

EMBRYO ADOPTION: DEFUSING THE LEGAL LANDMINE

I. Introduction

Dr. Margo Rhinehart is in the business of building families. She is not a matchmaker, a social worker, or a marriage counselor. Instead, Dr. Rhinehart is an embryologist at a fertility clinic. Aside from providing *in vitro* fertilization services for women wanting to bear their own genetic children, Dr. Rhinehart would like to help even more families by facilitating adoptions.

Embryo adoption, that is.

Dr. Rhinehart's clinic has a surplus of abandoned, cryopreserved (frozen) embryos. Dr. Rhinehart has many patients interested in adopting embryos and giving these frozen humans a chance at life, yet Dr. Rhinehart has not permitted any of these adoptions to take place. The embryos remain frozen and the families remain childless. Why?

Dr. Rhinehart faces one final and significant obstacle: will the law permit her to facilitate these adoptions?

II. Summary of Facts

Six different patients have abandoned their embryos at Dr. Rhinehart's clinic. None of these patients has paid the clinic's storage fee or had any other contact with the clinic for more than seven years. Four patients signed a document prior to creating the embryos that indicated they planned to retain the embryos for future family building efforts. They also agreed that all of their rights to the embryos would cease if they did not give the clinic further instructions within five years of the date the embryos were created. The fifth patient, a single woman, used donated sperm and her own eggs to create her embryos. She did not sign a document indicating her preference for disposition of unused embryos but promised the clinic that she would contact them later with her decision. She has not done so. The sixth patient, also a single woman, died

more than five years ago. The right to decide on the disposition of her unused embryos was given to her executor in her will. The executor has not paid the storage fees and refuses to make a decision regarding the disposition of the embryos. Each of the six patients had at least one live birth from the original embryos they created.

III. Issues of Law

Embryo adoption involves the intersection of several bodies of law. Property law, contract law, and parentage law could all potentially govern an embryo adoption. The constitutional right to reproductive autonomy, including the right to procreate and the right not to procreate, is also implicated.¹ In practice, no consensus exists as to the status of the embryo in relation to its gamete providers, potential donees, and the fertility clinic. Dr. Rhinehart can use elements from several different bodies of law to facilitate embryo adoptions and minimize her risk of liability from the gamete donors.

A. Are the Embryos Abandoned?

Both property law and contract law would deem all of the embryos from these six patients abandoned. The simple property law definition of abandoned is “property that the owner voluntarily surrenders, relinquishes, or disclaims.”² Another formulation provides that “abandonment means the voluntary relinquishment by the owner of all right, title, claim, and possession to the property, with the intention of terminating ownership and not reclaiming or resuming future possession, ownership, or enjoyment, but without vesting the property in any particular person.”³ Four of the patients signed a document at the time of the creation of the embryos that declared that all of their rights to the embryos would cease if they did not give the clinic further instructions within five years of the date the embryos were created. The embryos

¹ J.B. v. M.B., 170 N.J. 9, 25 (N.J. 2001).

² *Black's Law Dictionary* 573 (3rd pocket ed. 2006).

³ 25 Am. Jur. Proof of Facts 2d *Abandonment of Tangible Personal Property* § 685 (2008).

created under this agreement meet the abandoned property standard: the patients have voluntarily relinquished all right to the embryos and have not vested the property in a particular person.

Assuming the agreements are legally enforceable contracts, the clinic affirmatively placed the burden of notification on the patients and the patients failed to notify the clinic.⁴ Such a failure would constitute voluntary relinquishment. The remaining two patients also have abandoned their embryos. The patient who did not sign any documents but promised to contact the clinic later with her decision has not done so. Again, the burden of choosing disposition was placed on the patient and she failed to make a decision. Other authority supports this position. The American Bar Association's *Model Act Governing Assisted Reproduction Technology* states that an embryo is deemed abandoned only if at least five years have elapsed since creation of the embryo.⁵ None of the six patients has contacted the clinic for more than seven years.

The United States District Court for the Eastern District of Virginia, in *York v. Jones*, held that a bailment relationship was created between the patients and the medical college providing *in vitro* fertilization (IVF) treatments. Finding that the signed informed consent recognized the patients' property rights in the excess embryo, the court stated that the "essential nature of 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."⁶

Williston on Contracts states that

[a] bailment may be defined as the rightful possession of goods by one who is not the owner. Bailment has also been defined "as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he

⁴ Susan L. Crockin, *The "Embryo" Wars: At the Epicenter of Science, Law, Religion, and Politics*, 39 FAM. L.Q. 599, 629 (2005).

⁵ American Bar Association Proposed Model Act Governing Assisted Reproduction § 504 (2006). The Act lists several other criteria for determining abandonment. Note that the Act is a recommendation and not binding law.

⁶ 8A Am. Jur. 2d *Bailments* § 178 (2009).

reclaims it, as the case may be.”⁷

Even under bailment law, when Dr. Rhinehart’s patients (bailors) did not contact the clinic (bailee) for more than seven years, the patients should be deemed to have abandoned the property and the clinic can become the owner of the property.

The same legal theory of abandonment would likely apply to the deceased patient’s embryos. The executor, after failing to pay the storage fees or advise the clinic as to the disposition of the embryos, has abandoned the embryos.

Of course, the issue is more complex than if the embryos were abandoned. Though abandoned, the clinic still needs to determine if the embryos are property, if, as property, embryos can be governed by contract law, if the patients would have any rights related to future children born from their embryos, and how to ensure that adoptive parents become the legal parents of any resulting children.

B. Are the Embryos Property?

Classifying the embryos as property would ease the transition from gamete provider to clinic to donee. Though the purpose of embryo adoption is to give a human embryo the chance to continue the path of development to maturity, which has already begun,⁸ property law would permit the clinic to regulate the relationship between patients and embryos by contract and permit the clinic to donate the embryos to adoptive couples without receiving the express permission of the gamete providers.⁹

Louisiana provides embryos with more protection than any other state, by statute defining

⁷ Richard A. Lord., 19 Williston on Contracts § 53:1 (4th ed.) (2008).

⁸ Dan McConchie, *Defending Life* 2008, 354 (2008).

⁹ Shelly R. Petralia, Note, *Resolving Disputes over Excess Frozen Embryos Through the Confines of Property and Contract Law*, 17 J.L. & HEALTH 103, 119 (2003).

an embryo as a human being.¹⁰ The majority of other states addressing this issue by statute or case law deem an embryo to fall somewhere along a continuum from mere property¹¹ to an entity deserving special respect because of the potential for human life.¹² In Louisiana, an embryo is a juridical person which cannot be owned and is subject to the protection of state law.¹³ Disputes concerning the embryo must be resolved in the best interests of the embryo, a rule that is analogous to adoption law's "best interests of the child" standard.¹⁴ IVF facilities have a duty of safekeeping the embryos,¹⁵ and doctors are considered the temporary guardians of embryos until implanted in the womb.¹⁶ The statute also refers to "adoptive implantation" of embryos (as opposed to donation) and requires the consent of both parents before adoption.¹⁷ Oklahoma's definition of unborn child includes an embryo, though the wording of the statute could lead to an interpretation that only embryos conceived in the womb are considered unborn children. The statute states that an unborn child is the "unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth."¹⁸ The law also requires written consent to donate embryos and that the doctor performing the transfer must file the consent forms with a court within the jurisdiction.¹⁹

Louisiana and Oklahoma are the only two states to explicitly define an embryo as a human being. Other state statutes addressing this issue allow the regulation of embryo donation by some kind of contract or informed consent, implying that the embryo is considered transferable property at least for the purposes of donating the embryo for implantation. Property

¹⁰ La. Rev. Stat. Ann. § 9:123 (2006).

¹¹ York v. Jones, 717 F. Supp. 421, 426-27 (E.D. Va. 1989).

¹² Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

¹³ La. Rev. Stat. Ann. § 9:123 (2006).

¹⁴ *Id.* at § 9:131.

¹⁵ *Id.* at § 9:127.

¹⁶ *Id.* at § 9:126.

¹⁷ *Id.* at § 9:130.

¹⁸ Okla. Stat. Ann. tit. 63 § 1-730 (West 2006).

¹⁹ Okla. Stat. Ann. tit. 10 § 556 (West 2006).

rights traditionally include “the rights to control, possess, use, exclude, profit from and dispose of assets.”²⁰ Some of these rights clearly apply to the current treatment of embryos, though the issue is complicated because two people have equal rights to an embryo²¹ and, at some point, the embryo can move from mere ‘property’ to fully human under every definition of human being. Because of the dearth of state law defining the rights of interested parties involved in embryo creation, donation, and adoption, much of the law has developed judicially. Several cases treat embryos as simply property while others decide that though embryos are less than human, they still deserve special respect.

In the case *In the Matter of the Marriage of Dahl and Angle*, the Court of Appeals of Oregon concluded that “the contractual right to possess or dispose of the frozen embryos is personal property that is subject to a ‘just and proper’ division under [Oregon divorce law].”²² Though the court found that the contractual right was property, rather than finding that the embryos themselves were property, the result is the same. The embryos could be contracted over and disposed of however the parties wished without regard to any higher status the embryos might inherently possess. The court in *York v. Jones* upheld an informed consent agreement that recognized the patient’s “property rights in the [embryo]” and that recognized the medical hospital had “limited [its] rights as bailee to exercise dominion and control over the [embryo].”²³ The court found the agreement consistent with the position of the American Fertility Society, which found that “[i]t is understood that the gametes and concepti are the property of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these

²⁰ *Black’s, supra*.

²¹ Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169, 185 (2004).

²² *In the Matter of the Marriage of Dahl and Angle*, 222 Or.App. 572, 580 (Or. Ct. of App. 2008).

²³ *York, supra*, at 426-27.

items...”²⁴ If the embryo is the property of gamete providers, the gamete providers can also dispose of that property without considering the requirements of adoption law or parentage law, and the clinic, once the gamete providers have relinquished their rights to the embryo, can dispose of the embryos as it wishes without weighing the constitutional rights to reproductive autonomy that the gamete donors possess. In *J.B. v M.B.*, a divorced couple disagreed about the disposition of seven embryos remaining after a successful round of IVF. The court treated the matter merely as one of contractual interpretation, taking into account the parties’ rights to procreate and avoid procreation.²⁵ The court did not endow the embryos with special status because of their potential for life. In *Kass v. Kass*, a couple divorcing only weeks after executing their informed consents for the IVF procedure disagreed as to the disposition of the embryos. The Court of Appeals of New York concluded that the embryos were not recognized as persons for constitutional purposes.²⁶ The court also stated that because the question of who has dispositional authority over the embryos “is answered in this case by the parties’ agreement, for purposes of resolving the present appeal we have no cause to decide whether the pre-zygotes are entitled to ‘special respect.’”²⁷ The court looked only at the underlying contract to determine the disposition of the embryos rather than considering public policy concerns over whether the embryos were merely property or something more.

More cases treat the embryo as an entity deserving heightened respect than treat the embryo as mere property. Classifying the embryo as an entity deserving of special respect, rather than classifying it as mere property yet not fully human, complicates a clinic’s role in donating abandoned embryos to other couples but certainly does not prohibit it. In *Davis v.*

²⁴ *Id.* at 427 fn5.

²⁵ *J.B.*, *supra*.

²⁶ *Kass v. Kass*, 696 N.E.2d 174, 179 (N.Y. Ct. of App. 1998).

²⁷ *Id.*

Davis, the seminal case taking this position, a divorcing couple, both the gamete providers, could not agree on the disposition of their embryos. On the issue of the status of the embryos, the court concluded that “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. It follows that any interest that [wife] and [husband] have in the preembryos in this case is not a true property interest.”²⁸ The court determined the fundamental issue was whether the parties became parents and held that since two individuals contributed genetic material to create the embryos, the consent of both people was required for donation or other use of the embryos.²⁹

Further authority for this position is found in the report of the Ethics Committee of the American Fertility Society. The report states that

the preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The preembryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential.³⁰

All of the above cases involved gamete providers who are now divorcing and disagree as to the disposition of their embryos. In Dr. Rhinehart’s situation, however, the gamete providers are not in disagreement over disposition of their embryos. The gamete providers signed a document that relinquished all rights to their embryos if certain contingencies occurred. In theory, the patients have agreed to the possibility that the clinic would donate their embryos to others. Because both gamete providers agree, the cases that award disposition rights to the party that did not want to become a genetic parent would not bar the clinic from permitting adoption of these embryos under a strictly property theory.

²⁸ *Davis, supra.*

²⁹ *Id.* at 598.

³⁰ *Id.* at 596.

C. Does Contract Law Govern the Disposition of the Embryos?

Because almost all jurisdictions classify embryos as something less than a human life, contract law can govern their creation, disposition, and protection. The Committee on Medicolegal Problems and the Council on Ethical and Judicial Affairs of the American Medical Association recommends that agreements for future disposal of embryos should be enforceable.³¹ Though traditional adoption law does not permit agreements to relinquish children for adoption to be enforceable until after the birth of the child,³² embryos have not been treated as children and most states do not heavily regulate the procedures of IVF clinics. Thus, agreements entered between the gamete providers and the clinics at the time of the creation of the embryos should be enforceable. Several states have addressed this issue.

California law requires doctors to inform patients of embryo disposition options. Written consent is required before the clinic can initiate a change in the condition of an embryo. California also makes it a criminal offense to implant another's embryo without the consent of the provider and the recipients.³³ Colorado allows the gamete provider to withdraw consent regarding the disposition of embryos up until the placement of the embryo.³⁴ After placement, the donee couple would have protected rights in the implanted embryo. Connecticut requires fertility centers to provide patients with options for embryo disposition.³⁵ Oklahoma law, which uses the word embryo in its definition of unborn child, requires the written consent of the donating couple and recipient couple for a legal embryo donation. The doctor performing the transfer must file the consent forms with a court within the jurisdiction.³⁶ Texas requires that the

³¹ Petralia, *supra*, at 124.

³² Kindregan, *supra*, at 175.

³³ Cal. Penal Code § 367g (West 2004).

³⁴ Colo. Rev. Stat. § 19-4-106 (2003).

³⁵ Conn. Gen. Stat. § 19a-32d (2005).

³⁶ Okla. Stat. Ann. tit. 10 § 556 (West 2006).

donation of embryos be in writing.³⁷ Any resulting child is presumed to be the child of the recipient husband and wife.³⁸ In Florida, if both parties consented in writing to the use of the donated embryos, a child conceived in embryo donation is presumed to be the child of the gestating mother and her husband.³⁹ Embryo donation also “signifies the relinquishment of all maternal/paternal rights and obligations for any children resulting from the donation.”⁴⁰

Courts have gone both ways on this issue, some finding the initial IVF agreement providing for the disposition of extra embryos enforceable and some finding that public policy or lack of informed consent bars enforcing the prior agreement. In *Davis*, the divorcing couple did not have an agreement specifying the disposition of their excess embryos. The court balanced the parties interests to determine the proper disposition, but also said that “an agreement regarding disposition of any untransferred preembryos in the event of contingencies...should be presumed valid and should be enforced as between the progenitors.”⁴¹ The court allowed for modification of the agreement by the parties, but “in the absence of such agreed modification, we conclude that the prior agreements should be considered binding.”⁴² The court determined that though the gamete providers do not have a true property interest in the embryos, “they do have an interest in the nature of ownership, to the extent that they do have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law...”⁴³ In *Kass v. Kass*, the court found that the divorcing couple’s disagreement over disposition of their embryos was solely a matter of contract law. The court enforced a consent form signed by the parties prior to their IVF attempts, upholding the lower court that found “when parties to an IVF

³⁷ Tex. Fam. Code Ann. § 160.305 (Vernon 2004).

³⁸ *Id.*

³⁹ Fla. Stat. Ann. § 742.11 (West 2006).

⁴⁰ *Id.* at §§ 742.14, 873.05.

⁴¹ *Davis, supra.*

⁴² *Id.*

⁴³ *Id.* at 596.

procedure have themselves determined the disposition of any unused fertilized eggs, their agreement should control.”⁴⁴ The court listed a series of uncertainties related to IVF that are complicated by cryopreservation (for example, divorce, death, birth of other children) and stated that “[t]hese factors make it particularly important that courts seek to honor the parties’ expression of choice, made before disputes erupt, with the parties’ over-all direction always uppermost in the analysis.”⁴⁵ Because of this host of contingencies, and contract principles in general, “[a]dvance agreements as to disposition would have little purpose if they were enforced only in the event the parties continued to agree.”⁴⁶ Thus of utmost importance is whether the agreements clearly express the parties’ intent regarding disposition of their excess embryos.⁴⁷

In *Cahill v. Cahill*, a couple had entered a contract with the University of Michigan Medical School for the IVF procedure. Upon divorce, the court refused to award the embryos to either party without a demonstration that the embryos were property of the marriage. Instead, because neither party produced the actual signed agreement, the court looked to a form agreement used by the University which stated that “[wife and husband] agree that all control and direction of zygotes will be relinquished to the university...if we have not remained in contact with the IVF program for a period of time exceeding three years.”⁴⁸ In *Litowitz v. Litowitz*, the husband’s sperm was used to fertilize donated eggs. After divorce, the wife wanted the embryos implanted in a gestational surrogate while the husband wanted them donated for adoption.⁴⁹ The Washington Supreme Court determined that because the wife did not have a biological connection to the child, her interest was strictly contractual.⁵⁰ The court ordered

⁴⁴ Kass, *supra*, at 177.

⁴⁵ *Id.* at 180.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Cahill v. Cahill*, 757 So.2d 465, 466 (Ala. Civ. App. 2000).

⁴⁹ *Litowitz v. Litowitz*, 146 Wash.2d 514 (2002).

⁵⁰ *Id.* at 526-27.

adherence to the underlying contract, which called for the thawing and disposal of the embryos if the embryos were not used in five years, despite that outcome being neither party's current preference.⁵¹ *Roman v. Roman* involved yet another divorcing couple disagreeing as to the disposition of their embryos. The informed consent both parties signed directed that in the event of divorce the embryos be destroyed, but the wife now wanted the embryos for implantation. The Court of Appeals of Texas looked at state statutes regulating assisted reproduction and determined that "the public policy of this State would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for an embryo's disposition in the event of a contingency, such as divorce, death, or changed circumstances."⁵² The court followed *Davis*, agreeing that the advance directives should be presumed valid and enforced between the progenitors.⁵³ "We believe that allowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of this State and the interest of the parties."⁵⁴

Several jurisdictions have taken the position that an underlying contract or agreement entered into at the commencement of the relationship with the IVF clinic is not binding on the parties in a later dispute. In *A.Z. v. B.Z.*, the Massachusetts Supreme Court held that an agreement containing a specific clause awarding custody of a couple's frozen embryos to the wife was unenforceable as a matter of public policy. Though the husband and wife had both signed an agreement with the fertility clinic, the court stated that "even if the [spouses] had entered into an unambiguous agreement...we would not enforce an agreement that would compel

⁵¹ *Id.* at 533.

⁵² *Roman v Roman*, 193 S.W.3d 40, 49-50 (Tex. Ct. of App. 2006).

⁵³ *Id.* at 50.

⁵⁴ *Id.*

one donor to become a parent against his or her will. As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement.”⁵⁵ Similarly, the court in *J.B. v. M.B* found that the “better rule” is to “enforce agreements entered into at the time in vitro fertilization is begun, 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 preembryos.”⁵⁶ The court believed that in a majority of cases, the prior agreement would control. “Only when a party affirmatively notifies a clinic in writing of a change in intention should the disposition issue be reopened.”⁵⁷

These cases, though stating a preference for reliance on an underlying agreement, also render the agreement almost meaningless by allowing the parties to change their minds in the face of a conflict. Only because there is a conflict does a contract ordinarily need to be enforced. The Supreme Court of Iowa took a slightly different approach to a similar dispute in *In re Witten*. The divorcing couple had signed an informed consent providing that the embryos could only be transferred upon joint approval of the parties. Upon divorce, the wife wanted the embryos implanted in her or a surrogate so she could have a genetically linked child. The husband did not want the embryos destroyed but did not want the wife using them, either. The court identified three approaches to resolving disputes over frozen embryos: the contractual approach, the balancing test, and the contemporaneous mutual consent model.⁵⁸ The court said that in 2003, the prevailing view was the contractual approach—“that contracts entered into at the time of *in vitro* fertilization are enforceable so long as they do not violate public policy.”⁵⁹ The court noted that the contractual approach is often criticized because it “insufficiently protects the individual and societal interests at stake.” The court cited such interests as individual identity, inability to

⁵⁵ *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-58 (Mass. 2000).

⁵⁶ *J.B.*, *supra*, at 29.

⁵⁷ *Id.*

⁵⁸ *In re the Marriage of Witten*, 672 N.W.2d 768, 774 (Iowa 2003).

⁵⁹ *Id.* at 776.

make decisions ex-ante regarding life-altering events, and the difficulty of using contracts “to govern the disposition of human tissue with the potential to develop into a child.”⁶⁰ The court briefly addressed the balancing test approach but rejected it on the grounds that the proper decision-maker regarding the disposition of excess embryos are the progenitors themselves rather than the courts. The court then adopted the contemporaneous mutual consent model. This model is premised on the beliefs that “decisions about the disposition of frozen embryos belong to the couple that created the embryo”⁶¹ and that at what time the partners consent matters.⁶² That court said that it thought “judicial decisions and statutes in Iowa reflect respect for the right of individuals to make family and reproductive decisions based on their current views and values...[J]udicial enforcement of an agreement *between a couple* regarding their future family reproductive choices would be against the public policy of this state.”⁶³ Instead, the court held that agreements are enforceable and binding, subject to the right of either party to change his or her mind about the disposition of the embryos.⁶⁴ If one of the parties does change his or her mind, the signed authorization of both parties is required for the transfer, release, disposition or use of the embryos.⁶⁵ If no such mutual consent occurs, the status quo is maintained, which means the embryos will probably be frozen indefinitely.⁶⁶ The court does emphasize, however, that agreements between donors and clinics are still enforceable.

We recognized a disposition or storage agreement serves an important purpose in defining and governing the relationship between the couple and the medical facility, ensuring that all parties understand their respective rights and obligations. In fact, it is this relationship, between the couple on one side and the medical facility on the other, that dispositional contracts are intended to address. Within this context, the medical facility and the donors should be able to rely on the

⁶⁰ *Id.* at 777.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 782.

⁶⁴ *Id.*

⁶⁵ *Id.* at 783.

⁶⁶ *Id.*

terms of the parties' contract.⁶⁷

This is the situation Dr. Rhinehart and her patients find themselves in. The progenitors do not disagree as to the disposition of their embryos. Rather, the clinic wishes to know if it can exercise a contractual right to ownership of the embryos and dispose of them as it wishes, which is to donate the embryos to other couples for adoption. Four patients at Dr. Rhinehart's clinic signed a document prior to creating embryos agreeing that all of their rights to the embryos would cease if they did not give the clinic further instructions within five years of the date the embryos were created. If this document is a contract, it should effectuate the transfer of the right to dispose of the embryos from the patients to the clinic because the patients (both gamete donors) presumably agree, through silence, on the embryos' disposition.

The document signed by four of the patients should be treated as contracts. The elements of a contract are an offer from one party to the other, acceptance by the other party, and consideration supporting the offer and acceptance.⁶⁸ The clinic offered to perform the IVF procedure for payment and for acceptance of certain terms contained in the document.⁶⁹ The couples accepted this offer with their signature on the document, which demonstrates "unconditional assent to the terms of the offer."⁷⁰ Consideration represents a bargained-for exchange.⁷¹ In the IVF context, the consideration is the exchange of a promise of payment for services.⁷² *Kass* supports a pure contractual regulation of the relationship between the patients, the embryos and the clinic. The court "determined, using principles of contract interpretation, that the informed consents signed by the parties unequivocally manifest their mutual intention

⁶⁷ *Id.* at 782.

⁶⁸ *Petralia, supra*, at 128-29.

⁶⁹ *Id.* at 129.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

that in the present circumstances the pre-zygote be donated for research to the IVF program.”⁷³ In the present circumstances, the agreement manifests the mutual intention that the patients’ rights to the embryos would cease after five years. Because the parties no longer have rights to the embryos, their interest in the disposition of their embryos for donation, research, or destruction no longer exists. Though the progenitors might make an argument that they have a constitutional right to avoid genetic parenthood, by agreeing to relinquish the embryos after five years, they have presumably accepted the possibility the clinic will use the embryos for implantation in other women. Ideally, the agreement has addressed this issue and informed the progenitors of this possible consequence. IVF contracts have been challenged on several grounds, including impracticability, foreseeability, adhesion, changed circumstances and void as against public policy.⁷⁴ These disputes typically arise, however, when one gamete provider prefers one method of disposition while the other prefers another. Where both gamete providers are agreed that they will relinquish their rights to the embryos, the contract between the clinic and the patients should be enforced.

Another issue is whether the fifth patient, who did not sign a document regarding disposition prior to creating her embryos, entered into an oral contract by promising to notify the clinic later with her decision. A contract is simply a legally enforceable promise and is not required to be in writing. The fifth patient promised to contact the clinic later with her decision regarding disposition of excess embryos. If her promise is an agreement to notify the clinic as to her wishes, the burden of notice is placed on her and her failure to meet that burden should result in the relinquishment of the embryos to the clinic. The clinic should make a good faith effort to contact this patient and ascertain her wishes but if it is not able to do so, the clinic should treat

⁷³ Kass, *supra*, at 180.

⁷⁴ Petralia, *supra*, at 130-34.

the embryos as abandoned. The fact that these embryos were the product of donated sperm should not change this analysis. Anonymous sperm donors are not held liable for support obligations to resulting children⁷⁵ and contracts between the sperm donor and donee, disclaiming that the sperm donor has any support obligations to the resulting child, have been upheld.⁷⁶

The sixth patient raises some unique legal issues. She is deceased and left the right to decide on the disposition of her unused embryos to the executor of her will. This approach seems to treat the right to dispose of the embryos as a contractual right, as did the court in *In re Dahl*. The sixth patient is not attempting to pass the embryos themselves through her will (which would require compliance with state probate law and probably the Uniform Anatomical Gift Act⁷⁷) but rather to transfer decision making authority to her executor. Though transfer of embryos has raised issues of the gamete providers' constitutional right to procreational autonomy,⁷⁸ this patient expressed no preference in life as to her feelings regarding after-born genetic children. The embryos are now considered under the control of the executor. If the executor refuses to pay the storage fees, the embryos should be considered abandoned, all of the executor's rights to the embryos should cease, and the embryos should be relinquished to the clinic's control.

D. Does Parentage Law Control the Disposition of the Embryos?

Traditional adoption law does not provide direct authority for the facilitation of embryo adoptions. In many states, pre-birth agreements to adopt or relinquish a child are void as against public policy.⁷⁹ In the embryo adoption context, pre-birth, and even pre-implantation

⁷⁵ Uniform Parentage Act § 702 (2000).

⁷⁶ *Ferguson v. McKiernan*, 940 A.2d 1236, 1238 (Pa. 2007).

⁷⁷ Kathleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 242 (1997).

⁷⁸ *J.B. v. M.B.*, *supra*.

⁷⁹ *Kindregan*, *supra*, at 175.

agreements, seem necessary for the process to even begin. Traditional parentage law looks first to genetic relationships in determining disputes involving parental rights and custody.⁸⁰ In the context of embryo adoption, the genetic parents agree to relinquish their parental rights and in exchange, another couple agrees to accept all parental rights and obligations for any resulting children. An intent-based model for determining legal parenthood would better suit embryo adoption than traditional models, particularly considering that most states do not recognize the embryo as fully human. Courts have struck down a “best interests of the child standard” to regulate the disposition of embryos because that standard treats the embryo as a born human. Yet the law must acknowledge that an embryo has the potential to become a born human. This can be done through relinquishing and accepting parental rights by contract. “This change of intent of the progenitor couple should be memorialized in a contract that explains and protects the rights of all involved parties.”⁸¹

Gestational surrogacy provides a more direct comparison to embryo adoption than either adoption or parentage law.

The intent of this arrangement is that any resulting child is for the benefit of a donee couple, and is not intended to be the child of the birth mother. The intended parents can be the genetic parents. Alternatively, the intended parents might have no genetic connection with the embryo, if that embryo was produced in vitro with gametes provided by donors other than the intended parents.⁸²

Because genetics, biology, and traditional determinants of parenthood such as childbirth no longer represent who are a child’s legal parents, the law should determine parenthood by looking at who intended to become the parents. “Under the intent-based theory to legal parenthood, the parties who intend to rear the child are the legal parents. The theory cannot be defeated if the parties’ intentions are stipulated in a carefully drafted, legally binding contract that is recognized

⁸⁰ 67A C.J.S. *Parent and Child* § 115 (2008).

⁸¹ Kindregan, *supra*, at 180.

⁸² *Id.*

by applicable law.”⁸³ The intent theory has been applied in a gestational surrogacy context⁸⁴ and some commentators argue that it should also apply in the embryo adoption context.

The transfer of an embryo creates a biological mother and a birth mother. They are two different women, but both cannot be the legal mother. In the context of a gestational surrogacy situation, the intended mother should be considered the legal mother because she intended to raise the resulting child as her own. Likewise, in an embryo adoption scenario, the embryo recipient/birth mother should be considered the legal mother to remain consistent with the intent-based model of legal parenthood.⁸⁵

E. What Legal Action Should the Clinic Take to Facilitate Embryo Adoption?

The clinic should take a variety of actions to facilitate these adoptions while minimizing liability. A clear informed consent document from both donors and donees should be required.⁸⁶ The agreement Dr. Rhinehart’s patients have already signed could be construed as consenting to the donation because they have agreed that all rights to the embryos will cease. The American Society of Reproductive Medicine recommends that abandoned embryos (embryos stored “in excess of five years with no prior instructions having been given by the patients and for whom diligent efforts to contact have been unsuccessful”⁸⁷) not be used for any purpose, including donation for other’s use, without the consent of the patients.⁸⁸ These guidelines are recommendations only, and not binding, but ideally the agreement Dr. Rhinehart’s patients signed presents donation as a potential outcome for any abandoned embryos. The clinic could then file the consent forms with a court within the jurisdiction, as required by law in Oklahoma.⁸⁹

The adoptive couples should also, at minimum, sign documents that reflect the

⁸³ *Id.* at 181.

⁸⁴ *Id.* at 182-83.

⁸⁵ *Id.*

⁸⁶ Crockin, *supra*, at 613.

⁸⁷ *Id.* at 628.

⁸⁸ *Id.*

⁸⁹ Okla. Stat. Ann. tit. 10 § 556 (West 2006).

obligations they are undertaking. A contract between the donors and donees “that clearly reflects their respective roles, obligations, intentions and expectations”⁹⁰ would be helpful in a typical donor/donee scenario, but probably not practical in a scenario involving abandoned embryos.

A judicial order of parentage would protect both the clinic and the adoptive couples. Such an order “might add another layer of protection for the parties, similar to those created for intended parents of children born to gestational carriers. Courts have been receptive to actions that are brought for the purpose of designating parental rights and responsibilities to protect the adults and children involved.”⁹¹ Embryo adoption could have other legal similarities to gestational surrogacy. “In both cases, a pregnant woman’s status is being defined by the intentions of the parties who together created the pregnancy, with opposite intentions leading to opposite legal characterizations.”⁹² Similarly, an agreed pre-birth action “brought to clarify legal parentage of children born through embryo donation, with orders of legal parentage to become effective upon the child’s birth”⁹³ would be prudent.

A donation consent form, signed by the gamete providers and then notarized, agreeing to waive and release any claims to the embryos or any resulting offspring, would protect the clinic from future liability.⁹⁴ Without the ability to contact the gamete providers, the clinic could have the donee couple sign and notarize a consent form accepting full responsibility for and parental rights to any implanted embryos.

The clinic could also direct a court to enter a declaratory judgment recognizing the intended parents as the legal parents of any resulting child before it transfers the embryos.⁹⁵ This

⁹⁰ Crockin, *supra*, at 613.

⁹¹ *Id.* at 614.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ In the Matter of the Marriage of Dahl and Angle, 222 Or.App. 572, 576 (Or. Ct. of App. 2008).

⁹⁵ Kindregan, *supra*, at 179.

action would protect the clinic, the intended parents, and any resulting child from any confusion that might result after a baby is born to parents to whom it has no genetic relationship. The donee couple could also consent to the adoption by executing a notarial act of adoption, as is required in Louisiana.⁹⁶ The clinic should attempt to create documentation that the donee parents intend to become the legal parents of any resulting child as early as it can in the donation process.

Finally, the clinic should also implement internal procedures that protect itself, the donee couples, and any resulting children from a variety of contingencies. The clinic should select donee couples as it would select families for traditional adoption, performing studies of the household, requiring mental health exams, and fulfilling other statutory criteria for determining fit parents for already-born children who are up for adoption. Though the law does not adopt a “best interests of the child” standard when it comes to embryo donation, providing evidence that it did consider the best interests of the resulting child could help limit the clinic’s liability for negligent placement of the embryos. The clinic also needs to have documentation, even if it is kept private, that provides the genetic history of the embryo for health-related reasons and to limit the unlikely but possible event that genetic siblings raised in different families could desire to marry each other.

F. What Liabilities Could the Clinic Face in Facilitating Embryo Adoption?

Though each of the patients in question appears to have abandoned her embryos (four by contract and two by failing to notify the clinic as to their desired disposition), more is at stake here than merely using abandoned property. The fact that an embryo donation could result in genetic children for each of these patients heightens the emotions of all parties involved and could lead to a variety of legal claims made against the clinic.

⁹⁶ La. Rev. Stat. Ann. § 9:130 (West 2002).

The clinic could be subject to a basic breach of contract claim. The patients could argue that a contract was created for the purpose of providing this patient, the gamete provider, with genetic children. Transferring the embryos to other patients would then be a breach of that contract because the embryos would be used to provide other patients with children rather than the gamete providers. This claim could be defeated with a provision of the contract directing that abandoned embryos become the property of the clinic and that the clinic then has sole discretion to dispose of the embryos. The clinic could also argue that because, in Dr. Rhinehart's situation, each of the six patients did have a genetic child, the purpose of the contract was fulfilled so no breach could occur upon transfer of any remaining embryos. The clinic was not depriving the patients of the ability to bear a genetic child because each patient did bear a genetic child.

The Superior Court of Rhode Island recognized a claim for both physical loss of irreplaceable property and emotional distress in *Frisina v. Women and Infants Hospital of Rhode Island*.⁹⁷ Several couples undergoing IVF had frozen multiple embryos but when they wanted them implanted, the hospital notified them that most of the embryos had been lost. The couples then sued, claiming loss or destruction of their embryos and emotional distress. The court linked the claims and found that “recovery for damages for emotional distress based on the ‘loss of irreplaceable property,’ the loss of their pre-embryos, is permissible under [Rhode Island case law].”⁹⁸

Related to a claim based on loss of property is a cause of action in detinue. Detinue is a “common-law action to recover personal property wrongfully taken by another.”⁹⁹ *Salmond on the Law of Torts* discusses a cause of action in detinue:

⁹⁷ *Frisina v. Frisina*, 2002 WL 1288784 (R.I.Super.) (2002).

⁹⁸ *Id.* at 10.

⁹⁹ *Black's, supra*, at 206.

A claim in detinue lies at the suit of a person who has an immediate right to the possession of the goods against a person who is in actual possession of them, and who, upon proper demand, fails or refuses to deliver them up without lawful excuse. Detinue at the present day has two main uses. In the first place, the plaintiff may desire the specific restitution of his chattels and not damages for their conversion. He will then sue in detinue, not in trover. In the second place, the plaintiff will have to sue in detinue if the defendant sets up no claim of ownership and has not been guilty of trespass; for the original acquisition in *detinue sur bailment* was lawful.¹⁰⁰

If the embryos have not yet been implanted in an adoptive mother, this claim could be brought against the clinic. Again, however, if the informed consent agreements state that the progenitors lose all rights in the embryo upon certain contingencies, the progenitor would not have an immediate right to the possession of the embryo.

California has taken a more proactive approach and has enacted a law criminalizing the misappropriation of embryos.¹⁰¹ This claim could be averted with clear informed consent agreements that provide the patients' parental rights to the embryos cease after certain events (such as failure to pay the storage fee) occur. This claim could also be averted if the patients agree to the possibility their embryos will be donated to other couples once they have abandoned them.

Some couples, after discovering their embryos were donated to other couples or lost, have brought claims for lost ability to have children, inability to raise resulting children in their own religion, and depression from the belief that a couple has biological children that the couple will never know.¹⁰² These claims arose in the context of misappropriation of embryos,¹⁰³ however, and probably could not be raised if the gamete providers had consented to relinquish their rights to the embryos to a clinic after a specified contingency. If a couple successfully

¹⁰⁰ R.F.V. Heuston, *Salmond on the Law of Torts* 111 (17th ed. 1977).

¹⁰¹ Cal. Penal Code § 367g (1999).

¹⁰² Kindregan, *supra*, at 199-200.

¹⁰³ *Id.*

brings these claims, the clinic would face significant financial liability.¹⁰⁴

As with any medical procedure, the possibility of tort liability and medical malpractice also exists.¹⁰⁵ If a patient successfully brought these claims, the clinic would be subject to financial damages and probably have sanctions imposed on its practice. Again, a thorough informed consent could limit this liability in reference to donating abandoned embryos for adoption.

Another possible claim the clinic could be subject to is negligent or reckless endangerment if an embryo resulted in a child who was neglected or abused in the donee family. Treating the donation process as a true adoption, screening the potential couples for stable mental health, financial soundness, and other criteria would protect the clinic from this sort of liability.

The deceased patient's heirs might attempt to prohibit the clinic from donating their relative's embryos because they want to keep the family unit intact and prevent the birth of children who would not know their biological mother.¹⁰⁶ In *Hecht v. Superior Court*, a situation involving a woman wanting to use her deceased boyfriend's sperm, left to her through a "specimen storage agreement," the court found that the sperm was property for purposes of the disposition of the deceased's estate (so it could pass through the deceased's will) and also that "posthumous use of sperm" did not violate the public policy.¹⁰⁷ Under this reasoning, Dr. Rhinehart's deceased patient's decision making authority over her embryos passed to her executor and, because the executor failed to pay the storage fees, the embryos should revert to the clinic's control regardless of any heirs' desire to limit the size of their biological family. The

¹⁰⁴ *Id.* at 199.

¹⁰⁵ *Id.* at 199-200.

¹⁰⁶ *Hecht v. Superior Court*, 16 Cal.App.4th 836, 844 (1993).

¹⁰⁷ *Id.* at 858.

clinic could also rely on the ABA *Proposed Model Act Governing Assisted Reproduction* which states that

[i]f an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased person consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.¹⁰⁸

IV. Conclusion

Dr. Rhinehart is attempting a noble task, recognizing the life inherent in every frozen embryo and trying to give each embryo, and adoptive families, the chance to nurture that life to full development. This task is fraught with legal liabilities and, given the unsettled state of the law, no formula will guarantee Dr. Rhinehart a future of facilitating embryo adoptions free from legal liability to the gamete providers. The aforementioned legal actions and strategies, however, should minimize the clinic's liability and enable Dr. Rhinehart to continue the process of building families through placement of frozen abandoned embryos with adoptive families.

¹⁰⁸ Bar Association Proposed Model Act Governing Assisted Reproduction § 702 (2006).