

Legal Aspects of Third Party Reproduction:
Issues Surrounding the Use and Handling of Cryopreserved Genetic Material

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A. Embryos in the news:

1. Amy Eisinger, "Biological clock ticking? What you need to know about freezing your eggs." The Washington Post, July 27, 2015.
2. ABC News website: "Divorced Couple's Embryo Feud Could Affect How Fertility Clinics Do Business." July 14, 2015.
3. Debra Bruno, "Why You Need a Prenup for all of Your Relationships," Washingtonian, August 12, 2015.
4. Houston.com News, "Program matches families willing to donate embryos to those who want children." January 15, 2015.
5. Michael Sullivan, "Outside the Womb," www.lifeofthelaw.org, July 14, 2015.
6. Nick Loeb, "Sofia Vergara's Ex-Fiancé: Our Frozen Embryos Have a Right to Live," The New York Times, April 29, 2015.
7. Tamar Lewin, "Chicago Court Gives Woman Frozen Embryos Despite Ex-Boyfriend's Objections," The New York Times, June 12, 2015.
8. Maura Dolan, "Divorced couple fighting in court over frozen embryos," L.A. Times, July 13, 2015.
9. Tamar Lewin, "Industry's Growth Leads to Leftover Embryos, and Painful Choices," The New York Times, June 17, 2015.
10. Angela Pittenger, "Building families through embryo adoption," tucson.com, July 4, 2015.
11. Ellen McCarthy, "Fertility medicine brings babies -- and tough decisions." The Washington Post, May 18, 2015; reprinted as "What to do with a leftover embryo?" in Minneapolis Star Tribune, June 8, 2015.
12. Sumath Reddy, "Fertility Clinics Let You Select If You Want A Boy or a Girl," The Wall Street Journal, August 18, 2015.
13. Maura Dolan, Former California Couple's Case May Set Rules for Embryo Battles, Los Angeles Times/St. Paul Pioneer Press, September 27, 2015.
14. Tamar Lewin, "Groups Opposed to Abortion Join Fights on Frozen Embryos," The New York Times, January 20, 2016.

B. My first experience with an embryo issue in my ARTS practice -- about 15 years ago

1. Fertility clinic doctor calls me to ask if he can destroy cryopreserved embryos where owner couple refused to pay the storage costs or provide any direction as to what to do with the embryos;
2. Doctor sheepishly indicates that he used a very limited consent form in his earlier years that did not address storage costs or require any advance directives;
3. I do some blatant forum shopping among various family court and juvenile court judges, avoiding those I know have strong religious views on such matters (i.e., Catholic) and present my client's dilemma to see if any of them will assist;
4. I file a petition for a declaratory judgment and a specific performance order which, if granted, will direct the owner couple to either enter into a payment contract with the storage facility

within a prescribed short time period or the clinic would be authorized to dispose of the embryos;

5. Neither I nor the daring judicial officer had any idea whether this order would withstand further judicial scrutiny on review -- but luckily it was never tested and the couple finally did the right thing and took action;
 6. I learned from this case that this is not the best way to handle these situations and that the existence of stored embryos (and other such genetic material) presents a complex and risky undertaking, requiring detailed discussions and careful planning with all of our clients, whether they are donors or intended parents, as well as fertility clinics, storage facilities, or matching entities.
- C. What is an attorney to do? How far does our responsibility regarding the storage and future use of stored embryos and other genetic material extend?
1. At a minimum, attorneys practicing in the ARTS area have an obligation to advise their clients of the important need to think about, plan for, and provide clear and enforceable directives as to the disposition of stored embryos and other genetic material -- whether they are the client's genetic material or they are involved in any way in the use and maintenance of the material;
 2. Many of our clients will not even think about this issue or will believe it is not their problem; they also may be unwilling to think about or even contemplate all of the possible complications stemming from such un-pleasantries as divorce, death, bankruptcy, incapacity, and the need to make difficult decisions about future children and their children's siblings;
 3. These difficult decisions should not be left to the intended parents' children or heirs to grapple with, nor to judicial officers who have precious little statutory law and much contradictory case law to guide them, or to the fertility doctor or the cryopreservation facility who may not understand the legal issues and legal risks that attached to the stored genetic material;
 4. This process may involve working with fertility clinics and their attorneys, matching agencies and their attorneys, cryopreservation facilities, family law attorneys, and estate planning attorneys;
 5. ARTS attorneys: do you routinely review and analyze medical consent forms and other forms your clients sign as part of their work with fertility clinics and medical doctors? Do you ask yourself if these documents would hold up as enforceable contracts? Do you also scrutinize contracts your clients enter into with cryopreservation facilities? Do you review donor agreements in careful detail when you are not the attorney who drafted the agreement, yet you are working with the donated material pursuant to a gestational carrier arrangement? Do you suggest that married couples consider a prenuptial or postnuptial agreement to address disposition of stored genetic material in the event of divorce or death? For unmarried partners, do you suggest addressing these issues in cohabitation agreements or domestic partnership agreements? Do you suggest -- or mandate through terms in the gestational carrier contract or donor agreement -- that parties execute estate planning documents that specifically address the disposition of stored genetic material?

6. Family Law attorneys: have you added language to your client intake forms asking about the existence of stored genetic material and the client's intentions regarding that material? Do you discuss the possibility of addressing these concerns through prenuptial agreements? Post-nuptial agreements? Parentage agreements? Cohabitation agreements? Domestic partnership agreements?
7. Estate Planning attorneys: have you added language to your client intake forms asking about the existence of stored genetic material and the client's intentions regarding that material? Do you consider adding provisions for the storage, use, and control of embryos and other genetic material to your client's estate planning documents, including wills, trusts, health care directive, powers of attorney? Have you discussed the impact of posthumous conception and birth upon your client's estate plans?

D. What exactly are these genetic materials? How and why are they created?

1. The embryo -- sometimes referred to as a "pre-embryo" before it is implanted in a woman's uterus -- is a four to eight cell zygote with a unique genome. At this stage, the cells are undifferentiated and each has the capacity for developing into any cell in the human body and even into separate individuals.
2. Embryos are typically produced through the IVF (in vitro fertilization) process. At the most fundamental level, the IVF procedure combines sperm with an egg outside of the human body, producing a pre-embryo. The pre-embryo can then be implanted in a female's uterus with the hope of producing a successful pregnancy. The IVF procedure most times produces more than one pre-embryo. Of these, some pre-embryos are implanted in a female's uterus immediately (fresh), while others are cryopreserved and can be used by gamete providers or donor recipients at a later date.
3. Generally, the procedure for IVF starts with the woman's ovaries being hormonally stimulated so that the woman can produce multiple eggs (rather than the one that is produced during the monthly menstrual cycle). The eggs that the woman produces are then removed by either ultrasound directed needle aspiration or laparoscopy, and the eggs are then put into a glass petri dish where the eggs are introduced to sperm -- the process called insemination. The sperm and eggs are placed in incubators located in the laboratory which enables fertilization to occur. Fertilization usually occurs within hours, and over the next couple of days the embryo grows from one cell to eight cells. After the egg is fertilized by a sperm cell, this fusion, also known as a pre-zygote or pre-embryo, keeps dividing until the pre-embryo gets to the four to eight cell stage, at which time several of the pre-embryos are transferred into the woman's uterus by means of a cervical catheter. The implantation usually takes place within one to six days after insemination. Following the transfer of the embryos, the female is monitored for signs of pregnancy. If the procedure is successful, an embryo will affix itself to the wall of the woman's uterus, differentiate, and grow into a fetus.
4. The medically accurate term "pre-embryo" is used to denote a fertilized egg or zygote that has not yet been implanted into a woman's uterus. The pre-embryo period is roughly the fourteen-

day period of development that spans from the time the egg is fertilized to when the embryo is implanted into the wall of the woman's uterus and the nervous system precursor, the "primitive streak," emerges and can be seen.

5. Instead of immediate implantation of the pre-embryo into the woman's uterus, an alternative option is to have some or all of the pre-embryos cryopreserved for an indefinite period of time for later use. These pre-embryos are preserved in order to prevent the woman from having to go through the involved and potentially risky medical procedure of egg retrieval more than once, and to also save the woman from the substantial medical costs that are involved in the retrieval procedure. A cryopreserved embryo can be thawed and implanted at a later date.
 6. It must always be remembered that unlike sperm retrieval, the process of retrieving eggs from a woman's ovaries poses significant risks. The usual process is that drugs are administered to stimulate egg production so that several eggs can be retrieved. These drugs pose an increased risk of multiple births and ovarian hyper stimulation syndrome, a condition that may result in abnormal blood clotting, major organ damage, respiratory distress or stroke. Some studies suggest a correlation between fertility drugs and ovarian cancer. In addition to possible moderate to severe pain, even with the use of analgesic, common other side effects include abdominal or vaginal discomfort, bleeding, and less common, some women have required major surgery to repair damage caused by needle puncture of nearby organs. Some practitioners have reported severe infections.
 7. The use of cryopreservation of both embryos and eggs flows from the risks and realities of egg extraction. Such preservation reduces the number of cycles of egg retrieval necessary to achieve pregnancy, lessens the physical risks associated with the process, reduces the costs, and lessens the incentives to transfer large number of eggs in each stimulated cycle and thereby avoids multiple gestations.
 8. For detailed discussions of the medical processes and implications, see Ellen A. Waldman, Disputing Over Embryos: Of Contracts and Consents, 32 Ariz. St. L. J. 897 (Fall 2000).
- E. Legal challenges in characterizing this genetic material
1. The Embryo as Person
 - a. Louisiana statute: expressly declares a human embryo to be "a biological human being which is not the property of the physician who acts as an agent of fertilization, or the facility clinic which employs him or the donors of the sperm or ovum." The statute goes on to define "human embryo" as composed of one or more living cells and human genetic material so unified and organized that it will develop in utero into an unborn child. A human embryo may not be intentionally destroyed or created solely for research purposes. The best interests of the embryo standard governs custody disputes between genetic parents to best protect the embryo's future. This is the only state legislature to currently acknowledge embryo adoption, allowing IVF patients to relinquish their parental rights to the embryo as long as another married couple implants the embryo. La. Rev. Stat. Ann. § 9:126 (2008). NOTE: but see Georgia's Option of Adoption ACT (OAA): considered one of the nation's first

embryo adoption laws, but unlike the Louisiana statute, the Georgia statute does not explicitly define an embryo as a person; rather, it sets out a twostep process for adoption, whereby the embryo donors relinquish all rights to the donee parents via a written contract and the donees then petition the court for an order of adoption. Ga. Code Ann. § 198-40 (2010);

- b. New Mexico: statute declares its firm protection of a fetus's future safely and well-being, although the legislature falls short of an absolute grant of "judicial person" status; once an embryo is formed, those same protections exist for the embryo; thus, embryos cannot be intentionally destroyed, a prohibition that includes donating to research. N.M. Stat. § 24-9A-3 (2008);
- c. Oklahoma: defines "unborn child" to mean the unborn offspring of human beings from the moment of conception through pregnancy and until live birth, and specifically includes "embryo." Written consent of both donating and recipient couples is required for embryo donation. Okla. Stat. tit. 10, § 556(A)(1)(2010);
- d. Note: the United States Supreme Court has continuously rejected fetuses, which occupy a later stage of human development, as judicial persons. That Court would likely refuse to further stretch the definition to encompass an embryo, a less developed potential human. No state court has yet declared an embryo to be a person. Many of the courts have gone out of their way to distinguish the treatment of embryos from abortion and the debate surrounding Roe v. Wade, 410 U.S. 113 (1973). The argument advanced is that as the embryo exists separate and apart from the woman's body, unlike a fetus, it is not subject to the same considerations or treatment. In short, in the context of pregnancy, the abortion right outweighs the right to procreate. Because the embryo does not exist within a female's body, the protection of bodily integrity and autonomy are of no moment in the embryo context;
- e. Another interesting constitutional dimension is the balancing of interests when there is a dispute between donors of genetic material to an embryo as to allowing it to be used for procreation or not. There is a constitutionally protected right to procreate (Skinner v. Oklahoma, 316 U.S. 535 (1942) Griswold v. Connecticut, 381 U.S. 479 (1965); and a constitutionally protected right not to procreate (Eisenstadt v. Baird, 405 U.S. 438 (1972)). The majority trend is to side with the donor opposed to procreation -- but such a view is not without detractors who question whether the right to oppose procreation is constitutionally superior to the right to procreate and to use one's genetic material for that purpose. One author has suggested that courts and legislatures are mandated to act in a neutral fashion and to not hold one constitutional right superior to another in this context. See Mark W. Myott, Revisiting the Current Legal Approaches in Frozen Embryo Disposition Disputes Through the Lens of Neutrality, 10 Geo. J. L. & Publ. Pol'y 619 (Summer 2012).

2. The Embryo as “Potential Life” Deserving Special Respect and Protection
 - a. ASRM remains a staunch supporter of the “interim status” classification, stating that embryos should be afforded “profound respect” but not the same moral and legal rights that are afforded human beings;
 - b. The Food and Drug Administration in 2002 officially defined a human embryo as biological tissue subject to rules and regulations applicable to such tissue;
 - c. Davis v. Davis, 842 S.W2d 588 (Tenn. 1992). Embryos are neither persons nor property, but “occupy an interim category that entitles them to special respect because of their potential for human life.”
 - d. Jeter v. Mayo Clinic Arizona, 121 P.3d 1256 (Ariz. Ct. App. 2005). Human embryos “occupy an interim category between mere human tissues and persons because of their potential to become persons.”

3. The Embryo as Property
 - a. York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989). Viewed the genetic donors’ remaining embryos as their personal property and held that the donors and the clinic were in a bailor/bailee relationship;
 - b. Kass v. Kass, 91 N.Y. 2d 554 (New York Court of Appeals 1998). New York Court of Appeals holds that the five frozen embryos produced during the couples’ participation in IVF would not be recognized as “persons” and that contract law would determine the disposition of the embryos. By applying contract law to their disposition, the court implicitly held that embryos are property;
 - c. In re Marriage of Dahl and Angle, 194 P.3d 834 (Or. Ct. App. 2008). Court explicitly holds that frozen embryos are “personal property” and that parties hold the contractual right to possess or dispose of the frozen embryos as personal property;
 - d. Hall v. Fertility Institute of New Orleans, 647 So. 2d 1348 (1994). Court held that decedent’s frozen semen on deposit with the fertility institute was succession property devisable as part of his estate plan;
 - e. McQueen –Gadberry v. Gadberry, Circuit Court of St. Louis County, Missouri. Cause No. 13SL-DR06185 (April 18, 2015). In this divorce dispute involving the disposition of frozen embryos, the circuit court held that frozen embryos are marital property with unique characteristics. The embryos cannot be used without both spouses’ consent. Because of procedural irregularities, the documents signed by the parties at the fertility clinic were deemed to be invalid and non-binding and found to not be binding post-nuptial contracts between the parties.
 - f. Florida: codified a genetic donor’s property interest in his or her embryos, granting the donors joint decision-making authority regarding the embryos’ disposition, with control and decisional authority always remaining with the genetic donors. Fla. Stat. § 742.17(2) (2009).

- g. Michigan: legislation categorizes embryos as “property” by allowing Michigan researchers to create new embryonic stem-cell lines from embryos created solely for fertility treatment purposes.

F. Possible Dispositions of Embryos and Other Genetic Material

1. Donate for purposes of parentage (Note: there has long been a raging debate among professionals working in the assisted reproduction field as to the use of the term “donation” versus “adoption”; the issue is more than semantics. It is tied to the dispute as to whether embryos are persons, property, or something in between. In general, those who support the use of the term and the process of adoption to transfer embryos to another person or couple for procreation tend to view the embryos of adoption, with the transfer process being subject to all of the procedures and substantive laws applicable in adoptions, including the overarching view that the disposition must ultimately be governed by the best interests of the child. For a more detailed discussion of this debate, see Polina M. Dostalík, Embryo “Adoption?” The Rhetoric, the Law, and the Legal Consequences, 55 N.Y.L. Sch. L. Rev. 867 (2010/2011); Alexia M. Baiman, Cryopreserved Embryos as America’s Prospective Adoptees: Are Couples Truly “Adopting” or Merely Transferring Property Rights? 16 Wm & Mary J. Women & L. 133 (Fall 2009); Molly Miller, Embryo Adoption: the Solution to an Ambiguous Intent Standard, 94 Minn. L. Rev. 869 (Feb. 2010);
2. Donate for scientific research
3. Discard (NOTE: It is important to note the difference between destruction of embryos and destruction of gametes (either eggs or sperm). Gametes are the only human cells that have reproductive capacity to form a new human life. Eggs and sperm alone, however, cannot create life; they must be combined to create an embryo, fetus, and potentially, a baby. Embryos, however, are one crucial step closer to producing a child; conception has already occurred. The moral status of human embryos is the central question in determining what should or should not be done to them. There are strongly polarized views on this question that have led to very different legislative regimes in different states and countries. While lawsuits have arisen from the negligent destruction of embryos, there do not yet appear to be similar cases regarding gametes. It remains uncertain how the unique status of gametes relates to ethical considerations regarding embryos).
4. Store Indefinitely (Note: in response to concerns about indefinite storage creating even greater future problems for the donors, the fertility clinics, and society in general, England chartered a committee, the Human Fertilisation and Embryology Authority, as permitted by the Human Fertilisation and Embryology Act (HFEA; 1990), that regulates any clinic that performs the various types of assisted reproductive technologies. The Act states that “no gametes or embryos shall be kept in storage for longer than the statutory storage period and, if stored at the end of the period, shall be allowed to perish. The statutory storage period in respect of embryos is such period not exceeding five years as the license may apply;

5. For a more detailed discussion of these alternative options for the use and disposition of embryos and other genetic material, see Molly O'Brien, An Intersection of Ethics and Law: the Frozen Embryo Dilemma and the Chilling Choice Between Life and Death, 32 Whittier L. Rev. 171 (Fall 2010).

G. Situations where disputes as to disposition have arisen

1. Divorce/legal separation of married couples

- a. A complex body of family law exists to guide determinations of how jointly owned property should be divided between spouses when they divorce or separate;
- b. Complex and sure to be more common question that is not yet adequately addressed by this body of family law: when a married couple jointly donate gametes to create a fertilized embryo, whose post-divorce claims for dispositional authority should prevail?
- c. Can or should these issues be addressed through the time-tested drafting of a marital agreements? (antenuptial/prenuptial or post-nuptial contracts) and will or should they be enforceable as to these terms?
- d. Can the entire issue now be avoided by simply freezing eggs and/or sperm rather than an embryo? Will these be treated as separate, non-marital property or something else? No one knows at this time;
- e. When will these issues be discussed? By whom? Fertility clinic? Matching facility? ARTS attorney? Should we involve an experienced family law attorney in all of our ARTS cases?
- f. In July 2012, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved and recommended that states adopt the Uniform Premarital and Marital Agreements Act. This Act not only regulates property and money issues in the drafting of premarital and marital agreements, but also expressly recognized that there may be agreements on "custodial responsibility." This term includes child custody, child support, and child creation. Under the Act, such agreements would not "bind" the courts because parents and prospective parents do not have the power to waive the rights of their current or future children or to remove the jurisdiction or duty of the courts to protect the best interests of minor children. But while such agreements may not always be enforceable, they can provide guidance to courts and promote stability and permanence in family relationships by allowing intended parents to plan for their children, reinforce the expectations of all parties to the agreement, and possibly reduce contentious litigation. Child creation agreements would significantly implicate superior parental rights and other federal constitutional interests (like paternity opportunity interests), as well as public policy concerns. While some statutes and a handful of cases provide some guidance to courts, these agreements could provide another source of guidance for courts. See Jeffrey A. Parness, Parentage Prenups and Midnups, 31 Ga. St. U. L. Rev. 343 (Winter 2015); Marisa G. Zizzi, The Preembryo Prenup: A Proposed Pennsylvania Statute Adopting A Contractual Approach to Resolving Disputes Concerning the Disposition of Frozen Embryos, 21 Widener L.J. 391 (2012);

- b. Don't create a situation like I experienced where you need to get a judicial officer to step in and direct the disposition;
 - c. This issue highlights the good sense of the British law referenced above: all embryos automatically get destroyed five years after storage absent exigent circumstances. Would this ever have been enacted in the U.S.? Likely huge constitutional and political obstacles.
5. Fertility clinic refuses to turn over stored genetic material to the donor;
- a. These kinds of disputes go to the issue of who owns the material that is held in storage;
 - b. It involves questions of who pays costs and who controls disposition.
 - c. Most courts have enforced contracts as between fertility clinics and progenitors of genetic material in terms of control and disposition of the frozen embryos; not so much when the dispute is between the progenitors themselves.
- H. Models for Dispute Resolution in Divorce/Separation Situations¹
1. The Contractual Approach
- a. Premised on the notion that contracts entered into at the time of IVF are enforceable so long as they do not violate public policy; preferred for its relative simplicity and respect for the parties to make their own personal decisions while keeping the state from interfering in the matter;
 - b. Suggested model of analysis under the contractual approach: (i) did the progenitors create an embryo disposition contract? (ii) is the contract adequate? (iii) should the contract be enforced as a matter of public policy? Mark W. Myott, Revisiting the Current Legal Approaches in Frozen Embryo Disposition Disputes Through the Lens of Neutrality, 10 Geo. J. L. & Publ. Pol'y 619 (Summer 2012);
 - c. Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998). Divorce case where the parties had five cryopreserved embryos. They signed a consent form at the fertility clinic providing that disposition of the embryos in the event of divorce would be determined in a property settlement, and if the parties could not agree, the embryos would be donated for research. The court held the agreements should be presumed valid and enforceable, and because these parties could not agree on disposition, the provision for donation to research would control. The court did, however, allude to the view that significantly changed circumstances in some cases might preclude contract enforcement;
 - d. Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002). Embryos had been created with the husband's sperm and donor eggs. At the time of divorce, wife intended to implant the embryos in a surrogate and procreate. The husband wanted to donate the embryos for

¹ For various discussions of these three models for dispute resolution, see Deborah L. Forman, Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer, 24 J. Am. Acad. Matrim. Law 57 (2011); Marisa G. Zizzi, The Pre-embryo Prenup: A Proposed Pennsylvania Statute Adopting A Contractual Approach to Resolving Disputes Concerning the Disposition of Frozen Embryos, 21 Widener L. J. 391 (2012); Michael T. Flannery, "Rethinking" Embryo Disposition Upon Divorce, 29 J. Contemp. Health L. & Pol'y 233 (Spring 2013).

procreation by someone else. The cryopreservation contract provided that the couple must petition the court if they could not agree on disposition, but also provided that the clinic would thaw and destroy any embryos still in storage 5 years after the initial date of cryopreservation. While the divorce was commenced two years after the cryopreservation contract was signed, by the time the matter reached the supreme court, more than five years had passed and so the court ordered that any remaining embryos were to be thawed and discarded based on the terms of the agreement;

- e. Roman v. Roman, 193 S.W.3d 40 (Tex. 2006). Divorce case where the husband wanted to discard the embryos and the wife wanted to implant them. The court found a provision in the clinic consent form to discard unused embryos in the event of divorce to be valid and enforceable;
 - f. In re Marriage of Dahl and Angle, 194 P.3d 834 (Or. Ct. App. 2008). The court gave effect to a cryopreservation contract that provided that the wife would have decision making authority over the embryos if the parties could not agree. Here the wife wanted to destroy the embryos and the husband wanted to donate to another couple;
 - g. Findley v. Lee, Superior Court, County of San Francisco, Case No. FDI-13-780539 (November 18, 2015). Court asked to determine the rights of no-divorced wife and husband to five frozen embryos. The court applies the contractual approach, finding that these parties entered into detailed disposition agreements pursuant to the California statute mandating informed consent in these matters and requiring detailed dispositional instructions in the case of death and divorce. These parties clearly agreed that in the event of divorce the embryos would be thawed and discarded. The court denies the right of the wife to use the embryos over the objection of the husband.
2. The Contemporaneous Mutual Consent Model
- a. Shares an underlying premise with the contractual approach in that the couple who created the frozen embryos are given the decisional authority concerning the disposition of their frozen embryos with each of the partners having the right to an equal say regarding disposition, but here neither party is allowed to donate or destroy the frozen embryos without both individuals giving their “contemporaneous mutual consent.”
 - b. When the creators of frozen embryos are not able to reach an agreement as to their disposition, this model dictates that the most suitable solution is to leave the frozen embryos where they are -- in cryopreservation storage;
 - c. J.B. v. M.B., 783 A.2d 707 (N.J. 2001). Eight embryos were cryopreserved and remained in storage when husband sought a divorce. He wanted to have the embryos discarded, while wife wanted to use them herself or donate them to another couple. They had signed a consent form that provided they would relinquish the embryos to the clinic’s IVF program in the event of divorce, unless a court ordered otherwise. The court found that the consent form did not manifest a clear intent by either party regarding disposition in the event of divorce and that they had never entered into a separate binding contract providing for the disposition of the embryos. The court importantly notes that contracts entered into at the

time of IVF could only be enforced if they had been executed with reasonable safeguards, such as the agreement being written in plain language, reviewed with clinic personnel, and not signed in blank, and that they would have to be subject to either party's right to change his or her mind about disposition up to the point of use or destruction. In the absence of mutual contemporaneous agreement, the party choosing not to procreate would usually prevail. Since the husband did not object to continued storage, the wife could continue to pay the storage fees, and if she stopped or refused, the embryos would be destroyed;

- d. In re Marriage of Witten, 672 N.W.2d 768 (Iowa 2003). This couple had seventeen embryos in storage when they sought to divorce. They had signed a form that required joint consent for release of the embryos and an exception in the event of death of a party. The agreement was silent as to divorce. Wife wanted to use the embryos for her own pregnancy, while husband wanted them discarded. The court held that where the progenitors disagree about disposition, contemporaneous mutual consent is required, and in the absence of mutual consent, no transfer, release, use or other disposition can occur. Thus the embryos would remain in storage indefinitely with the party opposing destruction paying the fees;
- e. A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000). Here the parties entered into a cryopreservation agreement containing a provision giving the stored embryos to the wife for implantation in the event the parties separated. There were ambiguities as to the language and the circumstances surrounding the signing of the form where the husband had signed a blank form and the wife subsequently wrote in the terms of disposition. Thus, the court was skeptical that the agreement actually reflected the intent of the parties. Also, the court went on to hold that even if the agreement had been unambiguous, it would not enforce a clause that would compel one progenitor to become a parent against his or her wishes and that the court would require mutual contemporaneous consent;
- f. McQueen –Gadberry v. Gadberry, Circuit Court of St. Louis County, Missouri. Cause No. 13SL-DR06185 (April 18, 2015). In this divorce dispute involving the disposition of frozen embryos, the circuit court held that frozen embryos are marital property with unique characteristics. Expressing concurrence with the approach adopted by the state of Iowa in Witten, the court held that the embryos cannot be used without both spouses' consent. Because of procedural irregularities, the documents signed by the parties at the fertility clinic were deemed to be invalid and non-binding and found to not be binding post-nuptial contracts between the parties.

3. The Balancing Test

- a. This approach looks at both parties' interests and weighs those interests while rejecting the requirements of contractual enforcement and mutual consent;
- b. If the parties cannot reach an agreement regarding the disposition of their frozen embryos, the courts should look at the parties individually and evaluate each party's own interest in either the use, preservation, or destruction of the embryos;

- c. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992). This was the first case to consider disposition of disputed frozen embryos in a divorce situation. These parties had not signed any written agreement regarding disposition of the embryos. In the absence of a prior agreement, the Tennessee Supreme Court balanced the parties' conflicting constitutional interests in procreation, ultimately deciding in favor of the husband's right not to procreate and noting that the wife might achieve parenthood through another cycle of IVF or through adoption. The court ultimately held that the court's balance test would be a last resort, exercised only in the absence of an agreement between the parties, and in most cases, the party wishing to avoid procreation would prevail;
- d. Reber v. Reiss, 42 A.3d 1131 (Pa. Super. 2012). The Superior Court of Pennsylvania explicitly adopted the Davis balancing test so that in a divorce proceeding the wife would be awarded the frozen embryos when the parties did not have an agreement regarding their disposition in the event of divorce. Here wife had undergone chemotherapy for breast cancer and the evidence was sufficient to establish that wife did not have an ability to procreate biologically;
- e. Szafanski v. Dunston, 993 N.E.2d 502 (Ill. App. (1st) 2013); ___ N.E.2d ___ (Ill. App. (1st) 2015). This case came before the First District Appellate Court of Illinois two times. The dispute was between an unmarried couple who disagreed as to the use of pre-embryos created with their genetic material. The female partner was diagnosed with lymphoma and was expected to suffer ovarian failure and infertility as a result of her chemotherapy treatment. During the IVF procedure, three viable embryos were created and frozen. After the parties separated, the female partner sought control and use of the embryos over the objection of the male partner. Ultimately, the court found there was no enforceable, written disposition agreement between the parties, and that the written consent form with the fertility clinic was not dispositive as to dispute between the parties. An oral agreement was found to evince the intent of the parties that the female partner would have the right to use the embryos without the male partner's consent. The court also performed a balancing of interests analysis similar to what the court did in Reber v. Reiss and also used that as a basis to rule in favor of the female partner;

4. Legislation and Model Acts

- a. Florida: places all decision making authority in the hands of the couple donating the sperm and eggs by requiring them and the treating physician to enter into a written agreement that provides for the disposition of the eggs, sperm, and embryos in the event of divorce, death of either spouse, or other unforeseen circumstance. If there is no written agreement executed, the decision making authority pertaining to the disposition of the embryos will reside jointly with the commissioning couple. Fla. Stat. §742.17 (2005)
- b. California: this statute requires the health care provider who is conducting the fertility treatment to provide the patient with timely, relevant, and appropriate information to allow the individual to make an informed and voluntary choice regarding the disposition of any human embryos remaining following the fertility treatment. They must be given the choice

of storing any unused embryos, donating them to another individual, discarding the embryos, or donating the remaining embryos for research. The form must set forth advanced written directives regarding the disposition of embryos. The form is required to set forth the time limit for storage of the unused embryos at a storage facility and requires the couple to make choices in the following circumstances: death of either partner; separation or divorce; abandonment; or failure to pay storage fees. Cal. Health & Safety Code § 125315 (West. 2006);

- c. Massachusetts has a statute that tracks an earlier version of California's advance directive statute, also located in its chapter on biotechnology. It provides that a physician present the patient with the options of storing, donating to another person or to research, or destroying any unused embryos "as appropriate." It does not address any specific contingencies such as divorce or death and procreation will not be compelled absent contemporaneous consent. Mass. Gen. Laws. Ann. Ch. 111L § 4 (West 2007). New Jersey, Connecticut, and New York have enacted similar provisions in the context of stem cell research;
- d. Louisiana: stands in stark contrast to the above contractual legislative approach; see above discussion of how various states have defined an embryo; if patients surrender their parental rights to implant the pre-embryo, then the pre-embryo shall be available for adoptive implantation in accordance with the written procedures of the facility where it is housed or stored. La. Rev. Stat. Ann. §§ 9:121-33 (2008)
- e. See Great Britain's Human Fertilisation and Embryology Act (HFEA; 1990) as discussed above;

I. Death and Posthumous Reproduction

- 1. Posthumously conceived children – children conceived after the death of one or both parents -- have become increasingly common in recent years. Cryopreservation allows sperm, eggs, and embryos to be stored for lengthy periods of time, enabling their procreative use after an indeterminate number of years post-death;
- 2. An inherent problem involves the inheritance rights of such offspring in terms of social security benefits and intestate succession;
 - a. Under the Social Security Act, a posthumously conceived child's right to inherit under the applicable state's intestacy statute is dispositive of that child's right to receive Social Security benefits;
 - b. If a child qualifies for intestate succession under the applicable state law, that child can also receive Social Security benefits through a deceased wage earning parent;
 - c. If a child of postmortem conception is ineligible to inherit as an heir at law under the applicable state's intestacy law, the child is also precluded from receiving Social Security benefits;

3. State legislatures have failed to keep pace with scientific development and only eleven states sufficiently address how to resolve issues dispositive of whether a posthumously conceived child can inherit under intestate succession.
4. The existence of a parent/child relationship between a decedent and a posthumously conceived child must be established at the outset. Problem: administration of a decedent's estate typically occurs at the time of death; given that posthumously conceived children are not alive at the time of death, it must then be ascertained whether they can still inherit through intestate succession;
5. Without express legislation in most states, states have been forced to act and two predominant approaches have emerged:
 - a. Give effect to the intent of the decedent;
 - b. Give effect to legislative intent, assuming it can be ascertained;
6. In states where the law is not clear, various factors can be considered and emphasized to enhance the likelihood of finding the existence of the parent/child relationship:
 - a. Marriage
 - b. Execution of a will
 - c. Expedient conception
 - d. Utilize ambiguity of domicile to get the matter venued in a state with a clear statute
 - e. Emphasize a state's past reliance on uniform acts like the Uniform Probate Code and/or the Uniform Parentage Act, both of whose latest permutations have been supportive of establishing parentage posthumously;
7. Astrue v. Capato, 132 S. Ct. 2021 (2012). United States Supreme Court declared a child's right to Social Security benefits is determined by the intestacy law of the state where the decedent was domiciled at the time of his or her death; for a detailed discussion of this seminal case, see Heather Lacount, Dead Money: A Posthumously Conceived Child's Inheritance Rights under the Social Security Act and State Intestacy Law, 20 Suffolk J. Trial & App. Advoc. 219 (2015).
8. It is important to distinguish posthumous conception from posthumous birth: posthumously born children are considered alive at the time of a parent's death and will inherit through intestate success accordingly; children conceived after the death of one or both biological parents are typically not considered "in being" at the time death occurs;
9. Determining a posthumously conceived child's eligibility to inherit as an heir at law requires a two-part inquiry: (a) it is necessary to establish a parent/child relationship between the child of postmortem conception and the deceased parent; (b) if that is established, then one must ascertain whether the child is entitled to inherit under the applicable state's intestacy law. Most states that address the issue condition inheritance rights on conception occurring within a specific time post-death;
10. Problem: most states have not addressed the parentage and inheritance rights of posthumously conceived children at all -- most likely because of the contentious nature of the issue. A number of states address either inheritance rights or parentage, but not both. Many states that recognize inheritance rights have been influenced by the Uniform Probate Code. Many that

have recognized parentage rights have been influenced by the Uniform Parentage Act. Given this state of chaos, several courts have stepped into the breach:

- a. Hecht v. Superior Court, 20 Cal. Rptr 2d 275 (Cal. Ct. App. 1993): finding that a decedent had a property interest in his 15 vials of cryopreserved sperm. He both signed an agreement with the sperm bank and addressed the issue in his will. Under both instruments, he left his sperm to his girlfriend; this directive was challenged by his surviving children. The court held that the donor maintained an ownership interest in the use of his sperm for reproductive purposes post-death and that his written instructions would be honored;
 - b. Woodward v. Comm’r. of Soc. Sec., 760 N.E. 2d 257 (Mass. 2002). In certain limited circumstances, a child resulting from posthumous reproduction may enjoy the inheritance rights of “issue” under the state’s intestacy statute. Those limited circumstances exist where, as a threshold matter, the surviving parent or the child’s legal representative demonstrates a genetic relationship between the child and the decedent. They must then establish that the decedent affirmatively consented to posthumous conception and the support of any resulting child. Even where such circumstances may exist, time limitations may preclude commencing a claim for succession rights on behalf of a posthumously conceived child;
 - c. In re Estate of Kolacy, 753 A.2d 1257 (N.J. Super. Ct.Ch. Div. 2000). A father was diagnosed with leukemia and undergoes chemotherapy. He decides to freeze sperm in order to preserve his future ability to procreate. The Court held that general intent should prevail over a restrictive, literal reading of statutes which did not consciously propose to deal with the kind of problem before the court. Once established that child is the offspring of a decedent, the child should benefit as an heir at law. Only exception would be if so doing would unfairly encroach on the rights of others or create serious issues regarding administration of an estate;
 - d. Finley v. Astrue, 270 S.W.3d 849 (Ark. 2008). State assembly never intended to permit a child, created through IVF and implanted after fathers’ death, to inherit under intestate succession. The statute was enacted well before IVF was developed;
 - e. Beeler v. Astrue, 651 F.3d 954 (8th Cir. 2011): Posthumously born children must have had a relationship with the decedent at the time of death; posthumously born child were the only exception. Because this father’s child was not conceived before he died, the child did not have requisite relationship with the decedent and therefore could not inherit;
11. Issues to address in estate planning documents:
- a. Whether stored genetic material can be used for procreation after decedent’s death;
 - b. Whether any posthumous children should have any inheritance rights;
 - c. Who should have control, authority, and possession over the stored genetic material;
 - d. Whether the estate will pay for ongoing storage fees;
 - e. Whether trust funds can be properly used for storage payment, fertility treatment, support of competing beneficiaries;
 - f. How long should the decedent’s estate be kept open to deal with after born children;

- g. Who is an heir or distributee under intestacy;
 - h. Who is included in any classes of gifts;
12. Matter of Kievernagel, 166 Cal. App. 4th 1024 (Cal. 2008). Gametic material, with its potential to produce life, is a unique type of property and thus not governed by the general laws relating to gifts or personal property upon death. The person who provided the gametic material had, at his death, an interest in the nature of ownership to the extent he had decision-making authority as to the use of the material for reproduction;
13. Speranza v. Repro Lab, 875 N.Y.S.2d 449 (Sup. Court, Appellate Division, First Department, New York, 2009). Held that couple could not use their deceased son's cryopreserved semen to produce a grandchild via a surrogate. Such an act would violate state health regulations, and it would also be contrary to decedent's written directive in a clinic consent form directing the tissue bank to destroy his specimen in the event of his death;
14. Model Acts with suggested approaches to these issues

a. Model Uniform Parentage Act (last amended 2002)

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

b. Model Uniform Probate Code (promulgated in 1969; last major revision in 2008)

If an individual is considered a parent of a child of assisted reproduction who is conceived after the individual's death under one of the above sections of the UPC, the child is treated as in gestation at the individual's death for inheritance purposes if the child is (i) in utero not later than 36 months after the individual's death, or (ii) born not later than 45 months after the individual's death.

c. Restatement (Third) of Property (Wills & Don. Trans. § 2.5, note 1)

This Restatement takes the position that, to inherit from the decedent, a child produced from genetic material of the decedent by assisted reproductive technology must be born within a reasonable time after the decedent's death in circumstances indicating that the decedent would have approved of the child's right to inherit.

d. ABA Model Act Governing Assisted Reproductive Technology §607 (2008)

Except as otherwise provided in the enacting jurisdiction's probate code, if an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or per-embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

15. For a good discussion of basic property laws as applied to embryos and other genetic material, and especially for an interesting advocacy discussion that embryos should be considered to be held by couples in tenancy by the entirety rather than by joint tenancy or tenancy in common, see Bridget M. Fuselier, Pre-Embryos in Probate, 24 Prob. & Prop. 31 (September/October 2010).

J. Medical Consent Forms and Dispositional Agreements and Contracts

1. Where courts have determined that dispositional agreements are valid and enforceable, they have been largely unconcerned with the location and manner in which these agreements have been signed; they have endorsed the use of dispositional agreements even when they are embedded in informed consent documents provided by fertility clinics as a precursor to obtaining treatment;
2. Most courts have treated fertility clinics' informed consent documents as reliable transcriptions of each signatory's intent; yet there is ample evidence that patients often sign such documents with little or no appreciation of the content and judicial inquiry has been limited;
3. Medical consent forms are not exactly contracts and the regulation of medicine is different from the regulation of the legal relationships between parties; see Tom L. Beauchamp & James F. Childress, Principles of Biomedical Ethics (2001):
 - a. Conventional informed consent definitions focus on the transmission of standardized information and the signing of documents;
 - b. In this model, the doctor gives information to the patient, who considers her possible options and makes a decision
 - c. The medical consent model is under increasingly vitriolic attack: patients do not understand or read consent forms and the forms are difficult to understand;
 - d. This model also presumes an individualistic ideal-type patient, a rational and autonomous moral agent who makes sound, competent, thoughtful and rational choices on the basis of information given -- most real world patients are not like this;
 - e. This conventional definition caters more to the interests of providers than patients
 - f. Five components of consent: competence; disclosure; understanding; voluntariness; and consent;
 - g. Under the conventional view, courts and medical literature have focused almost entirely on disclosure; this conflicts with the moral viewpoint that informed consent has less to do with

liability of professionals as agents of disclosure and more to do with the autonomous choice of patients and subject;

- h. Non-conventional view: informed consent is not merely information transmission from provider to patient; it is a mutual and participatory process that depends in part upon emotions such as trust and hope.
4. This approach of transforming documents designed to record the transmission of medical information from clinic to couple and the couple's acceptance of medical treatment into a binding agreement between the couple itself is problematic because, despite their aspirational title, informed consent forms often reflect accessions to recommended treatment that are neither deliberate, thoughtful, nor informed. It has been suggested that reading informed consent forms as contracts between patient and provider is speculative because it requires reading the patient's signature as a manifestation of informed, deliberate choice. Giving significant weight to medical consent forms in this context is concerning because of the following considerations: the patients are usually in a highly vulnerable and emotional state at the time they review and sign the medical consent form related to infertility issues; the clinics and practitioners frequently rely on pre-printed, often complex forms that the patients do not really understand, nor do the providers have or take the time to adequately explain the forms. Furthermore, often the primary purpose behind medical consent forms is to protect the clinic from liability -- not reach a legal meeting of the minds between donors of genetic material through a bargained- for, enforceable and fair agreement.
5. What was intended as a process of dialogue and discussion has devolved into an event in which papers are signed, often at the last minute when the patients are most vulnerable and minimal legal requirements are satisfied;
6. Another huge problem is the combining of the medicinal procedure consent provisions with the disposition of the embryo/genetic material into one document. Asking couples to determine what should be done with the embryos if they die, become disabled, or choose to divorce, adds yet another layer of information that is difficult to process or thoughtfully evaluate. While these patients are often emotionally distraught about their fertility challenges, having them also think about their mortality or future problems in their marriage or possible disability could all lead to psychological overload and a glossing over of the import of the information that is being conveyed;
7. Dispositional agreements embedded into informed consent documents smack of both procedural and substantive unconscionability. Procedural unconscionability flows from circumstances where one party to the contract did not exercise meaningful choice, the use of standardized forms, presentation of the form as a "take it or leave it" proposition, and form language that is incomprehensible to a lay person with key contractual provisions hidden in fine print. Substantive unconscionability flows from those circumstances that are unreasonably favorable to one of the parties -- and these dispositional contracts are by their very nature significantly more constraining for the women who enter into them than the men who are able

- to continue to generate their genetic material much longer than can women; the woman is being asked to make disposition decisions that will be much more dramatic for her than for the man;
8. Another problem is that medical consent forms and dispositional agreements treat different subject matter. An informed consent form to IVF and cryopreservation details the risks associated with the medical treatment the patient is about to undergo; focused entirely on the here and now. A dispositional agreement deals with the hypothetical at the time the agreement is negotiated or drafted, causing the parties to possibly think the circumstances are unlikely;
 9. The complex nature of the issues at play in these strangely commingled forms also raises serious questions of unconscionability;
 10. For good discussions of the concerns regarding using medical consent forms for disposition agreements, see Jody Lynne Madiera, The ART of Informed Consent: Assessing Patient Perceptions, Behaviors, and Lived Experience of IVF and Embryo Disposition Informed Consent Processes, 49 Fam. L. Q. 7 (Spring 2015); Alicia J. Paller, A Chilling Experience: An Analysis of the Legal and Ethical Issues Surrounding Egg Freezing, and a Contractual Solution, 99 Minn. L. Rev. 1571 (April 2015); Deborah L. Forman, Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer, 24 J. Am. Acad. Matrim. Law. 57 (2011); Ellen Waldman, Disputing Over Embryos: Of Contracts and Consents, 32 Ariz. St. L. J. 897 (Fall 2000).
 11. Contract law is used to fill in the gaps created by nonspecific, or entirely non-existent ART-related legislation and case law. Yet, contracts regarding gametic material raise legal and ethical questions that are distinct from concerns surrounding other types of personal property. In the context of both embryo freezing, and now egg freezing, patients and clinics often enter contractual agreements. Whether these contracts are legally enforceable and ethically sound is the ultimate question. Some scholars suggest that the federal government or state governments should adopt a standardized consent form for ART procedures. Scholars further recommend that state statutes require word specific, written informed consent for any ART procedure geared toward creating and maintaining a fair, open, and balanced relationship between doctors, clinics, and patients. Uniformity, predictability, and security are startlingly absent from the current regulatory scheme.
 12. Contracts, when properly conceived and executed, can and should play a central role in clarifying the rights and obligations of all providers and parties involved in the creation of cryopreserved genetic material. Couples seeking infertility treatment should have the opportunity to consider how they want their embryos and other genetic material to be handled in the event of death, disability, or divorce, and to have their articulated wishes carried out. These dispositional agreements, however, should not be tucked into informed consent agreements, considered as an adjunct to the main event of obtaining treatment.
 13. As in adoption or surrogate motherhood agreements, dispositional agreements should be thoughtfully crafted -- the product of a separate contracting process in which the parties are prompted to seriously consider the contingencies at issue and the options available.
 14. An embryo disposition contract is an agreement between progenitors that in most cases serves two purposes: (a) informed consent between progenitors and the clinic; (b) dispositional

authority between one progenitor and another progenitor. The contract could also come in the form of an agreement with the sole purpose of disposition or even an implied contract.

15. If the couple entered into a disposition agreement, the court must analyze the contract in order to determine if it is adequate and enforceable. When progenitors do not enter into an embryo disposition contract, courts must find an alternative legal framework to resolve the dispute.
 16. Elements of a basic contract: offer, acceptance, bargained-for exchange, detrimental reliance; arm's length negotiations, no undue influence; sometimes written, sometimes witnessed, sometimes notarized -- usually governed by the common law, except for specific, special purpose contracts (e.g., real estate, insurance, employment, etc.) A valid embryo disposition contract unambiguously manifests a mutual intention between progenitors with regard to disposition. These contracts contain the traditional elements of a contract: offer, acceptance, consideration, and two unique elements: a duration provision and a provision which mandates a specific disposition;
 17. Another important wrinkle: not all courts are willing to enforce disposition contracts if finding them to be contrary to public policy. In most cases the contracts have not been enforced as against public policy when enforcement would compel a party to procreate against his or her will or a party has changed his or her mind due to a change in circumstances. Significant concerns exist about judicial intrusion into areas so personal that they are reserved to the progenitor;
 18. Family Law Contracts: heavily regulated by statute and case law; substantial variance from state to state. Some family relationship contracts have a complex and controversial history that raise significant public policy debates and challenges to drafting and enforcement: prenuptial/antenuptial agreements; post-nuptial agreements; various ARTS contracts; cohabitation agreements; domestic partnership agreements. Best practice is to engage a family law specialist when drafting these kinds of contracts. Whether you can include provisions as to treatment and disposition of embryos and other genetic material remains an open question;
 19. Estate Planning Contracts: wills, trusts, health care directives, powers of attorney, and final wishes forms. As with family law contracts, estate planning forms and directives are heavily regulated by statute and require precise compliance with statutory provisions in order to be enforceable. Written, witnessed, no undue influence or coercion, subject to challenge, notice to interested parties, difficult to modify. Not clear as to how inclusion of embryos and other genetic material will be treated. Especially complex when providing for posthumous conception;
- K. Sample language for contracts, consents, marital agreements, estate planning documents and other forms
1. Disposition Provisions in Gestation Carrier Contracts In the event the Genetic Father predeceases the birth of any Child born as a result of this Agreement, the Intended Mother shall be designated as said Child's sole guardian and shall take immediate physical custody of said Child. The Gestational Carrier agrees to take whatever steps are necessary to permit the

- Intended Mother to be named the lawful guardian and to obtain legal custody of such Child, and for the Genetic Father to be named as the legal father of the Child.
2. In the event the Intended Mother predeceases the birth of any Child born as a result of this Agreement, the Genetic Father shall be designated as said Child's sole guardian and shall take immediate physical custody of said Child. The Gestational Carrier agrees to take whatever steps are necessary to permit the Genetic Father to be named the lawful guardian and to obtain legal custody of such Child, and for the Intended Mother to be named as the legal mother of the Child.
 3. In the event the Intended Parents both predecease the birth of any Child born as a result of this Agreement, _____ shall be designated as said Child's guardians (hereinafter referred to as the "Guardians") and shall take immediate physical custody of said Child. The Gestational Carrier agrees to take whatever steps are necessary to permit _____ to be named the lawful Guardians and to obtain legal custody of such Child, and for the Intended Parents to be named as the legal mother and legal father of the Child.
 4. In the event of the Genetic Father's death, all references in this Agreement to Genetic Father shall be read to refer to Intended Mother. In the event of the Intended Mother's death, all references in this Agreement to Intended Mother shall be read to refer to Genetic Father. In the event of the deaths of both Intended Parents, all references to Intended Parents shall be read to refer to the Guardians.
 5. In the event of separation or divorce between the Intended Parents, it is agreed that any Child born to the Gestational Carrier under this Agreement shall be surrendered to the custody of the Genetic Father or the Intended Mother as determined by any legal agreement between the Intended Parents or as determined by proceedings in a court of law.
 6. Death of the Intended Parent. In the event either Intended Parent dies after Carrier's confirmed pregnancy, the remaining Intended Parent shall solely determine what is in the child's best interests under the circumstances giving consideration to the child's age. In the event of the death or disability of both Intended Parents prior to the release of custody, the child(ren) shall be placed in the custody of ** and **, currently of (city), (state) or their designated temporary representative and Carrier shall consent to their being appointed the legal guardian and conservator for the child(ren) with authority to adopt the child(ren). The Intended Parents, upon confirmation of the pregnancy, shall change their will to name the person named above as the trustees of a designated portion of their estate for the benefit of the child(ren) in the event of their deaths prior to delivery. This obligation ceases upon the child being delivered to either or both of the Intended Parents and custody shall then be as directed in the Intended Parents' wills.
 - a. In the event of separation or divorce between Genetic Mother and Genetic Father, and prior to any embryo transfer, no procedures shall take place pursuant to this Agreement. In the event Genetic Mother and Genetic Father separate and/or divorce after a successful embryo transfer, any resulting child shall remain as intended, the child of Intended Mother and Intended Father.
 7. Death of Parties. In the event of the death of Genetic Parents prior to the determination of custody, all of the parties to this Agreement expressly agree, for all of the reasons set forth in

paragraph 12 hereof, that it is in the child's best interest that the child be placed in the custody of a guardian as previously designated by Genetic Parents, if any. Genetic Parents agree to execute a formal Designation of Guardianship or Will to provide for custody and care of the child in the event of their death. Genetic Parents agree to notify Gestational Carrier of the names and addresses of any designated guardians before childbirth. Gestational Carrier agrees to execute a formal Designation of Guardianship or Will naming the Genetic Parents as fit and proper custodians for the child and appointing as alternative guardian(s) those guardians(s) designated by Genetic Parents to protect the welfare and security of the child in the event Gestational Carrier dies before parentage proceedings requiring her cooperation are completed.

DEATH OF INTENDED PARENTS PRIOR TO THE BIRTH OF THE CHILD.

- a. That if *IF should die before the child is born, the child shall be placed with *IM as the mother, and all of the terms of this Agreement continue.
- b. That if *IM should die before the child is born, the child shall be placed with *IF as the father, and all of the terms of this Agreement continue.
- c. That if both *IM and *IF should die before the child is born, they have chosen ** and ** to be the child's guardians and take custody at birth, and all the terms of this Agreement continue as if both *IM and *IF had survived.
- d. That in the event of the deaths of both *IF and *IM, the estates of *IF and *IM will be responsible for all expenses related to this Agreement.
- e. That no later than the ** month of pregnancy, *IF and *IM shall have established a will that provides for the child's guardianship and support and that requires that the estate of *IF and *IM be legally obligated under the terms of this Agreement.

"Appointed Guardian" as referenced in this Agreement refers to the individual(s) identified by the Intended Parents who will have parental responsibility for any child(ren) born as a result of this agreement in the event of the death of the Intended Parents. The Intended Parents have chosen _____ and _____ as "Appointed Guardians."

ESTATE PLANNING DOCUMENTS. Intended Parents shall have estate planning documents in place no later than the fourth (4th) month of any pregnancy resulting from this arrangement. Said estate planning documents shall clearly indicate their intentions regarding the disposition of any excess embryos, and shall name a guardian for the Child, which may be Donors or one of the Donors. Intended Parents agree to provide Donors with a copy of the section of her will naming a guardian upon their request. All Parties agree that Intended Parents' estate planning documents shall supersede this Agreement.

8. Estate Planning Documents

- a. Wills. To take any and all actions, including initiating and/or participating in all legal or other court proceedings, and enter into and execute any and all agreements or other documents as necessary to complete all of my obligations under my current gestational carrier agreement into which [INTENDED PARENT(S)], [SPOUSE (if applicable)] and I entered in counterparts on _____, respectively, and __, I hereby expressly authorize my personal representative to pay and/or reimburse any and all costs or other expenses that the terms of the gestational carrier agreement into which [INTENDED PARENT(S)], [SPOUSE (if applicable)] and I entered in counterparts on and _____, respectively, require me to pay, or that are otherwise necessary to initiate and complete any and all proceedings to effect the intent of said gestational carrier agreement.

“Descendants” means an individual related to the designated ancestor by lineal descent in any degree. An individual will be considered to be related by lineal descent only if connected by an unbroken chain of parent-child relationships in which:

3.1. the parent is a male:

- (a) who is married to the child’s female parent at the time of such child’s conception or birth; or
- (b) who became married to the child’s female parent after such child’s birth; or
- (c) whose marriage to the child’s female parent is subsequently declared invalid; or
- (d) who acknowledged in writing that the child is his biological child; provided, that a parent-child relationship with a person otherwise considered the child’s parent will be deemed to be broken by the legal adoption of the child by any person other than the spouse of such parent or after such parent’s death by the subsequent spouse of the surviving parent. Notwithstanding the foregoing, the child I am currently gestating pursuant to the gestational carrier agreement into which [INTENDED PARENT(S)], [SPOUSE (if applicable)] and I entered in counterparts on and _____, respectively, will not be deemed to be my descendant.

9. “Child” means a descendant of the first generation. As of the date of this document, my children's names and dates of birth are: _____.

- a. All references to "my children" shall include any children of mine who are born or adopted after said date. Notwithstanding the foregoing, the child I am currently gestating pursuant to the gestational carrier agreement into which [INTENDED PARENT(S)], [SPOUSE (if applicable)] and I entered in counterparts on _____ and _____, respectively, will not be deemed to be my child. My personal representative and trustees may accept these dates of birth as conclusive in making any determination for which they are pertinent.

10. I nominate [INTENDED PARENT(S)] as guardian(s) of the person of the child I am currently gestating pursuant to the gestational carrier agreement into which [INTENDED PARENT(S)], [SPOUSE (if applicable)] and I entered in counterparts on _____ and _____, respectively. If neither of them is able to care for said child, I nominate any alternate guardian(s) identified by either [INTENDED PARENT(S)] as the guardian(s) of the person of the child.
11. **Will Clauses: Including Children.** My children shall include any child born as a result of the use of my sperm/donated sperm implanted in my wife so long as we are married, and/or as a result of my agreement dated ___ with my partner/spouse and used to fertilize the eggs of my partner/spouse on or before (date) which are implanted into her on or before (date) so long as we are married on the date of implantation.
12. **Will Clauses: Including Children.** My children shall include any child born as a result of my agreement of (date) with (my spouse) and used to fertilize the egg(s) of (my spouse). This agreement has been made in anticipation of my (travel, military tour, illness) and I have authorized such sperm to be used in anticipation of my death.
13. **Will Clauses: Excluding Children.** I hereby exclude any child born as a result of any (sperm/egg) I have donated to (person/facility/anonymously) to (name) resulting in a child born/conceived after the date hereof.
- I hereby exclude any child born as a result of any embryo created or donated to ___ located at (name of facility), resulting in the birth of child, [so long as the embryo has been implanted on or after (date) or, born to someone other than _____].
- If a child is born post death, I include any such child as a beneficiary of my estate, provided such child is born or before (date).
14. **Will Clause: Excluding Children – Surrogate.** I hereby exclude from my estate any child born to me as a result of any pregnancy following the transfer of sperm/egg/genetic material pursuant to an agreement dated _____.
15. **Will Clause: Disposal of Genetic Material.** I hereby direct that my Executor shall require the disposal of any sperm/egg/embryo in storage with the (facility) by thawing or other appropriate method such that my genetic material shall not be used to allow the birth of any child after my death. I exclude from my estate any child born in violation of this direction.
16. **Trusts: Will Clause: Defense Trust.** In the event I have donated my sperm/egg/embryo to _____ or the same has been utilized by any unknown persons resulting in the birth of a child, I hereby create a trust to provide for the support of such child or children, with the sum of \$_____, to be held and administered in accordance with the terms of the trust set forth in Article _____.

I exclude from my trust any child born to an unwed parent (defense to posthumous child)

17. Power of Attorney Except as specifically limited herein, my attorney-in-fact shall have all the powers incident to a general power of attorney under the common law and statutes of Minnesota, and shall also have full authority to take any actions necessary or incident to the execution of these powers, as fully as I could do if personally present. For purposes of illustration, and not as a limitation of this grant of powers, these powers shall include:
18. Parental Powers. All powers of mine as a parent with respect to the care, custody and property of my minor children, if any, to the fullest extent, and for the maximum one year period, permitted by Minnesota Statutes, Section 524.5-211, if I am unwilling, unable or unavailable to exercise those powers myself; provided, however, that these delegated powers shall terminate with respect to the person or estate of a particular child to the extent these powers are given to a guardian or conservator of the person or estate of that child. The phrase "my minor children" shall not include the child whom I am currently gestating pursuant to the terms of the gestational carrier agreement into which [INTENDED PARENT(S)], [SPOUSE (if applicable)] and I entered in counterparts on _____ and _____, respectively. As to said child, all parental powers pursuant to this paragraph shall be awarded to [INTENDED PARENT(S)] as the [sole] legal guardian(s) of said child.
19. Enforcement of Surrogacy Agreement. The power to take any and all actions, including initiating and/or participating in all legal or other court proceedings, and enter into and execute any and all agreements or other documents as necessary to complete all of my obligations under my current gestational carrier agreement into which [INTENDED PARENT(S)], [SPOUSE (if applicable)] and I entered in counterparts on _____ and _____, respectively.
 - a. Payment of Surrogacy Obligations. The power to arrange and pay for and/or reimburse any and all costs or other expenses as I am required to pursuant to the gestational carrier agreement into which [INTENDED PARENT(S)], [SPOUSE (if applicable)] and I entered in counterparts on _____ and _____, respectively, or that are otherwise necessary to initiate and complete any and all proceedings to effect the intent of said gestational carrier agreement.

My agent may authorize, decline to authorize, or withdraw any authorization from time to time, or at any time as my agent may determine, the use of my sperm/egg/embryo that may result in the birth of a child, the donation of my sperm/egg/embryo to (name), and/or a specific in vitro fertilization procedure with person/facility on or before (date).

- b. Health Care Directive I hereby give the following specific instructions to the agent or any alternative agents.
 - i. I expressly request that I be kept on life support if I am brain dead while still pregnant with the child I am gestating pursuant to the gestational carrier agreement into which [INTENDED PARENT(S)], [SPOUSE (if applicable)] and I

have entered into for the purpose of maintaining the pregnancy until the child can be born alive

20. Same sex shared parenting agreements²

SHARED PARENTING AGREEMENT

This agreement is made this ____ day of _____, 20__, by and between _____ and _____.

In consideration of the promises made to each other, and in consideration of our mutual contributions toward the [creation by in vitro fertilization; artificial insemination] or [adoption] of a child [born] or [adopted] on the ____ day of _____, 20__, and in acknowledgement that state law is unsettled in this area of parental rights, and in acknowledgement of the parties' mutual belief that the best interests of our child, _____, require stable sources of financial, academic, medical, and emotional support, the parties enter into this Agreement to guarantee that their child will receive the full benefit of having each and both of the parties as parents, including current and future financial and emotional support and rights to inheritance, and to guarantee that both _____ and _____ shall be considered natural and legal parents of _____.

Therefore, we agree as follows:

21. Domestic Partnership Agreement:

Children

It is the intention of the parties to have or adopt one or more children during the domestic partnership. It is the intention of the parties that during their domestic partnership, when one partner has a child, that partner will consent to the other partner's undertaking of any and all steps to adopt that child.

It is the intention of each party to create an irrevocable life insurance trust that will be funded by their separate funds, and that will provide for the maintenance of the surviving partner, if the domestic partnership is still in effect at the time the other partner dies. Regardless of the status of the domestic partnership, the irrevocable life insurance trust will provide for the maintenance, health, education, and welfare of the parties' child(ren). The parties agree that each will continue to fund their own irrevocable life insurance trust until such time the life insurance policy has been paid in full or the youngest child reaches the age of twenty-five. The

² The text of this provision is from Joan M. Burda, Estate Planning for Same-Sex Couples (ABA 2004 as updated).

parties hereby agree that all indicia of life insurance shall be set forth in Schedule C, attached hereto.

22. Divorce Decrees and Related Documents

a. Divorce Decree

Finding of Fact

The parties have embryos stored at _____ and the embryos shall be disposed of exclusively according to the terms of the storage agreement on file at said storage facility. [Neither Husband nor Wife will be awarded any right or authority to take possession or control of the describe genetic material or to use the describe genetic material to initiate the gestation of a child without the subsequent express written consent of the other party prior to any such use or disposition. Any such consent is hereby ordered to include an express agreement between the parties' regarding legal parentage of any children whose gestation and birth are commenced after the conclusion of this proceeding.] [If the required mutual consent is not obtained, the resulting children are hereby ordered, pursuant to the express agreement of the parties in this proceeding, to be the legal children of only the party who initiated the gestation without the other party's prior knowledge and consent.]

b. Conclusion of Law

Embryos. The parties' [amount/description of stored genetic material] presently stored at [name/address of storage facility] is hereby ordered to be disposed of exclusively according to the terms of the storage agreement on file at said storage facility. [Neither Husband nor Wife is hereby awarded any right or authority to take possession or control of the [describe genetic material] or to use the [describe genetic material] to initiate the gestation of a child without the subsequent express written consent of the other party prior to any such use or disposition. Any such consent is hereby ordered to include an express agreement between the parties' regarding legal parentage of any children whose gestation and birth are commenced after the conclusion of this proceeding.] [If the required mutual consent is not obtained, the resulting children are hereby ordered, pursuant to the express agreement of the parties in this proceeding, to be the legal children of only the party who initiated the gestation without the other party's prior knowledge and consent.]

-or-

All right, title, and interest in and to, and sole control over the use and disposition of, the [amount/description of stored genetic material] presently stored at [name/address of storage facility]. In the event that [Husband/Wife] initiates the gestation of the [describe

genetic material], pursuant to the express agreement of the parties in this proceeding, the resulting children, if any, are hereby ordered to be the legal children [only of the Husband/Wife] [of both parties] for purposes of determining the party's subsequent custodial rights and child support obligations.

c. Alimony/Donation – Support Connection

Wife agrees to pay to Husband as alimony, a sum equal to any support order entered against Husband for any child born as a result of the use of the frozen embryos, plus an additional sum of 30% Partners/Friends – alimony becomes liquidated damages

Use of life insurance trusts, prefunded if donee dies and support is required

d. Divorce questionnaire

FERTILITY HISTORY AND INFORMATION

Have you or your spouse, if any, ever been diagnosed as infertile or treated for infertility? Yes _____ No _____. If you answer is "yes," please provide detailed information regarding the processes undergone, whether any contracts were signed, copies of any such contracts, and the outcome of the processes.

Do you or your spouse currently have any genetic material, frozen embryos, or any other such materials stored for future use? If so, provide the details of the storage and dispositional alternatives you have selected. Please include copies of any medical consent documents, dispositional contracts, estate planning documents, or prenuptial agreements where you may have addressed this stored material and its disposition.

23. Model Egg Freezing Contract and Model Medical Consent Form³

III. ENDORSING A CONTRACTUAL SOLUTION: PROPOSING A FORM OOCYTE CRYOPRESERVATION AGREEMENT TO AVOID DISPUTES, AMBIGUITY, AND UNCONSCIONABLE OUTCOMES

State statutes should require fertility clinics offering egg freezing services to use a form contract that thoroughly addresses informed consent,¹⁵⁸ allows each patient to clarify her *1600 wishes regarding the disposition of leftover or pre-deceased eggs, and delineates appropriate damages in the event that either party breaches the contract. A form contract would create uniformity among clinics and from state to state, which is crucial to protect the interests of clinics, patients, and society, as the market for egg freezing continues expanding. Beyond providing uniformity, form contracts are necessary to ensure that patients are fully aware of the many steps and risks

³ This entire section of the outline is an excerpt and proposed contract/consent form developed by law student Alicia J. Paller as presented in her law review article, A Chilling Experience: An Analysis of the Legal and Ethical Issues Surrounding Egg Freezing, and a Contractual Solution, 99 Minn. L. Rev. 1571 (April 2015).

involved in egg freezing, and that clinics are fully educated about each patient's intent. Section A provides a general description of the components that should be included in a form egg freezing contract.¹⁵⁹ Section B addresses informed consent, specifically, and how the form egg freezing contract should explicitly delineate the steps and risks involved in both cryopreservation and future IVF. Section C describes how the form contract can provide patients with flexible, multiple-choice options that indicate their intent regarding the disposition of their leftover, abandoned, or pre-deceased eggs. Section D addresses how the form contract should handle promotional offers and liquidated damages. Section E considers overarching recommendations that relate to the implementation of form contracts for egg freezing. Lastly, Section F highlights the feasibility of contract-based regulation.

A. NECESSARY COMPONENTS OF A FORM EGG FREEZING CONTRACT

A form contract for egg freezing should be comprehensive, regardless of length.¹⁶⁰ It is crucial that traditional provisions, as well as provisions tailored particularly to ART services and egg freezing, be included in the contract. Egg freezing contracts should include sections regarding important legal, medical, and ethical matters, including, at the very least: (1) Description of *1601 Oocyte Cryopreservation; (2) Variable Success; (3) Short-Term Effects and Risks; (4) Long-Term Effects Unknown; (5) Costs; (6) Disposition of Oocytes; (7) Clinic Liability; (8) Confidentiality; (9) Counsel; (10) Entire Agreement; (11) Written Amendments Required; (12) Severability; (13) Breach; (14) Liquidated Damages; (15) Enforceability; (16) Mediation Requirement; and (17) Voluntary Signing.

These sections can be grouped into four main categories: sections one through five address risks and informed consent; section six covers a range of appropriate options for disposition; sections thirteen and fourteen pertain to damages for breach of contract; and sections seven through twelve and fifteen through seventeen cover miscellaneous contractual safeguards and formalities. The first three categories will be explained in greater detail below, yet all seventeen sections should be included in a state-mandated form contract for egg freezing. It would also be prudent for states to clarify at the top of each form contract that the form has important legal consequences and the parties should consult legal counsel before signing. This boilerplate language is customarily found on state-mandated legal contracts.¹⁶¹

B. INFORMED CONSENT SHOULD SPECIFICALLY ADDRESS THE PROCESS AND RISKS OF CRYOPRESERVATION

Informed consent is arguably the most important and complex issue to be addressed by the form contract for egg freezing. The first provision of the contract should broadly state the nature of the agreement. For example:

I, _____[patient name], hereafter PATIENT, understand that cryopreservation (freezing) of human oocytes (eggs) is an assisted reproductive technology that

can preserve oocytes so that they may be stored, thawed, fertilized (via in vitro fertilization), and transferred for implantation at a later time. I understand that by signing this form, I evidence my consent to the retrieval and cryopreservation of my oocytes, by embryologists at _____[clinic name], hereafter CLINIC, in accordance with the following descriptions and provisions.

The next step is to ensure that the egg freezing process is clearly defined, that the variable chances of successfully freezing *1602 (and later thawing and fertilizing) eggs is made explicit, that the physical and psychological risks are expressed, and that the patient's financial obligations are plainly set out in the agreement.

1. Description of Oocyte Cryopreservation

The first major section of the form contract should describe egg freezing, both broadly and step-by-step. Including this description is essential, especially considering the plethora of incomplete or false information that potential patients are likely to have previously encountered regarding egg freezing.¹⁶²

A simple description of oocyte cryopreservation should be followed by a provision that patients must initial, indicating their understanding that their oocytes will be retrieved, frozen, stored, and thawed according to medically appropriate standards. Requiring patients to initial key provisions throughout the contract will compel them to slow down, and will encourage them to focus on important information bit-by-bit and ask questions as they arise. This strategy will help ensure that patients are processing and absorbing the intricacies of the contract, rather than rushing through unaware of significant provisions.

Next, the contract should include a heading titled "Oocyte cryopreservation involves the following steps," followed by this list (modified as appropriate to conform to a clinic's exact methods):

1. Preliminary administration of hormones to PATIENT to stimulate her ovaries.
2. Retrieval of oocytes from PATIENT's ovary(s) by inserting a needle into the ovary(s), using ultrasound guidance.
3. Freezing and storage of the oocytes in liquid nitrogen (- 196 degrees C).¹⁶³

Immediately after this list, there should be a provision that patients must initial, evidencing they understand that cryopreservation involves the three abovementioned steps.

It is not enough, however, to merely list the steps of oocyte cryopreservation, since each patient's end goal is by nature to achieve pregnancy and live birth. Patients should clearly understand the additional steps that will be required for them to use their frozen eggs when attempting to have children in the future. Therefore, the next subheading should be "Use of cryo *1603 preserved oocytes involves the following steps." The section should include these steps:

1. Thawing of individual or numerous cryopreserved oocytes.
2. Determination of viability of thawed oocytes.
3. Injection of partner's sperm or (purchased) donor's sperm into viable, thawed oocytes (if any oocytes are viable after being thawed).
4. If fertilization occurs, the embryos must grow for several cell divisions until determined by the embryologist(s) and/or physician(s) at CLINIC to be fit for transfer into PATIENT or surrogate carrier's uterus or fallopian tube(s).
5. Ultrasound examinations of PATIENT (or surrogate carrier) and blood tests of PATIENT (or surrogate carrier) to determine suitability of her uterine lining for the reception of embryos.
6. Transfer of the embryo(s) to the recipient's uterus or fallopian tubes.

(Note: Steps 2-6 constitute in vitro fertilization.)¹⁶⁴

Again, patients should be encouraged to pay special attention to these future requirements to make use of their frozen eggs. Thus, there should be two provisions following this list that require patients to initial (a) that they understand that the use of cryopreserved oocytes to achieve pregnancy involves the abovementioned steps, including future IVF, and may not result in successful pregnancy(s); and (b) that they understand that they may get pregnant through natural conception at any time and ultimately choose not to attempt to use their cryopreserved oocytes. Provision (b) is important because it highlights that patients' considerable expenditure of time, energy, and money is not essential to achieve pregnancy in the future, any time before menopause.¹⁶⁵

2. Variable Success

The next main section should articulate, "oocyte cryopreservation is performed with variable success."¹⁶⁶ The first subheading should state, "Known factors that may prevent preg *1604 nancy include, but are not limited to," and be followed by a list that includes, at a minimum:¹⁶⁷

1. Poor or no survival of viable oocytes after undergoing thawing.¹⁶⁸

2. Poor or no fertilization of the thawed oocytes.
3. Poor or no development of fertilized embryos.
4. Genetic abnormality(s).
5. Equipment failure leading to the loss or damage of oocytes or embryos.
6. Human error leading to the loss or damage of oocytes or embryos.
7. Technically difficult, impossible, or prohibited embryo transfers.
8. Failure of embryos to implant and continue developing.¹⁶⁹

Patients should initial next to separate provisions drawing attention to (a) the fact that neither pregnancy nor a successful outcome of pregnancy can be assured as a result of oocyte cryopreservation (and subsequent IVF); (b) that it is possible that no oocytes will be viable after being frozen and thawed; (c) that it is possible that no viable eggs will become fertilized to produce embryos; and (d) that no guarantees have been made to the patient regarding the possible success of oocyte cryopreservation.

The second subheading should focus on the various possible results of pregnancy, listing “Pregnancy(s) may result in”:¹⁷⁰

1. Multiple births (i.e., more than one fetus is carried to term during a single pregnancy, resulting in the birth of twins, triplets, or other multiples).¹⁷¹

*¹⁶⁰⁵ 2. Ectopic pregnancy (i.e., the fertilized egg implants somewhere outside of the uterus, causing the loss of the pregnancy. If left untreated, ectopic pregnancies may lead to life-threatening blood loss or diminished chances of healthy, future pregnancies).¹⁷²

3. Miscarriage (i.e., the spontaneous loss of a fetus before the twentieth week of pregnancy).¹⁷³

4. Stillbirth (i.e., the loss of a fetus after the twentieth week of pregnancy).¹⁷⁴

5. Birth of a child(ren) with congenital abnormalities (which may be caused by chromosome or single-gene abnormalities, certain maternal illness during pregnancy, a combination of genetic and environmental influences, and/or other unknown causes).¹⁷⁵

Women investing in egg freezing should be aware of the numerous barriers that potentially stand in the way of successful pregnancies, especially since multiple steps are required to attempt pregnancy through assisted reproductive technologies.

3. Short-Term Effects and Risks

The form contract's third section should focus on short-term effects and risks. Physical effects and risks should be described, beginning with a statement alerting the patient that she will be responsible for giving herself hormone injections every ___ () days, for ___ () days/weeks, to stimulate her ovaries prior to each oocyte retrieval procedure.¹⁷⁶ The contract should stipulate that these hormone treatments may have short- or long-term effects, including, but not limited to: (1) bruising and/or soreness; (2) weight gain; (3) loss or thinning of *1606 hair; (4) melisma (i.e., dark skin discoloration¹⁷⁷); (5) bloating; and (6) tender ovaries.¹⁷⁸ This section should conclude with a provision that a patient must initial, indicating that she understands that hormone treatments, as well as the oocyte retrieval procedure(s), may have short-term effects on her body.

Psychological effects and risks should also be indicated under the short-term risks heading. The patient should initial that she understands that oocyte cryopreservation and the use of future assisted reproductive technology may be psychologically stressful and may result in anxiety and depression, and that oocyte cryopreservation will require months of time and commitment.¹⁷⁹

4. Long-Term Effects Unknown

Another key component of informed consent is the patient's understanding that the long-term effects of the administration of fertility drugs are not known. Specifically, the potential risk of ovarian or endometrial cancers are still being evaluated.¹⁸⁰ The form contract should briefly explain that long-term effects remain unknown, and leave space for patients to initial that they understand this situation.

5. Costs

The final aspect of informed consent that must be included in the form contract is costs. Patients should pay special attention to their financial obligations. The form contract should include an overview of costs and fees, noting that costs will be associated with every step of the egg freezing (and future storage and IVF) processes. The clinic should provide an appendix that lists current costs and fees, but should note that these amounts may vary and/or be adjusted by the clinic based upon market factors. In addition, the form should clearly state that the fee for each storage period shall be paid in advance, and that unused storage fees are non-refundable (if this is the case).

*1607 A separate section should address default. The default section should specify: "If, at any time, CLINIC has not received the full payment of all amounts due from PATIENT on or before thirty (30) days after the beginning of any storage period, PATIENT is in default;" and "In the event of default, CLINIC agrees to attempt to contact PATIENT, according to the disposition provisions"

and may “at its sole discretion, refer PATIENT’s account to any attorney or collection agency for collection.” The form may further stipulate that PATIENT agrees to pay all costs and fees reasonably associated with such collection.¹⁸¹

C. MULTIPLE-CHOICE OPTIONS FOR THE DISPOSITION OF EGGS

The issue that perhaps has the greatest potential to create ethical dilemmas is egg disposition. Both patients and clinics should be determined to clarify provisions regarding disposition well before the egg freezing procedures begin. This is a challenging yet necessary undertaking.

A form egg freezing contract should include a section specifically dedicated to disposition of oocytes. The first subheading should state, “If PATIENT should die while any of her oocytes remain in storage,” and be followed by these options¹⁸²:

I, _____ [PATIENT NAME], wish for any and all oocytes that remain in storage to (check all those that apply):

(a) ___ be thawed and disposed of, in a professional and ethically accepted manner according to the fertility clinic’s guidelines, not inconsistent with American Society for Reproductive Medicine guidelines. Disposed of oocytes cannot and will not be used for reproductive purposes on behalf of any person(s).

(b) ___ be donated to a single woman for reproductive use.

(c) ___ be donated to a couple for reproductive use.

___ I intend “couple” to refer to married partners of the opposite-sex, only.

___ I intend “couple” to refer to married or non-married partners of the opposite-sex, only.

___ I intend “couple” to refer to married partners of the same-sex, only.

___ I intend “couple” to refer to married or non-married partners of the same-sex, only.

___ I intend “couple” to refer to married partners of the opposite- or same-sex.

*1608 ___ I intend “couple” to refer to married or non-married partners of the opposite- or same-sex.

(d) ___ be donated to research.

___ I wish to donate the oocytes to research with no restrictions on future use.

___ I wish to donate the oocytes to research with the following restrictions on future use:¹⁸³

___ The oocytes shall not be fertilized.

_____ Other:

OR,

(e) _____ become the property of _____ [NAME], my

_____ [RELATION], unless the circumstances surrounding my relationship with this person drastically change (e.g., separation, divorce, lack of contact for over one (1) year). I expressly intend that my eggs not transfer

to this person if:

_____ (DESCRIPTION OF SPECIFIC CIRCUMSTANCES THAT SHALL AUTOMATICALLY TRIGGER REVOCATION).

_____ I intend for this person to pay for remaining storage fees.

_____ I intend for storage fees to be paid out of my estate for as long as possible, and then I intend for this person to pay for remaining storage fees.

_____ I intend for any child(ren) created from my cryopreserved oocytes within five (5) years of my death to inherit from my estate.

_____ I do not intend for any child(ren) created posthumously from my cryopreserved oocytes to inherit from my estate. I do not expect or want to be considered their legal mother.

_____ [PATIENT INITIALS] I understand that should the circumstances surrounding my relationship with the abovementioned person drastically change, any remaining cryopreserved oocytes shall be disposed of according to my second choice, option _____ (CHOOSE FROM OPTIONS (a)-(d)), as described above.

_____ [PATIENT INITIALS] I understand that my will should reflect my intent regarding posthumous disposition of my cryopreserved oocytes, but fully intend for this document to be legally binding and enforceable upon my death.

_____ [PATIENT INITIALS] I understand that should I change my mind at any time regarding the disposition of my cryopreserved oocytes upon *1609 my death, I must contact the fertility clinic immediately and sign a new form, clearly stating my intent, otherwise, this form shall govern.

These extensive provisions will help ensure that patients consider possible future circumstances, so that their wishes are carried out, and so that clinics are not forced to make ethically difficult decisions about patients' eggs.

Similarly, another subsection should address what should happen if the patient becomes unreachable. There should be a provision that a patient initials indicating that she agrees to promptly update her contact information if it should change. Then, a detailed description of clinics' obligations to reach out to patients for a certain length of time (e.g., five months), and attempt contact at least ___ times (e.g., once every two weeks), should be stated. Lastly, patient should initial that she understands that if she remains unreachable for that length of time, the clinic may dispose of her oocytes according to her wishes (expressed in the contract), so long as the clinic has attempted contacting her according to the stated provisions.

D. PROMOTIONAL OFFERS AND PROVISIONS FOR LIQUIDATED DAMAGES SHOULD BE DESCRIBED IN EACH CONTRACT

The issue with many ART agreements is that when disputes arise, specific enforcement is often not an option. It would be unconscionable to force a woman to gestate a fetus, go through IVF, or keep her eggs in a storage facility. The issue, then, is what the consequences should be for breach of contract. This Note recommends that the form egg freezing contract specifically address breach and liquidated damages.

Liquidated damages clauses appear in numerous types of contracts.¹⁸⁴ Typically, liquidated damages provisions are enforceable if:

(1) it appears that the parties intended to liquidate damages; (2) . . . the amount of damages specified was a reasonable estimate of the presumed actual damages that would result from a breach; and (3) at the time of contracting, it was difficult to ascertain the amount of damages that would result from a breach of the agreement.¹⁸⁵

*1610 Excessive liquidated damages provisions are generally deemed unenforceable because they essentially create a penalty for breaching the contract, which is not the true purpose behind enforcing liquidated damages.¹⁸⁶ Instead, the purpose is to promote good faith dealings, to prevent inequality between bargaining parties, and to provide fair, certain recoveries.¹⁸⁷

Liquidated damages in the form egg freezing contract could be broken into two subsections: (1) “Damages to be Recovered by Patient;” and (2) “Damages to be Recovered by Clinic.” Subsection (1)(a) should list amounts to be paid from the clinic to the patient in the event that the clinic’s negligent, grossly negligent, or intentional acts lead to the patient’s inability to use her cryopreserved oocytes¹⁸⁸ (e.g., \$10,000 per unusable or wrongly disposed of oocyte, plus the reasonable costs and fees that patient expended on the cryopreservation of that oocyte). Subsection (1)(b) should state the amounts to be paid from the clinic to the patient if the patient’s oocytes are wrongly (whether accidentally or intentionally) implanted in the wrong woman, or wrongly disposed of (e.g., \$15,000 per wrongly used or wrongly disposed of oocyte). A provision may cap all of the patient’s (or her heir’s or estate’s) recovery, by providing that she may only recover under section (1)(a) or (1)(b), whichever amount is greater. The agreement should specifically state that this provision caps all damages, including recovery for the loss of ability to procreate, pain and suffering, and any potential future amounts not currently contemplated.¹⁸⁹

Subsection (2) should specifically address damages that the patient will be expected to owe the clinic if she defaults on storage payment, especially if she receives a discount that is contingent on future acts. For example:

If PATIENT receives a discount on services (e.g., oocyte preservation and/or oocyte storage) on the condition that PATIENT also agrees to use CLINIC for future services (e.g., for future IVF treatments), or agrees to donate extra eggs in the future, and PATIENT ultimately *1611 decides to use a different clinic for future services, or does not donate her extra eggs, contrary to the conditional agreement, PATIENT shall pay CLINIC 105% of the amount of money that she originally saved, plus interest on the amount of money that she originally saved, in the amount of ___ %.

While this provision sets up clear guidelines that ideally will be enforced if breach occurs, it is critical to note that clinics are better off avoiding discounts contingent upon future performance. Instead, if clinics choose to offer discounts, they should promote savings that are applied up front. For example, “If you undergo three rounds of egg freezing, you will receive a 20% discount on the third round,” or “Pay for two years of storage costs up front and receive the first three months, free.” These schemes avoid the issue of clinics holding patients’ genetic materials “hostage” while patients struggle to pay back discounts that they originally received, even decades earlier, under drastically different circumstances.¹⁹⁰ In the event that discounts are offered that are contingent on future acts, the form contract should require the inclusion of provisions for liquidated damages.

E. SUGGESTIONS FOR IMPLEMENTATION

Clinics may be concerned that if statutes require the use of standard egg freezing contracts, they may face an extra financial burden. The use of standard egg freezing contracts, however, should be relatively inexpensive to implement and will likely save clinics from having to make legally and ethically troublesome (and costly) decisions in the future. In addition, clinics have the ability to create policies that will foster patient confidence, and lead to safer business practices and better health care. For example, clinics might benefit by suggesting that patients take a certain number of days to look over the egg freezing contract on their own time, either at home or with a lawyer. This could potentially shield clinics from liability, and would also encourage women to review their options on their own time frame, in a calm environment, and possibly with legal assistance. Clinics might even stress the importance of patients seeking legal counsel before completing the contract.¹⁹¹ For example, the clinic might include in the contract:

*¹⁶¹² PATIENT understands that CLINIC strongly urges her to independently consult with an attorney knowledgeable about assisted reproductive technology.

_____ [PATIENT INITIALS] I understand that it is recommended that I seek independent legal advice before signing this Agreement.

_____ [PATIENT INITIALS, IF APPLICABLE] I have, in fact, sought independent legal counsel regarding oocyte cryopreservation, and have reviewed this Agreement with an attorney.

Clinics also have the ability to determine how they will provide women with the opportunity to update or modify their preferences once patients have completed the contract and frozen their eggs. An initial contract will not necessarily prevent disputes if women cannot revise their preferences over a potentially long period of time, while their eggs are in storage. If information is accessible to patients, indicating how they can update their preferences, both clinics and women freezing their eggs will benefit. The clinic may, for example, require written amendments, or require an entirely new agreement to be completed and signed.

Finally, the standard form contracts should be viewed as setting a floor for the types of information that women freezing their eggs should be provided with before undergoing the procedure. Clinics should consider on an individual basis how they may tailor, implement, improve, and explain the egg freezing contract to patients, to best address their patients' needs and concerns.¹⁹² This in turn will reflect particular clinics' practices, and prevent against disputes, ambiguity, and unconscionable outcomes.

F. THE FEASIBILITY OF STATE LEVEL, CONTRACT-BASED REGULATION

There are certainly arguments that can be made against the abovementioned solution. Perhaps no steps should be taken *1613 to encourage egg freezing, as they may merely provide women with “false hope,” or inappropriately insinuate either that women cannot be “good employee[s] without delaying [[motherhood],” or that they must freeze their eggs or future infertility will somehow be their “fault.”¹⁹³ Keeping in mind, though, that ASRM, the most influential body overseeing reproductive medicine in the United States, has heralded egg freezing as an “exciting” new technology, women are increasingly rushing to freeze their eggs.¹⁹⁴ Thus, assuming that some sort of legal action should be taken to safeguard women and fertility clinics as this technology takes off, state-based mandatory form contracts are a promisingly feasible solution.

First, contracts have already been used to protect the interests of patients and fertility clinics.¹⁹⁵ They are a familiar tool for working out both legally and ethically complex issues, while memorializing parties’ understanding and intent. Second, states have historically used form contracts to set minimal requirements, both within and beyond the medical sphere.¹⁹⁶ Third, the form contract suggested in this Note would benefit both patients and fertility clinics, serving to prevent costly and morally troubling disputes from arising. Clinics will have the flexibility to tailor contracts to fit their needs, while maintaining key safeguards set out by legislatures, and patients will be better informed before investing their bodies, minds, and savings in egg freezing. Lastly, egg freezing is unlikely to inspire particularly charged political disagreement; it is much more akin to the benign issue of freezing sperm than it is to the controversial issue of freezing embryos.¹⁹⁷

Ultimately, it is no longer appropriate for egg freezing to proliferate without implementing legal safeguards. Mandatory form contracts provide an expedient, manageable, and flexible solution that will prevent conflict without prohibiting growth.