¹⁶ Specific performance is a non-monetary equitable remedy. BLACK'S LAW DICTIONARY (8th ed. 2004).

time frame of five years had lapsed. Here, like the *Litowitz* case, the clinic could also seek the execution of the contracts that the patients no longer wanted enforced because the requisite time frame of five years had similarly passed. Enforcement of the contract terms would end the four original patients' rights to their unused embryos because the agreement stated that all rights ended if the patients did not contact the clinic in five years. Once those rights were severed, transfer of the unused embryos could be effectuated without liability.

B. Implied Contract

The clinic could argue that an implied contract existed between it and the two patients who never signed any agreements. In the absence of a written instrument, a contract can still be found if the parties exchanged promises. A promise can "be stated in words either oral or written, or may be inferred wholly or partly from conduct."¹⁷ Here, an implied contract was created when the original patients proceeded with the IVF process and subsequent cryopreservation of their unused embryos because they manifested a commitment to the clinic's services in return for the promise to pay storage fees and remain in contact with the clinic. The original patients breached the implied contract by neither paying the storage fees nor remaining in contact with the clinic. This breach should enable the clinic to transfer the embryos because it would be manifestly unfair if clinic had to store the embryos indefinitely without payment.

The original patients could argue that the application of contract law to what were essentially family law matters violates public policy. Scholars have argued that the

¹⁷ RESTATEMENT (SECOND) OF CONTRACTS § 4.

application of contract law should be strictly reserved for commercial activity.¹⁸ This position posits that when it comes to decision-making regarding procreative autonomy, “it is the altruistic ethic of family law that should guide [a] court, not the ethic of self-gratification of the marketplace and contract law.”¹⁹ However, if a court rejects a contract only to inject its own opinion as to the disposition of the embryos, that appears to be an even greater privacy intrusion. Contract enforcement may ultimately bind a party to a result they no longer wish to accept; nevertheless, “allowing gamete providers to [contract for] the disposition of their genetic material allows the parties greater latitude in determining their reproductive roles as well as future obligations”²⁰ because the end result would remain the product of their original intent.²¹

C. The Davis Balancing Test and Procreative Autonomy

The two patients who did not have agreements with the clinic could argue that their interests should prevail in the balancing of procreative rights, and therefore, their respective embryos should not be transferred. In the absence of an agreement regarding the disposition of unused embryos, courts have balanced the constitutional rights of each party to protect their procreative autonomy.²²

¹⁸ See Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 347-48 (1990) (arguing that contract law “should not be employed in the context of the family”).

¹⁹ Mark W. Premo-Hopkins, *Between Organs and Adoption: Why Pre-Embryo Donors Should Not be Allowed to Discriminate Against Recipients*, 2006 U. CHI. LEGAL FORUM 441, 447 (2006) (quoting Judith Areen, *Baby M. Reconsidered*, 76 GEORGETOWN L. J. 1741, 1758 (1988)). See Ellen H. Moskowitz, *Some Things Don't Belong in Contracts*, Nat'l L. J., June 8, 1998, at A25 (“Contracts put the power of the state behind some, but not all, private promises, and they have *not* governed the structure of potential or actual family relationships.”) (emphasis added).

²⁰ Satpathi, *supra* note 9, at 73.

²¹ The Restatement of Contracts states that “[i]n weighing the [public policy] interest in the enforcement of a term, account is taken of (a) the parties’ justified expectations, [and] (b) any forfeiture that would result if enforcement were denied.” RESTATEMENT (SECOND) OF CONTRACTS § 178.

²² See *Davis*, 842 S.W.2d at 604; see also, *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001).

In *Davis v. Davis*, there was no dispositional agreement and the wife wanted the embryos donated to another couple while the husband wanted them destroyed.²³ The court stated that procreative autonomy was an inherent right²⁴ “composed of two rights of equal significance – the right to procreate and the right to avoid procreation[.]”²⁵ and these rights must be viewed “in light of the joys of parenthood that [were] desired or the relative anguish of a lifetime of unwanted parenthood.”²⁶ The court weighed the competing interests and determined that the psychological burden that Mr. Davis would face in becoming a biological parent against his will outweighed the burden on Mrs. Davis of knowing that the embryos they created would never become children.²⁷ Thus, the balancing test places a thumb on the scales in favor of the party seeking to avoid procreation unless the party seeking to use the embryos has no other reasonable alternative for becoming a parent.²⁸

In response to criticisms associated with strict contract enforcement,²⁹ some jurisdictions have actually used the right not to procreate found in *Davis* to invalidate

²³ *Davis*, 842 S.W.2d at 589-90.

²⁴ The inherent right of procreative autonomy is rooted in fundamental notions of liberty and privacy. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) (“the concept of liberty protects those personal rights that are fundamental and it is not confined to the specific terms of the Bill of Rights.”); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (recognizing the right to procreate as “one of the basic civil rights of man”); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (stating that the right to privacy includes “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

²⁵ *Davis*, 842 S.W.2d at 601.

²⁶ *Id.*

²⁷ *Id.* at 604.

²⁸ *Id.*

²⁹ See Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 101 (1999) (arguing that the strict enforcement approach fails to protect parties’ rights to “make decisions consistent with their contemporaneous wishes, values, and beliefs[.]”); but see Sara D. Petersen, *Dealing with Cryopreserved Embryos Upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 UCLA L. REV. 1065, 1081 (2003) (criticizing the inalienable rights approach for providing “little incentive for parties to think through various contingencies when they first participate in [assisted reproductive technologies] and decide to cryo-preserve excess embryos, for they know that any plans they make may be revoked if either one of them experiences a change of heart.”).

dispositional agreements.³⁰ In *A.Z. v. B.Z.*, the Massachusetts Supreme Judicial Court considered the effect of a couple's agreement that stipulated on divorce the wife would receive any unused embryos.³¹ In refusing to force parenthood on the husband, the court stated that "prior [valid] agreements to enter into familial relationships should not be enforced against individuals who subsequently reconsider their decisions."³² One year later, in *J.B. v. M.B.*, the New Jersey Supreme Court dealt with a case in which the couple agreed to donate their unused embryos to the clinic if they divorced.³³ On divorce, the wife wanted the embryos destroyed while the husband wanted to donate them to another couple or use them for himself.³⁴ The court rejected the agreement because enforcement would have resulted in the wife becoming a biological parent against her will.³⁵ It held that contracts would be enforced "subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored pre-embryos."³⁶

The right to avoid procreation could be used to invalidate the agreements held by the four original patients. In *J.B.*, the court sided with the wife who opposed the husband's interest in donating their embryos to another couple in accordance with their existing agreement. Like *J.B.*, the original patients could argue that transfer and eventual use of their unused embryos could result in the birth of a child thus forcing them to become parents against their will.

³⁰ See *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1056-59 (Mass. 2000); *J.B.*, 783 A.2d at 717.

³¹ *A.Z.*, 725 N.E.2d at 1054-57.

³² *Id.* at 1059.

³³ *J.B.*, 783 A.2d at 710.

³⁴ *Id.*

³⁵ *Id.* at 717.

³⁶ *Id.* at 719. The court stated that if either party did change their mind then the interests of both parties must be evaluated. *Id.* This weighing of interests was borrowed from *Davis*. Interestingly, the court stated "[w]e express no opinion in respect of a case in which a party who has become infertile seeks to use stored preembryos against the wishes of his or her partner, noting only that the possibility of adoption also may be a consideration, among others, in the court's assessment." *Id.* at 720.

The right to procreative autonomy could also be used by all of the original patients to block the clinic's transfer of their embryos. To date, no court has ever enforced a contract resulting in forced parenthood on a gamete provider.³⁷ There appears to be a strong presumption in favor of upholding a party's right to procreative autonomy. However, *Davis* and *J.B.* left the door somewhat ajar in suggesting that if the party seeking to procreate had no other reasonable means of becoming a parent then the court might consider forcing parenthood on the party in opposition.³⁸

According to *Davis*, the right to avoid procreation will outweigh the right to procreate unless there were no other reasonable alternatives for the party seeking to become a parent. As one scholar noted; "if further IVF treatments and traditional adoption fall within the definition of reasonable alternatives, as suggested by *Davis*, it is hard to imagine a scenario where the party seeking to avoid procreation would ever lose."³⁹ Nonetheless, in these difficult economic times, IVF procedures and traditional adoption may be too expensive for many couples to afford.⁴⁰ The facts do not state

³⁷ Courts have enforced contracts disposing of unused embryos while invalidating contracts that would have forced parenthood. *Compare Kass*, 696 N.E.2d at 180 (enforcing the contract calling for the donation of the embryos for scientific research), *and Litowitz*, 48 P.3d 261 at 271 (adhering to a contract calling for the destruction of the unused embryos), *and Roman*, 193 S.W.3d at 55 (same), *with A.Z.*, 725 N.E.2d at 1059 (voiding a contract that would have forced parenthood on the husband), *and J.B.*, 783 A.2d at 719 (finding unenforceable an agreement forcing the wife to become a biological parent).

³⁸ *See Davis*, 842 S.W.2d at 604; *see also J.B.*, 783 A.2d at 720.

³⁹ 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, 565-66 (2008). The recipient patients could also be at a disadvantage in the weighing of procreative rights because the *Davis* balancing test presupposes that the parties in conflict were both gamete providers. Unlike the patients whose procreative rights are rooted in the fact that they are the gamete providers, the recipient couples have no such connection or basis in procreative rights. The fact pattern also indicated that one of the patients who did not have an agreement with the clinic used donated sperm to create her embryos. This is significant in the balancing of interests because if that patient's embryos were all transferred to others then she would no longer have the ability to procreate biologically similar offspring.

⁴⁰ In 2009, the average cost for the first round of IVF treatment in the U.S. is \$12,146. *See* <http://www.ivfcost.net> (last visited Feb. 19, 2009). The estimated average cost of privately adopting a child from the domestic U.S. ranges from \$8,000 to over \$30,000. <http://statistics.adoption.com/information/statistics-on-cost-of-adopting.html> (Last visited Feb. 19, 2009).

whether the recipient patients have any other reasonable means of becoming parents; however, if they do not, the scales of the *Davis* balancing test may tip toward allowing the embryos to be used. Alternatively, if the court applied the right to avoid procreation to prohibit the transfer of the embryos, this Comment would recommend that the clinic file a demand letter for the outstanding storage fees owed to it.⁴¹

D. Mutual Consent

The four original patients holding agreements with the clinic could avoid the transfer of their embryos for lack of mutual consent. Some jurisdictions have rejected contractual enforcement in favor of a rule where dispositional agreements are subject to the right of either party to change their mind up to the point of use or destruction of the embryos.⁴² In *In re Marriage of Witten*, when the couple disagreed as to the disposition of their embryos, the court concluded that IVF agreements should be enforceable subject to either party changing their mind.⁴³ In the event that one party changed their mind, the embryos would remain in storage at the expense of the person who opposed disposition until the parties signed a mutual agreement.⁴⁴

Under the mutual consent model, the original patients holding agreements with the clinic could argue for the continued storage of their embryos until they reached an agreement. In *Witten*, the court essentially voided the contract because one of the parties changed their mind. Here, the former patients similarly changed their minds regarding

In comparison, embryo adoption is less expensive than either traditional adoption or IVF. Naomi D. Johnson, *Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?*, 68 BROOK. L. REV. 853, 864 (2003).

⁴¹ Black's Law Dictionary defines a demand letter as "[a] letter by which one party explains its legal position in a dispute and requests that the recipient take some action (such as paying money owed), or else risk being sued." BLACK'S LAW DICTIONARY (8th ed. 2004).

⁴² *In re Marriage of Witten*, 672 N.W.2d 768, 778 (Iowa 2003).

⁴³ *Witten*, 672 N.W.2d at 783.

⁴⁴ *Id.* at 778, 783.

the relinquishment of their rights. Therefore, under this approach the contract cannot be enforced to sever the original patients' rights to their unused embryos. Additionally, the original patients could demand the continued storage of their embryos until an agreement was reached.⁴⁵ In response, the clinic could assert a public policy argument in opposition to the application of the mutual consent model. Unlike the *Davis* balancing test, this model completely eliminates the procreative rights of the party seeking to use the embryos⁴⁶ while at the same time punishing the party who chooses not to procreate by forcing them to pay a storage fee indefinitely.

II. Property

In order to determine the rights of the original patients under property law, the legal status of the embryos at issue must be identified.⁴⁷ One recognized view is that embryos are the property of the genetic providers.⁴⁸ Under this approach, ownership⁴⁹ is vested in the gamete providers and, absent consent, no restrictions shall be placed on the

⁴⁵ In part, this produces an acceptable result for the clinic in that it would receive its storage fees once again. However, it would frustrate the clinic's ultimate goal of transferring the unused embryos.

⁴⁶ See Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process*, 33 FLA. ST. U. L. REV. 395, 408 (2005).

⁴⁷ What is an embryo? "To members of ethics commissions . . . it is a potential human being worthy of special respect. To physicians, it is a collection of cells with specific properties depending on the embryo's developing stage. To couples, it is a powerful symbol of hope and potential parenthood." Jill R. Gorny, *The Fate of Surplus Cryopreserved Embryos: What is the Superior Alternative for Their Disposition?*, 37 SUFFOLK U. L. REV. 459, 464 (2004).

⁴⁸ See Kristine Luongo, *The Bill Chill: Davis v. Davis and the Protection of "Potential Life"?*, 29 NEW ENG. L. REV. 1011, 1017 (1995).

⁴⁹ In this context, ownership denotes a unique decisional authority, the right to "decide whether legally available options with early embryos will occur, such as creation, storage, discard, donation, use in research, and placement in a uterus." John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 454-55 (1990).

owner's "right to possess, use, or dispose of [the property] according to [his or her] own pleasure."⁵⁰

The property-based view of embryos was employed by the Eastern District Court of Virginia in *York v. Jones*.⁵¹ The Yorks signed an agreement with a fertility clinic, underwent IVF procedures, and placed their remaining embryo in storage.⁵² The Yorks then moved to California and requested that the clinic transfer their embryo.⁵³ The Virginia clinic refused, citing to the agreement which called for disposal by donation to another couple, donation for research, or destruction.⁵⁴ The court applied principles of contract law to find that a bailment was created.⁵⁵ To establish a bailment, all that is needed "is the element of lawful possession however created, and duty to account for the thing as the property of another"⁵⁶ In *York*, a bailment was created because the clinic held the embryo under an agreement to store it and had a duty to account for the embryo as the property of the Yorks.⁵⁷ Once the bailment relationship was terminated the clinic was obligated to return the Yorks' "property."⁵⁸

The application of the embryo as property approach dictates that the clinic could transfer the embryos of the original patients. Under property law, ownership was originally vested in the gamete providers and, absent consent, no restrictions should be placed on their rights to use their embryos as they see fit. However, the four patients

⁵⁰ Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH. L. J. 257, 268 (1990).

⁵¹ 717 F. Supp. 421 (E.D. Va. 1989).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 427.

⁵⁵ *Id.* at 425.

⁵⁶ *Id.*

⁵⁷ The clinic agreed to account for the embryo under the stipulation that it would not be held responsible for any injury to the embryo while in storage. *Id.* at 425 n.3.

⁵⁸ *Id.* at 426-27.

holding agreements with the clinic consented to the termination of their property rights if they did not provide the clinic with further instructions within five years from the date the embryos were created. Therefore, although ownership in the embryos vested in the original patients, they entered into an agreement with the clinic to forfeit those rights.

In response, the original patients could argue that a bailment was established by the agreements they entered into with the clinic. In *York*, a bailment was created by an agreement between fertility patients and their clinic that gave the clinic possession of the embryo and a duty to account for it.⁵⁹ Here, the original patients could argue that a bailment was similarly created by the clinic's agreement that it would store and account for their unused embryos. Having established a bailment, the patients could then demand receipt of their property. This bailment argument would probably fail because although the element of lawful possession by the clinic was created, its duty to account for the embryos as the property of the original patients has ended. As *York* stated, "[t]he obligation to return the property is implied from the fact of lawful possession of the personal property of another."⁶⁰ Under the terms of the agreement, the embryos ceased being the lawful property of the original patients five years after the embryos were created and therefore the clinic is under no duty to return the property.

III. Probate

Any posthumous children⁶¹ born from the embryos of the deceased patient could claim inheritance rights to the decedent's estate. Overall, existing case law tends to

⁵⁹ *Id.* at 425.

⁶⁰ *Id.*

⁶¹ Posthumous children refer to children that are conceived before the death of either parent but are subsequently born thereafter. See Cameron Krier, *Heir on the Side of Exclusion? Addressing the Problems*

suggest a public policy aimed at providing for posthumously conceived children.⁶² The following cases all proceeded from an identical fact pattern in which a widow used IVF procedures to become pregnant following the death of her husband.⁶³

In *Gillett-Netting v. Barnhart*, the district court interpreted an Arizona inheritance statute to exclude children that were not in gestation at the death of the parent.⁶⁴ The Ninth Circuit Court of Appeals reversed, concluding that a decedent's posthumous children could inherit from their biological parents.⁶⁵

In *Woodward v. Commissioner of Social Security*, the Supreme Judicial Court of Massachusetts also dealt with the complex problems arising from the impact of IVF procedures on inheritance rights.⁶⁶ The court found that the inheritance rights of posthumous children were not limited to those in utero at the time of the father's death.⁶⁷ The court did qualify its ruling by further requiring that in order to be recognized as an heir, the deceased parent must have affirmatively consented to the conception and support of any resulting children.⁶⁸

by Assisted Reproductive Technologies to the Inheritance Rights of a Class Named in a Funded Trust or Probated Will, 20 QUINNIPIAC PROB. L.J. 47 n.4 (2006).

⁶² See Krier, *supra* note 61, at 63. It should be noted that existing case law does not unanimously support the proposition that posthumous children should be considered heirs of their biological parents. Compare *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004) (favoring inheritance rights), and *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002), and *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000), with *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 290 (Ct. App. 1993) (disfavoring inheritance rights, stating "it is unlikely that the estate would be subject to claims with respect to [after-born] children."), and *Stephen v. Comm'r of Soc. Sec.*, 386 F. Supp. 2d 1257, 1260 (M.D. Fla. 2005) (finding posthumous child cannot inherit unless specifically expressed in a will).

⁶³ See generally *Gillett-Netting*, 371 F.3d 593; *Woodward*, 760 N.E.2d 257; *Kolacy*, 753 A.2d 1257.

⁶⁴ *Gillett-Netting*, 371 F.3d at 595. The Administrative Law Judge held that "the last possible time to determine dependents [sic] on the wage earner's account is the date of the death of the wage earner. Therefore, children conceived after the wage earner's death cannot be deemed dependent on the wage earner." *Id.* (construing ARIZ. REV. STAT. § 25-501 (West 2009)).

⁶⁵ *Id.* at 599.

⁶⁶ *Woodward*, 760 N.E.2d at 261 n.6.

⁶⁷ *Id.*

⁶⁸ *Id.* at 272.

Finally, in *In re Estate of Kolacy* the Superior Court of New Jersey held that the decedent's posthumously conceived children were his heirs.⁶⁹ The court emphasized the importance of determining the status of the children because that determination could impinge on their future property rights.⁷⁰ The court's analysis referenced a general legislative intent to protect and expand the rights of children and therefore courts should routinely grant posthumous children the legal status of heirs.⁷¹

As illustrated above, there are several concurrent interests operating when considering the inheritance rights of posthumous children. First, the interests of the decedent should be considered.⁷² Second, the rights of the posthumous child must be taken into account.⁷³ The welfare of children remains an important public policy of every state.⁷⁴ This policy is manifested in intestacy statutes which prefer the children of the decedent over all other heirs except for the spouse.⁷⁵ Further, most states also have pretermitted heir statutes that protect children not specifically mentioned in a will.⁷⁶ Finally, the rights of any other heirs should be weighed because expanding inheritance rights to include posthumous children directly impacts existing heirs by diminishing their inheritance and delaying probate.⁷⁷

⁶⁹ *Kolacy*, 753 A.2d at 1263-64.

⁷⁰ *Id.* at 1260.

⁷¹ *Id.* at 1262. Notably, the court further emphasized that a child who was genetically related to the parent should be the heir of that parent unless the rights of others would be "unfairly intrude[d]" on. *Id.*

⁷² Joseph H. Karlin, "Daddy, Can You Spare a Dime?": *Intestate Heir Rights to Posthumously Conceived Children*, 79 TEMP. L. REV. 1317, 1337 (2006).

⁷³ Karlin, *supra* note 72, at 1338-39.

⁷⁴ Robert Kraimer, *Preconception Fertilization Agreements: Valid or Void*, 35 J. FAM. L. 595, 597 (1997).

⁷⁵ See Susan C. Stevenson-Popp, "I Have Loved You in My Dreams": *Posthumous Reproduction and the Need for Change in the Uniform Parentage Act*, 52 CATH. U. L. REV. 727, 733 (2003).

⁷⁶ Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169, 198 (2004). See Karlin, *supra* note 72, at 1337 ("In the absence of evidence that a child was deliberately omitted from an estate plan, a decedent's child will be able to inherit property from his parent.").

⁷⁷ Karlin, *supra* note 72, at 1340.

Procedurally, there are two ways that the posthumous child could gain inheritance rights. First, if the decedent's will names "children" as a class of beneficiaries, then an argument could be made that the posthumous child falls into that class and should be provided for under the will.⁷⁸ Second, if the will did not include a class beneficiary listing, the posthumous child could alternatively seek inheritance rights by operation of a pretermitted heir statute.⁷⁹ Pretermitted statutes presume that children not specifically mentioned in the will should inherit, absent express language to the contrary.⁸⁰ Here, the posthumous child could argue for the application of a pretermitted statute because there was no document explicitly disinheriting the child.

Given the fact that a posthumous child could be recognized as an heir, the existing heirs or assignees of the decedent would likely attempt to inhibit transfer of the decedent's embryos. The existing heirs or assignees could argue that transfer of the embryos of the decedent would be improper because waiting for the embryos to be carried to term will unduly delay the closing of the decedent's estate. Public policy calls for the timely administration of estates,⁸¹ and if the existing heirs were forced to wait for the maturation of the decedent's unused embryos then probate will be significantly delayed. This argument would probably not be successful in blocking the embryo transfers because the clinic could respond that the administration of the estate could proceed if the unborn child's share was placed in a statutory trust.⁸² Therefore, a court

⁷⁸ Krier, *supra* note 61, at 55-58.

⁷⁹ Kindregan & McBrien, *supra* note 76, at 198.

⁸⁰ *Id.*

⁸¹ Woodward, 760 N.E.2d at 266.

⁸² See Michael K. Elliot, *Tales of Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child*, 39 REAL PROP. PROB. & TR. J. 47, 65 (2004). The statutory trust option would be slightly more complicated because the ultimate number of posthumous children that will be born would remain undetermined. The rule against perpetuities could also present an issue for the unborn children because it requires that a determination of "whether there is any chance the interest could vest more than

faced with a delay argument would probably not inhibit the transfer of the unused embryos.

Assuming the transfer has not yet been completed, in an effort to facilitate such a result, the clinic could seek to exact a class fee for the outstanding storage fess from the decedent's estate.⁸³ As discussed, if the decedent's will named "children" as a general group of intended heirs, then a beneficiary class would have been created. This class would be entitled to share equally in the decedent's assets after existing debts were settled.⁸⁴ Obtaining payment of the outstanding storage fees would diminish the estate assets and likely cause the heirs to demand that their executor make a dispositional decision. However, this revives the possible concern the heirs would have in sharing their inheritance if the embryos were donated and brought to term. Additionally, the heirs could even instruct the executor to pay the storage fess and demand that the embryos remain in the clinic if it was more financially advantageous for the heirs to pay the fees versus allowing the embryos to be implanted and then later possibly sharing in the inheritance.

Collectively, all of the heirs' concerns listed above could be resolved if the clinic made transfer of the embryos contingent on the recipient patients obtaining a declaration of legal parentage. A declaration of legal parentage could clarify the inheritance rights of any resulting children.⁸⁵ A declaration of parentage establishes legal parentage in the

21 years after the deaths of everyone alive at the creation of the interest." Joseph William Singer, INTRODUCTION TO PROPERTY § 7.7.4, at 319 (2001). An interest that vests outside of this time period is void. *Id.* This rule could cause a significant problem for the unborn children who want a will held open for an extended period of time.

⁸³ Testate means having died leaving a will. BLACK'S LAW DICTIONARY (8th ed. 2004).

⁸⁴ See Krier, *supra* note 61, at 67.

⁸⁵ The determination of whether the biological or "adoptive" parents are the legal parents has obvious implications on the inheritance rights of a child born from IVF. Kindregan & McBrien, *supra* note 76, at 198.

recipient parents and extinguishes any rights owed to a resulting child by its biological parents.⁸⁶ Here, the declaration would address the heirs' concerns about sharing their inheritance because all rights to inherit would be severed. Having resolved that concern, the heirs would probably request that the executor allow the transfer to take place because then they would no longer be responsible to pay the future storage fees.

IV. Parentage

In the late 1970s and early 1980s, developments in IVF provided infertile couples with alternative means of attaining parenthood.⁸⁷ For decades, cryopreservation has enabled these couples to freeze their surplus embryos.⁸⁸ To date, there are an estimated 400,000 frozen embryos in storage in the United States.⁸⁹ Thus, many couples face the difficult decision of what to do with their unused embryos. Embryo adoption can provide a mutually beneficial outcome for donor patients and recipient parents alike.

Embryo adoption offers a multitude of benefits.⁹⁰ For the donor couple, adoption offers the benefit of providing their embryo with a chance of attaining life.⁹¹ Prior to embryo adoption, couples with excess embryos had the choice of either: (1) using the embryos; (2) paying the clinic's annual storage fees indefinitely; (3) donating the

⁸⁶ *Id.*

⁸⁷ See Tracey S. Pachman, *Disputes over Frozen Preembryos & the "Right Not to Be a Parent,"* 12 COLUM. J. GENDER & L. 128, 128 (2003).

⁸⁸ Kindregan & McBrien, *supra* note 76, at 171.

⁸⁹ U.S. Dept. of Health and Human Services, Office of Public Affairs, *available at* <http://www.hhs.gov/opa/embryoadooption/index.html>. Researchers suggest that the total number of embryos being stored increases by 18.8% annually. Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED., 35, 59 (2000).

⁹⁰ Olga Batsedis, *Embryo Adoption a Science Fiction or an Alternative to Traditional Adoption?*, 41 FAM. CT. REV. 565, 572-73 (2003).

⁹¹ Lambert, *supra* note 39, at 549-50.

embryos to scientific research; or (4) destruction.⁹² For the recipient parents, adoption offers an “alternative method of achieving parenthood that allows them to experience the joys of pregnancy and childbirth”⁹³ Furthermore, because adoption often involves multiple embryos, it provides recipients with the unique opportunity of having multiple biologically-related children.⁹⁴

Although embryo adoption has garnered wide-spread public interest and approval, several points of criticism have emerged.⁹⁵ First, it is argued that unlike traditional adoption, embryo adoptions are completed without the guidance of laws explaining the legal rights and responsibilities of the adoptive parents and their resulting children.⁹⁶ Second, many argue there is no child to be adopted because embryos are not legally recognized as people.⁹⁷ Third, under traditional adoption law, embryos cannot be adopted because biological parents may not terminate their parental rights until after the child is born.⁹⁸ Finally, embryo adoption programs are misleading because they are not regulated in the same ways as traditional adoption programs.⁹⁹

There is no doubt that parentage issues have been significantly complicated by the availability of embryo adoption. Unfortunately, there have been only a few legislative attempts at defining the status of IVF participants and the legal parentage of resulting

⁹² Johnson, *supra* note 40, at 856.

⁹³ Lambert, *supra* note 39, at 531.

⁹⁴ Batsedis, *supra* note 90, at 573.

⁹⁵ See Michelle L. Anderson, *Are You My Mommy? A Call For Regulation of Embryo Donation*, 35 CAP. U. L. REV. 589, 615-18 (2006).

⁹⁶ Lambert, *supra* note 39, at 550.

⁹⁷ Anderson, *supra* note 95, at 615.

⁹⁸ Batsedis, *supra* note 90, at 568-69.

⁹⁹ Scholars opposed to embryo adoption emphasize that most embryo adoption programs do not require pre-placement screening of potential adoptive parents, a typically requirement under traditional adoption statutes. Anderson, *supra* note 95, at 617. However, it is also argued that requiring infertile couples, who have been unsuccessful with IVF procedures using their own genetic material, to submit to a pre-placement screening for embryo adoption would be discriminatory. *Id.* Thus, for embryo adoption programs a pre-placement screening *Catch-22* is created.

children.¹⁰⁰ Nevertheless, the complex parentage issues created by embryo adoption can be resolved using the *Johnson intent standard*.¹⁰¹ In *Johnson v. Calvert*, the Calverts contracted with a gestational surrogate, Ms. Johnson, to carry and delivery their biological child.¹⁰² During the course of pregnancy, Ms. Johnson decided that she wanted to keep the child.¹⁰³ The court gave the baby to the Calverts, stating that the parents were those who “intended to procreate the child – that is, [those] who intended to bring about the birth of a child that [they] intended to raise as her own”¹⁰⁴

The clinic could argue that the *Johnson intent standard* should be applied to the transfer and implantation of the original patients’ unused embryos. In *Johnson*, the court found that the legal parentage rested with the intended parents because “but for their acted on intention, the child would not exist.”¹⁰⁵ Here, the recipient patients should be considered the intended parents because but for their act of receiving and implanting the unused embryos, a child would not be born.

In opposition to the application of the *Johnson intent standard*, the original patients could argue that this standard fails to consider the best interests of the resulting child because it ignores the intended parents’ abilities to care for the child.¹⁰⁶ *Johnson* addressed this concern by stating the intent standard and the child’s best interests were not mutually exclusive considerations and that “the interests of the children, particularly

¹⁰⁰ See FLA. STAT. ANN. § 742.14 (West 2005); LA. REV. STAT. ANN. § 9:121-:133 (West 2000); OHIO REV. CODE ANN. § 3111.97 (West 2005); OKLA. STAT. ANN. Tit. 10, § 556 (West 2007).

¹⁰¹ Kindregan & McBrien, *supra* note 76, at 182-83.

¹⁰² 851 P.2d 776, 778 (Cal. 1993).

¹⁰³ *Johnson*, 851 P.2d at 778. Under California law, giving birth and genetic consanguinity were both grounds for establishing maternity. *Id.* at 781.

¹⁰⁴ *Id.* at 782.

¹⁰⁵ *Id.*

¹⁰⁶ Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 606 (2003).

at the outset of their lives, are ‘[un]likely to run contrary to those of adults who choose to bring them into being.’”¹⁰⁷

Embryo adoption has also been criticized as an attempt to elevate the legal status of the embryo to that of a person.¹⁰⁸ The embryo’s legal status has “deep roots in the U.S. Supreme Court’s constitutional interpretation.”¹⁰⁹ Over time, three competing views on the status of the embryo have emerged: (1) the embryo as property;¹¹⁰ (2) the embryo as a person;¹¹¹ and (3) the embryo as a potential life.¹¹² The embryo as a person theory is based on the idea that life begins at conception and therefore embryos are people.¹¹³ A concern exists that the label “embryo adoption” affords embryos the legal status of people and this elevated status will result in the eventual erosion of abortion rights.¹¹⁴ Nonetheless, as evidenced by *Roe v. Wade* and subsequent abortion rights cases, the Supreme Court’s current position is that embryos are not people.¹¹⁵

¹⁰⁷ *Johnson*, 851 P.2d at 783 (quoting *Shultz*, supra note 18, at 297). See also *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 290 (Cal. Dist. Ct. App. 1998) (applying the *Johnson intent standard* to hold an intended father responsible for the support of his child).

¹⁰⁸ As one prominent bio-ethicist stated; “While helping people have babies is ethically commendable, there is something very strange about extending the use of the term ‘adoption’ to embryos. Children get adopted, but . . . embryos?” Arthur Caplan, Ph.D., Director of the Center for bioethics at the University of Pennsylvania, *The Problem With ‘Embryo Adoption’ Why Is the Government Giving Money to ‘Snowflakes’?*, *Breaking Bioethics*, msnbc.com, available at <http://www.msnbc.msn.com/id/3076556>.

¹⁰⁹ James M. Kramer, *Stemming the Tide: A Call For a Reinterpretation of Embryonic Rights In Light of Emerging Alternatives in Medical Research and Conflicting Areas of Law*, 39 RUTGERS L.J. 703, 723 (2008).

¹¹⁰ See supra notes 52-59 and accompanying text.

¹¹¹ See LA. REV. STAT. ANN. § 9:124 (West 2000) (describing the frozen embryo as a “juridical person.”).

¹¹² See *Davis*, 842 S.W.2d at 597.

¹¹³ *Coleman*, supra note 29, at 66.

¹¹⁴ *Kindregan & McBrien*, supra note 76, at 188-89.

¹¹⁵ See *Roe v. Wade*, 410 U.S. 113, 164-65 (1973) (holding that the state could not interfere with a woman’s right to terminate a pregnancy until the third trimester); see *Planned Parenthood v. Casey*, 505 U.S. 833, 869-76 (1992) (replacing the trimester framework with an undue burden analysis but adhering to the “essence of *Roe*’s original decision.”).

Notwithstanding Supreme Court precedent, New Mexico and Louisiana have enacted statutes that mandate implantation by either the gamete providers or an alternative surrogate couple. See LA. REV. STAT. ANN. § 9:129 (West 2003) (strictly prohibiting the intentional destruction of human embryos); see N.M. STAT. ANN. § 24-9A-3 (West 2003) (absent medical emergency, the fetus cannot be placed at risk). Commentators have responded both in support and in opposition to the statutes above. Compare Jennifer P. Brown, “*Unwanted, Anonymous, Biological Descendents*”: *Mandatory Donation Laws and Laws*

The interim status of the embryo as a potential life could be used to alleviate concerns that embryo adoption will improperly elevate the status of the embryo to that of a person. *Davis* articulated the widely accepted approach¹¹⁶ of the embryo as potential life stating “preembryos 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.”¹¹⁷ Thus, embryo adoption programs could advocate for this interim status to be applied to embryos without offending existing constitutional doctrine.

The argument that embryo adoptions are improper because an adoption cannot take place until after the child is born, places the cart before the horse. Under traditional adoption law, a biological parent’s rights cannot be terminated until after the birth of the child.¹¹⁸ Therefore, an embryo cannot be adopted under traditional adoption laws. However, this does not present a problem for embryo adoption programs because they are not required to follow traditional adoption laws.

Finally, the concern that the term “embryo adoption” is misleading because embryo adoption programs are not required to follow the same regulations as traditional adoption programs is misplaced. It should be noted that there are few laws regulating embryo adoption.¹¹⁹ However, as embryo adoption programs have continued to gain

Prohibiting Preembryo Discard Violate the Constitutional Right to Privacy, 28 U.S.F. L. REV. 183, 186 (1993) (questioning the constitutionality of mandatory implantation laws), with Jill Madden Melchoir, *Cryogenically Preserved Embryos in Dispositional Disputes and the Supreme Court: Breaking Impossible Ties*, 68 U. CIN. L. REV. 921, 963 (2000) (supporting the constitutionality of mandatory implantation statutes).

¹¹⁶ Lambert, *supra* note 39, at 539.

¹¹⁷ *Davis*, 842 S.W.2d at 597.

¹¹⁸ Batsedis, *supra* note 90, at 568.

¹¹⁹ See generally FLA. STAT. ANN. § 742.14 (West 2005) (requiring that embryo donors terminate all parental rights with to their embryos and the resulting children and that only compensation directly related to the embryo adoption is permitted); LA. REV. STAT. ANN. § 9:130 (West 2000) (requiring that excess embryos be donated to another couple for use); OHIO REV. CODE ANN. § 3111.97 (West 2005) (specifying that embryo donor have no rights or obligations to children resulting from donation); OKLA. STAT. ANN. Tit. 10 § 556 (West 2007) (demanding the private written consent of the donating and receiving parties).

popularity, many agencies have modeled their programs after traditional adoption practices.¹²⁰ These programs tend to require detailed information from the donor and recipient patients.¹²¹ Thus, although the practice of embryo adoption remains largely self-regulated,¹²² many leading agencies are stepping forward with a package of services rivaling any well-established traditional adoption agency.

A petition for the termination of the parental rights of the original patients could be used to assist the clinic in transferring the unused embryos. In order to assist with the termination proceeding, the clinic could also petition the family court for the appointment of a guardian ad litem to represent the interests of the embryos. A guardian ad litem is an attorney appointed by the court “to independently identify the child's interests in the litigation and to participate in the litigation in support of those interests.”¹²³ Guardians ad litem have been used to protect and represent the interests of unborn children.¹²⁴

¹²⁰ Nightlight Christian Adoptions was one of the first agencies to take the experience of traditional adoption work and apply it to facilitate embryo adoptions. Johnson, *supra* note 40, at 859. “Nightlight uses its forty years of experience in traditional child adoption to match donating couples with adopting couples.” *Id.*

¹²¹ See Nightlight Christian Adoptions Embryo Adoption Awareness Center, <http://www.embryoadooption.org/faqs/index.cfm>, (last visited Feb. 18, 2009) (listing requirements such as medical history, home study, and counseling).

¹²² The recent birth of octuplets to a mother on public assistance who already had six children has sparked a national debate resulting in a backlash from ethicists, medical providers, and citizens calling for increased government oversight of the nation’s \$3 billion a year self-regulated fertility industry. Scott LaFee, *Octuplet Case Sparks Calls For Fertility-Industry Curbs*, Union Tribune, Feb. 12, 2009, available at <http://www3.signonsandiego.com/stories/2009/feb/12/1n12births233821-octuplet-case-sparks-calls-fertil/?zIndex=51852> (last visited Feb. 20, 2009).

¹²³ Mark Hardin, *Guardians Ad Litem For Child Victims In Criminal Proceedings*, 25 J. FAM. L. 687 (1987).

¹²⁴ Typically, the guardian was assigned to protect the future financial interests of the unborn children. See *Leonardini v. Wells Fargo Bank & Union Trust Co.*, 280 P.2d 81 (Cal. 1955) (holding that the guardian was obligated to protect the interests of the unborn beneficiaries). See *Deal v. Wachovia Bank & Trust Co.*, 11 S.E.2d 464 (N.C. 1940) (refusing to terminate a trust because the interests of the unborn child could be diminished). However, the cases stand for the more general proposition that a guardian can be appointed to represent the interests of unborn children.

Although most parental rights termination proceedings are initiated by social service agencies, many state statutes permit other parties to file a petition as well.¹²⁵

Assuming the case is brought in a jurisdiction that permits a petition to be filed by an interested party, the clinic could file for termination based on abandonment.¹²⁶

Abandonment is found when a parent willfully demonstrates a settled purpose to forego all duties and relinquish all parental rights to a child.¹²⁷ Here, for over seven years, all of the patients completely ignored their responsibilities associated with the care and maintenance of their embryos. Under these facts, a court could find abandonment. Once the parental rights of the original patients were terminated, the clinic could then transfer the embryos of the original patients without liability.¹²⁸

¹²⁵ See ALA. CODE § 26-18-7 (West 2009) (allowing any “interested person” to file a petition); ARIZ. REV. STAT. ANN. § 8-533 (West 2009) (permitting petition by any person with a legitimate interest); FLA. STAT. § 39.802 (West 2009) (allowing any person with knowledge of the facts alleged to file).

¹²⁶ This abandonment argument is grounded in child protection laws. However, an alternative abandonment argument could be asserted if the applicable jurisdiction adopts § 504 of the Model Act Governing Assisted Reproductive Technology (“Model Act”). See Charles P. Kindregan, Jr., & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L. Q. 203, 218 (2008). The American Bar Association formerly adopted the Model Act on February 11, 2008. *Id.* at 203. Although the Model Act has not yet been adopted by any jurisdictions, a few states are considering it. E-mail from Professor Charles P. Kindregan, Jr., Distinguished Professor of Law for Research & Scholarship, Suffolk University Law School, to Francis Jamison (Feb. 23, 2009, 01:50 EST).

Under the Model Act, an embryo is abandoned when: (1) at least five years have passed since the embryo was created; (2) the clinic has notified the interested participants; and (3) the interested participants have signed an agreement detailing the standards governing the disposal of abandoned embryos. Kindregan, & Snyder, 42 FAM. L. Q. at 219. A finding of abandonment means that the clinic can dispose of the embryos without liability, absent criminal intent, gross negligence, or intentional misconduct. *Id.* Here, seven years have passed since the embryos were created, the clinic has notified the interested participants through demands for storage fees, and the original patients signed an agreement detailing the disposition of the embryos in the case of abandonment. Thus, the embryos of the patients who had agreements with the clinic would be considered abandoned and the clinic could dispose of them without liability.

¹²⁷ See *Natural Mother v. Paternal Aunt*, 583 So. 2d 614, (Miss. 1991). The embryo abandonment argument requires the court to apply family law principles typically reserved for children. This Comment recognizes the possible concern that such an application might begin to elevate the legal status of the embryo. However, the application of abandonment statutes to embryos would assist clinics across the country in the disposal of the thousands of unclaimed embryos while at the same time providing couples with the opportunity to experience parenthood. Furthermore, the Supreme Court has already decided the legal status of embryos.

¹²⁸ Typically, in order to effectuate an adoption the biological parents must consent. Notwithstanding this general rule, consent of the parents to the adoption of their child is generally not necessary where parental

Conclusion

The complex questions created when the science of IVF intersects with established legal constructs such as contract, property, probate, and parentage escape simple solutions. Under contract law, the outcome of the disputes between the clinic and the original patients depends largely on the approach adopted by the court. Property law principles suggest that the clinic could obtain ownership of the embryos of the patients who held agreements with it because their agreements ultimately extinguished the patients' property rights. Under probate law, most of the issues interfering with the clinic's ability to transfer the embryos could be resolved by obtaining a declaration of legal parentage. Finally, embryo adoption has further complicated existing parentage issues. However, the benefits of embryo adoption far outweigh the perceived shortcomings. Further, the application of child protection laws could be utilized by the clinic to assist in transferring the unused embryos.

rights have been terminated for abandonment. *See generally* Matter of Adoption of J. M. H., 564 N.W.2d 623 (N.D. 1997); In re Adoption of M. J. C., 590 N.E.2d 1095 (Ind. Ct. App. 3d Dist. 1992); In re Groleau, 585 N.E.2d 726 (Ind. Ct. App. 3d Dist. 1992); Matter of Adoption of Doe, 543 So. 2d 741 (Fla. 1989); Hucks v. Dolan, 343 S.E.2d 613 (S.C. 1986); Natural Mother, 583 So. 2d 614; In re Adoption of W. B. L., 681 S.W.2d 452 (Mo. 1984).