

**ALL YOUR EGGS IN ONE
BASKET:
WHY CONTRACT LAW PROVES
UNRELIABLE IN FROZEN EMBRYO
ADOPTION CASES**

Austin Caster

As more couples begin to rely on assisted reproductive technology as a result of increasing subfertility to conceive their children, the question arises what will happen to the remaining frozen embryos once a couple completes its own family. A 2003 study reported that at the time about 400,000 frozen embryos were stored in the United States. About eighty-eight percent were designated by the patients who created them for future family building with only two percent to be donated to another family, but what about the remaining embryos after their family is complete? Should that couple have the right to destroy embryos created from its own gametes? Even if the couple from which the embryos were created considers the unused ones its

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“property,” is it ethical to let what could become a human life be disposed of or expire on a shelf? Should another infertile couple be allowed to adopt the unused embryos? What if the first couple changes its mind or the second couple does not use them all? Based on holdings from cases involving same-sex parent adoptions and surrogacy contracts, judges still seem so conflicted about the public policy implications that, depending on the state, couples cannot be sure until their case climbs the entire chain of appeals—which could be several years after a child is born and very expensive with cryopreservation costs in addition to litigation fees.

Because the United States follows the presumption that family law matters should generally be decided at the state rather than federal level, one of the most rapidly evolving, emotionally charged American law regimes has become one of the least stable and most incongruent. A biological father’s rights to a child he never knew was conceived, a posthumously conceived child’s ability to inherit from both of her parents, or even a

couple's choice to donate or dispose of frozen embryos at all varies drastically merely by crossing state lines. And for some of the most polarizing issues facing our nation, many states have no laws in place at all.

In other areas of law if a particular state's constitution, statutes, and courts remain silent on an issue, private parties with equal bargaining power (absent fraud, duress, or other malfeasance) can enter a contract to safeguard their intents and remedies should a dispute arise or use a choice of law provision to incorporate another state's regime. In many contentious modern family law issues, however, without stable legislation in place, judges can strike down an otherwise valid agreement, sometimes because of nothing more than their own political persuasion, individual religion, or morals tells them a particular contract is against public policy.

Those hit hardest by this luck-of-the-draw approach include infertile and same-sex couples.

Because these couples cannot have a child on their own for reasons they would argue are beyond their control, they need medical help to fulfill their dreams of becoming parents. Even though courts, social workers, adoption agencies, and legislatures may have a good faith belief they know what is in the best interests of someone else's child, these barren couples face obstacles even unmarried criminals and adolescents bypass in conceiving and obtaining parental rights as long as they are fertile and heterosexual.

This article will show why infertile couples cannot unequivocally rely on good faith, consensual contracts in cases of assisted reproductive technology because the law is so unsettled. Each section will show why, because of alleged public policy implications, contract doctrines or clauses such as (1) the termination of parental rights, (2) the doctrine of waste, and (3) liquidated damages still remain almost completely unreliable in a matter regarding assisted reproductive technology. Though this uncertainty affects infertile couples trying to

complete their families through various methods including adoption, surrogacy, in vitro fertilization, and artificial insemination, this article will focus on cases involving the donation, sometimes referred to as adoption, of frozen embryos.