Couched in a halo of nutrient cells, an egg smaller than the dot on an “i” drifts slowly down a Fallopian tube, one of a pair of narrow passages that leads from a woman’s ovaries to her womb. Like a beacon guiding ships at night, the egg sends forth a calling signal. A convoy of sperm—the remnants of an armada that was once a couple of hundred million strong—sails into view, their long tails thrashing vigorously. Lured by the chemical signal, several hundred of the most energetic swimmers close in on the egg, their narrow tips unleashing a carefully timed sequence of biochemical salvos. One substance dissolves the jelly-like veil surrounding the egg. Another softens the egg’s tough outer shell, preparing it for penetration. In the last moments before conception, a few dozen sperm race to break through the final barricade.

One and only one succeeds.¹

I. Introduction

The primitive process nature bestows on mankind to create an embryo is fraught with challenges and not unlike the battles that take place in war. For those would-be parents whom nature has failed, the process is an everyday war that devastates relationships, demolishes health, and destroys the basic human desires of parenthood.

Assisted Reproduction Technology (ART) gives people more options for parenthood than ever before. It is now possible for a person to con-
ceive an embryo, genetically related or not, and have that embryo carried
to term by a woman who is not related to the resulting child. These med-
ical advances and the social norms surrounding them have outpaced our
legal system, bringing with them various issues. These issues include
defining the families created by ART and the rules needed to govern the
process.

This article narrows to one part of the ART process: the disposition of
excess embryos that result from ART. Part I examines the patchwork of
existing laws created in reaction to disputes concerning embryo disposi-
tion. Part II discusses the two leading models commentators propose
should govern embryo disposition and which body of law should govern.
Part III offers the simple solution of taking the best and most applicable
aspects of both models to create a system of rights and repeatable proce-
dures to govern embryo disposition as needed today and in the face of
future medical advancements.

Many articles take the position that embryos are either property to
be governed by contract law or a person subject to adoption laws. This
article offers a different approach, which recognizes the strengths and
weaknesses of both arguments and suggests that the answer lies some-
where in between. By sidestepping the moral and political dilemmas, we
can move past the roadblock of classifying the status of an embryo and
instead identify which rights should attach to the parties involved in the
process. Moreover, instead of stalling on the procreational rights of the
“parents,” this article suggests skipping that step entirely because a par-
ent’s right not to “procreate” is moot after an embryo is created.

II. The Need for Assisted Reproductive Technology
and the Current Status of Embryos

A. The ART of Making Babies

ART provides solutions for many different categories of people, includ-
ing the medically infertile,2 same-sex couples, single parents, the geneti-
cally at-risk, and gender selectors.3 The most common category to use
ART is the medically infertile.4 Medical infertility is a disease of the repro-
ductive organs that creates an inability or diminished capacity to produce

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2. In the context of this article, infertility can be either medical or social. Social infertility
implies that a party might be able to medically reproduce; however, they lack either a partner
or are unable to biologically reproduce with their partner.
3. Debora Spar, Building a Better Baby Business, 10 MINN. J.L. SCI. & TECH. 41, 44
(2009).
4. Id.
a pregnancy, carry a pregnancy to term, or both. The last reported study of infertile women reported 7.5 million affected—meaning, approximately one in eight women suffer from infertility. For many jurisdictions, after a woman is diagnosed with infertility, she is eligible for reproductive help through the use of Assisted Reproductive Technology (ART). ART is a customized medical concoction of services that includes procedures performed by fertility doctors and embryologists, donated reproductive tissue, and large doses of genetic research and medical technology.

As clinical and progressive as ART sounds, the processes and procedures falling under ART’s umbrella are complicated and to some, bizarre. The process involves the use of terminology that makes many people squeamish: sperm and eggs (donor, biological, or a combination of both), combined in a Petri dish for several days until high-potential embryos form and, through In-vitro fertilization (IVF), are transferred into a woman’s uterus. Surrogacy often uses the entire gamut of ART services to assist individuals in building a family. This term refers to the process of someone other than the progenitors carrying the intended child to term.


6. Compare Anjani Chandra et al., *Fertility, Family Planning, and Reproductive Health of U.S. Women: Data from the 2002 National Survey of Family Growth*, 23 VITAL & HEALTH STAT. 25, 105, 108, 316 (2005), with Barbara Collura, Executive Director of RESOLVE, Panelist at the American Bar Association (ABA) Section of Family Law 2011 Spring Meeting: The Infertility Patient Is Now Your Client (Apr. 9, 2011) (emphasizing that current numbers suggest the 2002 number has increased dramatically and is closer to one in five women affected by infertility).


8. ABA MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY § 102(1)-(2) (2008) [hereinafter ART MODEL ACT], (proposed by the ABA Section of Family Law’s Committee on Reproductive and Genetic Technology, approved by the ABA House of Delegates in 2008, and proposing rules for ART issues, embryo status, and parentage).

9. Surrogacy involves the use of either a gestational or traditional surrogate (often called carriers). A gestational carrier is a “woman into whom an embryo formed using eggs other than her own is transferred” and a traditional carrier is a “woman who undergoes inseminations and fertilizations of her own eggs in vivo.” See id. § 102 (16).

10. For purposes of this paper, the term progenitor refers to the person or persons who originally created the embryo with the intention to produce and raise a child. See id. § 102 (27) (defining the same as “Participant”).
B. The Problem: Too Much of a Good Thing Is Not Always Wonderful

Despite popular belief, human reproduction is not a safe bet. Only twenty percent of human embryos, regardless if using ART, survive to implant in the uterine wall.\textsuperscript{11} While infertility doctors aim at producing quality embryos, they also desire a resulting pregnancy. Therefore, the end result of the complicated egg retrieval and insemination process is a number of excess embryos, some of which are not chromosomally fit for transfer to a woman’s uterus.\textsuperscript{12}

By definition (and in some states by statute), patients who are eligible to receive ART have already spent a year, if not longer, facing reproductive disappointment.\textsuperscript{13} It is no wonder they enter the process focused on one step at a time. However, when the whirlwind of counseling, doctor’s appointments, and strictly-administered medication ends in a thirty-minute egg retrieval procedure, patients find they have underestimated the number of embryos that can result from the procedure. Faced with a dilemma that is the very opposite of infertility, these patients generally have four options for the embryos they created: use them all or cryopreserve them for later implantation, donate them to another couple, donate them to research, or allow the clinic to destroy them.\textsuperscript{14} Fertility clinics will present these options to patients by way of a consent form. Not all states, however, allow for the destruction of embryos or donation of embryos to research.\textsuperscript{15} States that do allow for donation to research might have legislation in place to regulate the process so progenitors can choose research more in line with their beliefs.\textsuperscript{16}

\begin{thebibliography}{9}


\bibitem{13} Some states define infertility by statute. \textit{See, e.g.}, CAL. HEALTH & SAFETY CODE § 1374.55 (2010) and N.J. STAT. ANN. § 17:48-6xa (2010). \textit{Cf.} FLA. STAT. § 742.15(2)(a)-(c) (2010) (Florida does not define infertility through statute, but it requires participants to a gestational surrogacy agreement to be infertile).

\bibitem{14} Theresa M. Erickson & Megan T. Erickson, \textit{What Happens to Embryos When a Marriage Dissolves? Embryo Disposition and Divorce}, 35 WM. MITCHELL L. REV. 489, 473 (2009).

\bibitem{15} \textit{See} KY. REV. ANN. STAT. § 311.715 (2010) (prohibiting destruction of embryos in publicly funded facilities); \textit{see also} LA. REV. STAT. ANN § 9:122, 129 (2008).

Surprisingly, the complicated part of ART occurs less with the impressive medical technology and more with the inconsistent legal structure attempting to govern it. There is no debate that ART is about creating families, but what happens when a couple who intended to use their embryos to create a family no longer agree about the embryos’ fate? Despite best intentions, desires change, and whether divorce, death, or financial and emotional drain is the reason, some 400,000 existing, cryopreserved embryos remain unused.\footnote{17}

Long before ART was a glimmer in the eyes of hopeful parents, the circumstances and intentions of people living together as a family often changed, and the court system had to handle any remaining disputes. Families created through ART are no different. They face the same issues of divorce, custody, and family planning as non-ART enhanced families—if not more. These families deserve a unified body of law they can depend upon before making the decisions they must make about their excess embryos.

C. It Takes a Village to Create a Baby: Gamete Donation

A legal ramification of ART is that there could conceivably be six “parents” to a given embryo. One embryo could have a sperm donor, egg donor, surrogate carrier, surrogate’s husband, and two intended parents.\footnote{18} These parties present problems for the fertility doctors who must determine to which party they owe a duty\footnote{19} and for court systems accustomed to ruling in the best interests of the child. Adding to this confusion is the fact that not all gametes are treated equally.\footnote{20} In the past, courts have classified frozen sperm as property for purposes of ownership, control, transfer, and bailment.\footnote{21} In contrast, embryos are not always considered to be property, but they are not given the status of “person” either.\footnote{22}
1. Sperm and Egg Donation

Generally courts do not grant people property interests of the organs or cells removed from their bodies.\(^{23}\) One court even expressed the fear that the selling of human body parts in the market place would “comingle the sacred with the profane.”\(^{24}\) Yet this fear has little clout in the sperm-and-egg donation world. Regardless of their legal status, sperm and eggs carry a price tag and are considered the property of either the donor or the donee.\(^{25}\) Because the high costs of ART have not diminished the demand for its services, egg donors sometimes charge more for eggs with desired traits.\(^{26}\) Generally, egg donors receive anywhere from $1,500 to $15,000, however, “Ivy League” donors might receive $25,000 to $50,000 per egg.\(^{27}\) Sperm, the donation of which is a less time-consuming and invasive process, generally fetches up to $300.\(^{28}\)

2. Embryo Donation

In contrast to donor sperm and egg, it is by unspoken agreement that embryos carry some special status, making them unethical to sell.\(^{29}\) Which begs the question, why treat them differently? This leads to delicate questions about what an embryo is and how embryos should be classified. One school of thought is that embryos are cellular matter, which are eligible for donation, and, as such, should be treated and governed similarly to other human cellular matter, such as a liver or kidney.\(^{30}\) Another view is that each individual embryo is a living being, subject to the same rights and protections as other human beings, and governed by existing adoption laws.\(^{31}\) As such, the fate of embryos is subject to a war of terminology.
where the procedural differences between donation and adoption dictate how people establish or terminate their interests and rights in the embryos.

D. The Road to an Uncertain Legal Status

Disputes concerning frozen embryos generally arise when the progenitors divorce or otherwise end their relationship. Davis v. Davis was the first case to bring this particular issue before the court. The court in Davis employed a balancing test, weighing the interests of the father who did not wish to procreate against the interest of the mother who wanted to donate the embryos. While ruling in favor of the father, the Davis court noted that a contract identifying the parties express interests would be useful in determining future embryo disputes. As a result, the next dispute to arise in court, Kass v. Kass, involved such a contract. Citing Davis, the Kass court upheld the parties’ wishes as stated in the contract.

The American Bar Association’s Model Act on Assisted Reproductive Technology (ART Model Act) and The American Society for Reproductive Medicine (ASRM) suggests an embryo is subject to disposition by its progenitors. Despite this guidance, there exists a spectrum in which courts classify embryos. At one end of the spectrum is the idea embryos are a “Juridical Person” subject to constitutional protection. On the other end, courts view embryos as genetic material that can be contracted for, transferred, and sold. In the middle, is the “Deserving Special Respect” approach, which gives a lot of discretion to the court.

32. For an embryo dispute not involving a battle between the progenitors or donors, see Bonnie Steinbock, Life Before Birth: The Moral and Legal Status of Embryos and Fetuses, 212–13 (1992) (explaining the dilemma of the high-profile couple Mario and Elsa Rios who died in a plane crash leaving their frozen embryos to Mario’s son from a former marriage. The dispute concerned the possibility the embryos could be heirs to the Rios estate). See also Sandra Blakeslee, New Issue in Embryo Case Raised Over Use of Donor, N.Y. Times, June 21, 1984, http://www.nytimes.com/1984/06/21/us/new-issue-in-embryo-case-raised-over-use-of-donor.html (where it was revealed that the embryos were created using donor sperm).

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

34. Id. at 603–04.

35. Id. at 597 (court’s dicta stated “an agreement regarding the disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced between the progenitors.” Note that the court did not state these agreements are permanent, but that they could be modified by both parties when their intentions change).


37. ART Model Act, supra note 8, § 102(10) (defining embryos as “a cell or group of cells . . . that has the potential to develop into a live born human being . . . ”); ASRM Ethics Committee Report, American Society for Reproductive Medicine: defining embryo donation, available at http://www.asrm.org/publications/detail.aspx?id=2320 (last viewed Apr. 28, 2012) (stating “embryos are deserving of special respect, but they are not afforded the same status as persons.”).
1. THE EMBRYO AS A JURIDICAL PERSON

Louisiana has defined frozen embryos as juridical persons who may not be destroyed or donated to science and, therefore, must be placed for adoption.\(^\text{38}\) At this time, Louisiana’s statute remains uncontested; however, it is unclear whether the statute would survive constitutional scrutiny on two grounds. First, the law has made it clear that embryos are not persons,\(^\text{39}\) which means this statute might conflict with a woman’s constitutional right to have an abortion. It is illogical to give an embryo constitutional protection, only to remove that protection once the embryo has been placed into a woman’s uterus.\(^\text{40}\) Second, Louisiana’s statute could also be considered overbroad. For instance, giving an embryo the constitutional status of “person” could open the possibility that errors committed by the embryologists or fertility doctors could result in criminal charges of wrongful death. Moreover, if we attach the same rights to frozen embryos as we do to people who age, how do we treat an embryo that has been frozen for eighteen years? Does that embryo now have a constitutional right to vote or be emancipated from its parents? Besides the illogical constitutional implications, the proclamation that an embryo at this stage of development is a person is in direct contrast to proven medical science.\(^\text{41}\)

2. THE EMBRYO AS PROPERTY

Linguistically, courts rarely choose the word property to classify embryos, however, in application, they often use property concepts to resolve embryo disputes.\(^\text{42}\) Consider the case, \textit{York v. Jones}, where progenitors wished to have their frozen embryos transferred to another state, but their clinic refused. The court looked to the signed agreement and held that it created a bailor-bailee relationship from which the Yorks’ could recover under property theory.\(^\text{43}\) As property of the progenitors, the Yorks had the right to make decisions about their embryos.\(^\text{44}\)

Likewise, while the court in \textit{Kass} originally used family law principles to resolve a dispute over embryo disposition, on appeal, the court applied

\(^{39}\) \textit{Roe v. Wade}, 410 U.S. 113 (1973) (rejecting the view that embryos are legal persons from the moment of conception).
\(^{40}\) \textit{Id. Roe} would kick in once the embryo is implanted, and the embryo would not have constitutional protection until the time it becomes viable.
\(^{41}\) \textit{See Kiessling}, \textit{supra} note 12, at 1063 (describing the cellular stages of “embryos” and their potential to turn into any cell within the body).
\(^{44}\) \textit{Id.} at 427.
contract law. The court stated that embryos are not “persons” and the progenitors’ express agreement governs. The court in Kass had the benefit of referring to the Davis court’s opinion, which suggested prior written agreements outlining the wishes of the progenitors are enforceable as long as procreational rights do not come into play.

3. THE EMBRYO AS DESERVING OF SPECIAL RESPECT AND PROTECTION

The Davis court created a compromise between the two potentially irreconcilable classifications. While recognizing an embryo’s potential for “burgeoning” human life, the court determined embryos deserve special respect above that of mere human cells. However, potential alone was not enough to classify an embryo as human life, thus they should not be afforded personhood rights. Using this reasoning, the court held frozen embryos are neither “persons” nor “property,” but instead they exist somewhere in between. Additionally, the court held that although an embryo is not classified as property, progenitors had an interest in ownership. This decision had two effects: it gave progenitors the right to make decisions regarding disposition, and it recognized a progenitor’s right to claim not to be a genetic parent.

On the surface, Davis appears to be a good solution to the matter of handling disputes over embryo disposition. As stated earlier, the progenitors of embryos deserve a body of law they can rely upon when making the decision of what to do with their excess embryos. While many disputes concerning frozen embryos would benefit from a case-by-case analysis, the effect of too much judicial discretion is that the resulting case law is unpredictable and unreliable.

In summary, despite uncertain case law and statutes that vary greatly among states, we can still make certain conclusions about the status of embryos today. At this time, the United States Constitution does not recognize an embryo as a person, but it does prohibit the buying and selling of human tissue and potential human life. Additionally, while state courts sometimes label embryos as property, they do not assign personhood sta-
tus to them. Finally, contracts expressing progenitors’ wishes are generally enforced, unless the procreational rights of one party to the contract are implicated.

III. Term of ART: Two Competing Models Governing Embryo Disposition (and how, in application, they are almost the same)

An embryo for “adoption” persuades society to classify embryos as persons and prompts the legal community to apply personhood theories to them. In contrast, an embryo for “donation” suggests either a property or quasi-property classification. Using the word “adoption” in the context of embryo donation creates misleading expectations in both donors and donees, making the practice more than just a battle of mere semantics.

A. Adoption’s Illogical Application

Traditional adoption law is not a logical framework from which to govern embryo disposition. Many states consider prebirth agreements to adopt a child void as against public policy—meaning embryos cannot be legally adopted. In addition, all states, but Alabama, prohibit the termination of parental rights prior to birth. The policy reasons for establishing a waiting period before genetic mothers relinquish their parental rights to their biological child do not apply to the progenitors of embryos. Applying the waiting period policy, thus the lack of ability to determine legal parentage of a child prior to birth, could mean that embryo donors could demand the child back after the donee had either given birth or commissioned a carrier to give birth.

Applying the adoption model to donated embryos creates inconsistent treatment of ART parties. For instance, if an embryo’s progenitors use donor sperm and a donor egg to create an embryo, they do not have to undergo the intricacies of adoption, such as home studies and psychological testing.

53. Louisiana is the only state to enact legislation calling an embryo a person. See supra note 38. Former President George Bush has also advocated treating embryos as persons. See Anderson, supra note 31, at 604 (citing President’s Remarks on Bioethics, 41 WEEKLY COMP. PRES. DOC. 875 (May 30, 2005)).

54. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); see also Litowitz v. Litowitz, 10 P.3d 1086, 1087 (Wash. Ct. App. 2000) (holding that the court would not force a person to become a parent if they did not want to be a parent).

55. A law dictionary defines the term “Embryo Adoption” as slang, (stating “The process is not considered to be a legal adoption because American law does not treat embryos as children.”). See Adoption, BLACK’S LAW DICTIONARY (9th ed., 2009).

56. Falker, supra note 11, at 511–12. See also Uniform Adoption Act, which only allows valid surrender and consent to adoption after the child’s birth.

57. ALA. CODE § 26-10A-13 (2010).

58. In the case of IVF alone, progenitors do not have to undergo physiological testing.
Adoption law is fraught with its own issues and is not yet up to the complexity of issues ART procedures present. In addition, ART law is developing quickly under an intent standard—a standard that does not currently exist in adoption law. It would be confusing for courts to apply this standard when terminating parental rights because both the original progenitors and the embryo donees have the intent to create a child.

A better framework in which to place embryo donation is within the laws governing gestational surrogacy, also known as gestational carriers. Well-established case law, and even statutes, regulate the termination and granting of parental rights, based upon the intentions of the party wishing to parent.59

B. Property and Something in Between

The true issue in embryo disposition is how to balance the interest in protecting the developing embryonic life with the progenitor’s interests in rights over potential offspring. Recognizing embryos as property would allow courts to use an existing body of law to assign rights and settle disputes. This is a clean solution that would allow progenitors to confidently prepare binding contracts for the disposition of their embryos in case of donation, divorce, or death. The recognition of embryos as property could also allow for reliable termination of parental rights and the possibility of issuing a nonparent status to one of the creators.60 Likewise, if we are to apply a “quasi-property” classification, we still need to know what rights and protections to give.

1. CONTRACTS V. PROCREATION

Classifying the status of embryos has been a taboo topic for various courts to address. Yet, courts are willing to allow embryos to be destroyed in order to support either a contractual agreement or the right of one progenitor not to procreate.61

On the surface, regulating embryo disposition using contract law is logical. Documenting the express wishes of the progenitors during the creation of the embryos and allowing for modifications of those wishes for

However, many states require that parties going a step beyond IVF and using a surrogate must get counseling first.


61. Davis v. Davis, 842 S.W. 2d 588 (Tenn. 1992).
embryo disposition is a simple method for preventing embryo disputes. The problem occurs when the original wishes of the progenitors change and the parties cannot agree on the modifications. In these cases, courts are reluctant to enforce contracts that make a progenitor a parent against his or her will.\(^{62}\)

In cases of embryo disposition after divorce, courts often rule a party cannot be forced to become a parent.\(^{63}\) However, applying liberty rights to embryo disposition detracts from the true legal issue, which is the disposition of specific embryos, not the embryo creator’s right to reproduce.\(^{64}\) Under both a personhood theory and a property theory, the issue of procreation is moot. Under the personhood theory, by the time this type of dispute arises, embryos have been procreated. Therefore, to be consistent with the movement behind personhood theories where life begins at conception/procreation, neither parent has the right to avoid biological parenthood if they have willingly participated in procreative activities.\(^{65}\) Therefore, the issue is not one of forcing procreation, because the property in question already exists by the time of dispute. Instead, the issue is similar to a custody agreement and property division, which might or might not rely on contractual enforcement.

Focusing on the procreational liberties of the progenitors presents another set of constitutional issues. If we do not want the government to intrude on a person’s decision as to whether or not to bear a child,\(^{66}\) then courts cannot rule in favor of one party’s procreational rights over the other’s. This places a burden on rights, which is unconstitutional without a narrowly drawn, compelling state interest.\(^{67}\)

Instead of focusing on how to classify an embryo, a slippery slope that leads into the abortion debate, we should focus on the interests or rights we want to assign to each entity in the ART process.

2. EMBRYOS AS PROPERTY INTERESTS

Most of today’s property rights derive from the utility and labor theories of property.\(^{68}\)


\(^{63}\) Davis, 842 S.W.2d 588.


\(^{66}\) Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (where Justice Brennan states that the right to privacy means being free from the government intruding upon a person’s right to have a child).


\(^{68}\) See Petralia, supra note 62, at 107.
Property rights include the right to control, possess, use, exclude, and alienate.\textsuperscript{69} Intended parents consider embryos their property to control.\textsuperscript{70} Therefore, people will be less likely to create embryos if they lose this control over them. Because the existence of more embryos has the potential to provide more solutions for infertile couples, and allow for medical research that might cure disease (both things that are good for society), the utility theory of property recognizes embryos as a property interest. The problem with this theory is that it does not give an interest to any particular party involved.

In contrast, the labor theory prioritizes interests based upon those who might wish to assert a claim of ownership. For instance, the labor theory suggests gamete providers, intended parents, and carriers all have invested labor into the creation of the embryos. However, the gamete providers receive compensation for their labor instead of property rights. And, if not compensation, the carrier and fertility physician act as a trust or bailor until the process is complete.

The labor theory also issues a hierarchy between the two progenitors. Under this theory, one who exerted the most labor is the top contender for superior property rights. However, an important component of the labor theory is that it values “use.”\textsuperscript{71} Therefore, in the event the party who exerted the most labor would allow the product of such labor to spoil, property rights transfer to the party who wants to use the product. Consequently, under the labor theory, where one progenitor of an embryo does not wish to give the embryo life, property rights to that embryo reside in the progenitor who added value and wishes to use it.\textsuperscript{72}

The fear of using property interests to govern embryos is that we will treat embryos as slaves or commodities.\textsuperscript{73} It is possible to separate the property interest to transfer embryos from the marketability of embryos. An example is that parents have property interests in their children: they may exclude them from others\textsuperscript{74} and they may also transfer interest through custody arrangements and adoption. The point is that even though parents have a right to these interests, they still may not sell their children.

Which model prevails? This article suggests neither model can accomplish the needs of embryo disposition alone. The needed solution includes one that does not offend current public policy, one that balances both the

\textsuperscript{69} Berg, \textit{supra} note 64, at 200.
\textsuperscript{70} Id. at 188.
\textsuperscript{72} Petralia, \textit{supra} note 62, at 110.
\textsuperscript{73} Spar, \textit{supra} note 3, at 47.
\textsuperscript{74} Troxel v. Granville, 530 U.S. 57 (2000) (holding a fit biological parent has the right to restrict and control visits by grandparents).
interests of the embryo as a future child and the ownership interests of the progenitors, and one that allows for a greater predictability in the outcome of embryo disputes.

IV. Adopting ARTful Solutions to Embryo Disposition

A. No Publicity Is Good Publicity

As it stands, ART recipients are viewed as egotistical, over-educated, freeloaders with too much money on their hands and no respect for life or the interests of the children they wish to produce. The doctors who facilitate these procedures are criticized for promoting the exploitation of women and the murder of children. The donors and surrogates who make dreams come true are ridiculed for selling their bodies and receiving payment for a service that continues twenty-four hours a day for approximately forty weeks. These common misconceptions can only lead to one conclusion: the entire ART spectrum could benefit from a little public relations consulting.

The legal and the medical communities must combine efforts to remedy the processes that create the negative perceptions surrounding ART. Only then will courts be able to receive the compromises to public policy it needs to correctly classify embryos and successfully regulate their disposition. These remedies include acknowledging ART as a process involving monetary transactions, regulating those transactions to allow for expanded access to ART procedures, addressing the best interests of future children by creating effective donor registries, and regulating procedures that lead to the potential for socially taboo circumstances.


76. See B C Heng, Should Fertility Doctors and Clinical Embryologists Be Involved in the Recruitment, Counseling and Reimbursement of Egg Donors?, 34 J. MED. ETHICS 5 (2008) (stating that fertility doctors often act as the “middleman” in the transaction of eggs).

77. See, e.g., Heather Murphy-Raines, Should Surrogates Be Paid? THE STIR, A CAFÉ MOM BLOG Mar. 22, 2011, http://thesit.st.com/in_the_news/117569/should_surrogates_be_paid (mocking the critics who feel surrogates should not be paid, Heather writes “You want to help, but pregnancy is work. It’s a strain on any woman, yet this back-breaking, 24-hour-a-day, exhausting work is not valued enough to merit minimum wage in some states. You’re just a vessel so that another couple may have the gift of parenthood.”).
1. BUYING THE PROMISE OF A CHILD

A child is priceless. We “adopt” orphaned children into our homes, “donate” sperm and eggs, and “lend” wombs to prospective parents in need.78 Society does not accept the idea of paying for our children—however, semantic debates aside, the reality is that each of these practices involve the exchange of money.79

With the advancement of ART, hope springs eternal for people wishing to have a child of their own. However, that hope also brings out individuals seeking to reap the benefits of an unregulated market, or as the media frequently terms it, the baby-business.80 Despite the fact that ART services are exchanged for money, participants are reluctant to call it a commercial transaction.81 We must acknowledge that this market exists, however, in order to protect ART’s ability to provide a valuable solution for those who can benefit from the technology.82 By establishing guidelines, we can meet the needs of donors and carriers and provide critics of such payments with the option of becoming better informed about the reasons for compensation.

2. ART FOR ALL, ALL FOR ART

Americans have a fascination with high-priced commodities.83 The “American Dream” gives society access to those commodities. Part of the mystique of ART is the high cost of its services, yet ART’s downfall is its limited access to society as a whole. Even with a low success rate, progenitors can spend between $50,000 and $100,000 on the chance to have a baby.84 The myth is that only the wealthy and elite can afford the luxury of ART’s benefits. The reality is that prospective parents, desperate to have a child, will sell their home and borrow whatever they can get to buy the promise of a child.85

78. See Spar, supra note 3, at 48.
79. Id.
80. DEBORAH L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION (2006). See also Spar, supra note 3, at 47 (stating that although the fertility market is difficult to quantify, the average costs of IVF alone suggest that ART services in the United States cost at least $1.7 billion, without considering the added costs of sperm/egg sales, legal fees, or surrogacy fees).
81. See Spar, supra note 3, at 43.
83. Amar Bhidé, Why Aren’t You Saving Money?, N.Y. TIMES, OP. PAGES, ROOM FOR DEBATE, Feb. 8, 2011, http://www.nytimes.com/roomfordebate/2011/02/08 (suggesting that America was founded on the idea that the finer things in life were not only for the rich).
84. Spar, supra note 3, at 51.
If ART could resolve the inequality of access to its services, perhaps the public opinion would mount in its favor. That is why proper regulation of embryo donation is so important. Embryo donation reduces the costs of ART services because donees skip some of the steps and expenses of egg retrieval.  

Regulating the amount of money donors and carriers receive might, as critics suggest, reduce the number of participants adding to the pool. However, this regulation would ensure that the willing donors and surrogates remaining are acting in the socially tolerable view of ART’s goal: to create families.

Other areas for increased access for all include expanding insurance coverage to include IVF cycles for those diagnosed as medically infertile and better education about the options for embryo donation, which significantly reduces the costs of the entire ART process.

3. MY DADDY’S NAME IS DONOR

Proponents of “embryo adoption” argue that the best reason for using adoption law to regulate ART is because it has had time to make and remedy its mistakes. While not the most reassuring of arguments, it is clear that in the area of tracking donor identities, ART is traveling along the same path of destruction.

Sperm donations have occurred for more than a century and generate 30,000 and 60,000 conceptions every year. While these donations began as anonymous, the spread of AIDS in the 1980s prompted the need for clinics to collect personal information and medical histories of sperm donors. Sperm clinics now allow their clients to pick between an anonymous teacher who put her IVF treatments on her family’s credit card in order to play the “gamble” of having a baby). Cf. Judith F. Daar, Regulating Reproductive Technologies: Panacea or Paper Tiger?, 34 HOUS. L. REV. 609, 629–31 (1997).


Lynn J. Bodi, Panelist, Oh What A Relief It Is—An Analysis of Insurance Issues in Surrogacy, ABA Family Law CLE Conference (Apr. 9, 2011) (speaking as the original attorney representing two surrogate mothers who sued their health insurance company. The result was that the Wisconsin Supreme Court ruled insurance companies could not deny coverage to surrogate mothers). See also MercyCare Ins. Co. v. Wis. Comm’r of Ins., 786 N.W.2d 785 (Wis. 2010).

Elizabeth Marquardt et al., My Daddy’s Name Is Donor: A New Study of Young Adults Conceived Through Sperm Donation, INSTITUTE FOR AMER. VALUES (2010), http://www.familyscholars.org/assets/Donor_FINAL.pdf (report released by the Commission on Childhood’s Future, tracking the effects on children conceived using donor sperm. The name of the report came from t-shirts a lesbian couple made for their son to wear). See also Elizabeth Marquardt, My Daddy’s Name Is Donor, http://www.americanvalues.org/html/donor.html.

Molly Miller, Embryo Adoption: The Solution to an Ambiguous Intent Standard, 94 MINN. L. REV. 869, 890 (2010).


See also MercyCare Ins. Co. v. Wis. Comm’r of Ins., 786 N.W.2d 785 (Wis. 2010).
mous or known donor, but there is no method in place to require sperm donors to keep their medical history information current.91

Conversely, egg donations, which contribute to roughly 6,000 births per year, began with known providers.92 However today, many egg donation clinics offer the option of being an anonymous donor.

At the very least, children born from donor material need access to pertinent medical information and ancestry at the time of donation. An added bonus would be the requirement that donors automatically update a registry with new, relevant medical information, including death.93 The ABA Model Act suggest what should be included in a national registry, including retention of relevant records until the resulting offspring reach the age of majority and established procedures to allow for information disclosure based on mutual consent.94

It is estimated that one million American adults are the biological children of sperm donors.95 Because sperm donors can contribute enough sperm to create many children, the often-cited concern is the risk that the resulting children will meet and attempt to procreate themselves later in their lives. This is of particular concern in the embryo donation context because the resulting children are full-blooded siblings. We could resolve this issue by managing embryo lots together and keeping better records of their donation path.

4. THE TAMING OF THE SOCIALLY TABOO

Before the McCaughey septuplets and “Octomom” became household names, ART was a private endeavor funded by prospective parents and regulated by fertility clinics.96 Now, the word is out, and society has lost

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93. Id. (reporting that three of the largest sperm banks are uniting to create the nation’s first sperm and egg donor registry).

94. ART MODEL ACT, supra note 8, § 1002, DONOR AND COLLABORATIVE REPRODUCTIVE REGISTRIES.

95. See Douthat, supra note 92 (citing a study by Elizabeth Marquardt et al., My Daddy’s Name Is Donor, a study performed by the Institute for American Values who interviewed people who were conceived using sperm donation, ages 18 to 45. Douthat writes that the study “depict[s] a population that’s at once grateful to the fertility industry and uneasy about the way they were conceived, supportive of assisted fertility but haunted by the feeling of being a bought-and-paid-for child.”).

96. In efforts to ensure successful practices in IVF clinics, Congress enacted the Fertility Clinic Success Rate and Certification Act in 1992; see 42 U.S.C.S. §§ 201, 263a-1 to 263(a)(7) (1991). But see Peter E. Malo, DECIDING CUSTODY OF FROZEN EMBRYOS: MANY EGGS ARE FROZEN,
its taste for sensationalized multiple births as it realizes certain costs trickle down. For instance, multiple births result in higher labor and neonatal costs, which add to the ever-increasing burden on America’s health care system.  

There is also a push for legislation to prohibit surrogacy because of its potential to exploit women. Even female scholars who once advocated for the procreative rights of women also find issue with what they feel is the “exploitation” of women who become egg donors or carriers. The word exploitation is becoming yet another term that is up for debate as society decides: is reproductive donation and surrogacy a gift or exploitation?  

It is difficult to provide a remedy to public perception about the above two issues. Educational awareness and advocacy could be stronger in both areas. For instance, RESOLVE, the National Infertility Association, is a consumer advocacy group that provides support groups and advocacy campaigns to educate the public about infertility as a disease. Additional public education provided by surrogates would be helpful to ease fears of female exploitation.  

5. CUTTING THE ROE UMBILICAL CORD  

Advocates in favor of embryo donation want to distance the issue from...
You Say Adoption, I Say Objection

abortion and have embryos classified as nonpersons. However, many articles use Roe to support the first argument against the personhood theory: that “the unborn have never been recognized in the law as persons in the whole.”

To truly move out of the abortion debate, we must sever our ties to this argument. Not only because of the obvious contradictory reasons, but also because the argument is faulty. Both historic and modern courts have recognized the unborn as persons. For instance, consider the property Rule Against Perpetuities, which treats even an unconceived child like a human being, capable of inheriting property. Furthermore, the Supreme Court itself has applied Due Process and Equal Protection rights to the unborn.

The status of the cells created after sperm and egg unite fuels debates that might be far from resolution, but one thing is clear: when the abortion debate enters into the discussion, communication breaks down and there is a lack of will by legislators to keep up with the reality of how people live their lives. Roe is irrevocably tied to the abortion debate. And because it is not embryo donation’s strongest argument, we must sever ourselves from using Roe for support.

B. How Embryo “Donation” Can Work

There exists a gaping hole when applying only the adoption model or the property model to embryo disposition. The result creates a much higher burden on the legal system and works against the interests of all parties involved—most importantly the best interest of the children.

1. Predonation Agreements

Regardless of its classification, an embryo’s fate can be decided using a contract. The ideal situation would be for the federal government to enact legislation calling for uniform state statutes regarding embryo disposition. In turn, states should bind clinics by law not to proceed with ART procedures unless a predonation agreement exists. These agree-
ments must address what the progenitors will do with the embryos upon disagreement about their use, divorce, or death of one or both of the parties, and must identify contingency plans for payment of storage or disposition of embryos in case of unforeseen circumstances.

2. CLINIC CONSENT AND LAWYER INTAKE FORMS

Parties often rely on medical consent forms containing boilerplate clauses unrelated to their specific situation. The harm in such reliance is that the form might not represent the true intentions of the parties, and such forms only create privity between the parties and the medical facility.\(^{108}\) This means the intended parents and donors might not have a valid agreement between them. The federal government needs to strengthen its regulation of IVF clinics. These regulations should include informing ART patients of all options, health risks, and the full range of disposition options. Consent forms need conspicuous type or a separate agreement so they are not confused with an adhesion contract that a court would find unconscionable.

ART attorneys (and sometimes fertility doctors) are drafting consents, but it is the divorce lawyers who are dealing with them. Therefore, practicing attorneys need to be cognizant of the issues that embryo disposition presents. For example, with one in eight women in the U.S. infertile, it is conceivable that family law attorneys will have clients with frozen embryos. It is less likely, however, that the clients will tell their attorney about their infertility problems.\(^{109}\) Therefore, attorneys should simply add a line to their client intake forms asking the question “Have you participated in assisted reproductive technology to achieve or attempt to achieve a pregnancy?”\(^{110}\)

3. DEFAULT RULES

Fertility specialist Dr. Preston Stacks expressed it best, saying “Regulation is great, but you’ll always have people who rob banks.”\(^{111}\) Accordingly, states must create default rules for instances when, for whatever reason, predonation agreements do not exist. To prevent a progenitor from becoming a parent, against his or her wishes, courts would likely require the party who wishes to keep the embryos to pay for storage until a consensus is reached. Clearly, legislation would have to place time restrictions on such requirements. The goal, however, is that if parties

\(^{108}\) Sacks, supra note 19.

\(^{109}\) Interview with Barbara Collura, Exec. Dir. of RESOLVE, Amelia Island, Fla. (Apr. 8, 2011) (explaining infertility as a “silent” disease because most sufferers do not discuss their problems with family, friends, and most importantly, their lawyers).

\(^{110}\) Sacks, supra note 19.

\(^{111}\) Snyder, supra note 20.
have strong beliefs either way, they will commission a clear legal agreement outlining their wishes before they create the embryos.

V. Conclusion

ART recipients spend years and thousands of dollars fighting to achieve the dream of having a child—something most people take for granted. To them, the current social and legal climate is a battleground where lines are drawn, dividing those who will do whatever it takes to create a child of their own from others whose values and beliefs get in the way of that dream. ART offers a solution for creating families for those who only decades ago might have otherwise remained childless. But the research is misunderstood, and the political platforms have hindered ART’s progress and reinforced its social stigma. Once we remedy the processes and circumvent the obstacles creating the negative public perception of ART, courts will be free to properly classify embryos according to more favorable public policy. In the meantime, by filling the gaps in the existing legal structure with required agreements and consent forms—leaving no doubt as to parties intentions—progenitors, donors, and surrogates alike can safely navigate the legal system. The end result is that the fate of an embryo is no longer subject to a war of terminology and legal classification. Instead, with the help of a little medical magic, an embryo once again becomes the hope for a family.

And for hundreds of thousands of years, without anyone knowing quite how or why, [human reproduction] has worked—well enough to perpetuate the species, populate the planet, and bring the joy and responsibility of children to countless generations of parents.

But what if it doesn’t work? What if egg meets sperm and nothing happens?112

112. The quote that begins and ends this article (Elmer-DeWitt, supra note 1) is from a Time article written in 1991. Replace each instance of the word “IVF” with the word “embryo” to find a similar legal and social landscape that exists today for embryo disposition. Twenty years ago, IVF hopefuls struggled with the challenges and uncertainties that face embryo progenitors and donees today. Hopefully it takes fewer than twenty years to create a legal structure and social acceptance that allows everyone to access the miracle of ART.