

Northwestern Journal of Law & Social Policy

Volume 3 | Issue 1

Article 6

Winter 2008

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Recommended Citation

Sarah Terman, *Marketing Motherhood: Rights and Responsibilities of Egg Donors in Assisted Reproductive Technology Agreements*, 3 Nw. J. L. & Soc. Pol'y. 167 (2008).
<http://scholarlycommons.law.northwestern.edu/njlsp/vol3/iss1/6>

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Marketing Motherhood: Rights and Responsibilities of Egg Donors in Assisted Reproductive Technology Agreements

Sarah Terman*

I. INTRODUCTION

¶1 Each year thousands of young women enter the American gamete market as egg providers.¹ They are actively recruited on college campuses and on the internet by assisted reproductive technology clinics and are evaluated on the basis of their academic achievements, athleticism, and appearance.² Egg providers are then individually marketed to infertile intended parents, who may be looking for particular attributes.³ Once a match is made, the provider will undergo hormone therapy designed to align her ovulation cycle to that of the intended pregnancy carrier and cause her ovaries to go into hyper-production.⁴ When the time is right, several eggs will be extracted from the woman's ovaries, fertilized in vitro (usually with the intended father's sperm), and implanted in the womb of either the intended mother or a gestational carrier.⁵ If the procedure is successful and the resulting pregnancy is carried to term, a baby will be born—a baby with strong genetic ties to an egg provider who has been paid to contract away her claim to parenthood.

¶2 This article examines the rights and responsibilities of egg providers in assisted reproductive technology (ART) arrangements. While much has been written on legal disputes between intended parents and surrogates,⁶ far less attention has been paid to the role of egg providers in assisted reproductive arrangements. There may be a higher degree of judicial involvement in disputes involving surrogates because surrogates run

* Special thanks to Professor Helene Shapo for her guidance and support.

¹ Unlike organ donors, who may not be paid for their gifts, egg donors are often motivated by generous compensation packages, and are thus more accurately referred to as providers than donors. U.S. DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS (2003), <http://www.cdc.gov/art/art2003/PDF/ART2003.pdf> [hereinafter ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES]; Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 B.Y.U. L. REV. 107, 108 n.5 (2001) (discussing the difference between donors and providers).

² Jim Hopkins, *Egg-donor Business Booms on Campuses*, USA TODAY, Mar. 15, 2006, at A1; see generally Kari L. Karsjens, *Boutiques Egg Donations: A New Form of Racism and Patriarchy*, 5 DEPAUL J. HEALTH CARE L. 57 (2002) (describing fertility clinic recruitment of egg donors).

³ See, e.g., Donors Wanted Classified Advertisements, STANFORD DAILY, <http://daily.stanford.edu/classified?category=Donors+Wanted>.

⁴ AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, THIRD PARTY REPRODUCTION (SPERM, EGG, AND EMBRYO DONATION AND SURROGACY): A GUIDE FOR PATIENTS 6, <http://www.asrm.org/Patients/patientbooklets/thirdparty.pdf>.

⁵ *Id.* at 7.

⁶ E.g., Flavia Berys, *Interpreting a Rent-A-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour*, 42 CAL. W. L. REV. 321 (2006); H. Joseph Gitlin, *Illinois: An International Magnet for Surrogacy?*, 94 ILL. B.J. 48 (2006); Krista Sirola, *Are You My Mother? Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania*, 14 AM. U. J. GENDER SOC. POL'Y & L. 131 (2006).

the risk of becoming emotionally attached to the fetus during the nine-month gestation period and are therefore more likely to seek parental status. Although cases involving egg donors are less frequent, they are just as poignant and difficult to resolve.

¶3 Section One of this Comment describes the rising demand for alienable eggs and analyzes the ways in which American courts have provided an incentive to ART clinics to move away from traditional surrogacy arrangements toward arrangements involving egg providers. Section Two focuses on the current state of federal and state regulation of egg transfer and includes a discussion of the current bifurcated system of body part alienability, in which eggs may be bought and sold, while organs may only be acquired through gratuitous donation.

¶4 Following these two background sections, this Comment addresses three looming questions in the area of egg provider fertility arrangements. First, do egg providers retain any legal responsibilities for a genetic child born as a result of their donation? Second, can egg providers ever sue for shared custody of their genetic children? And third, if egg providers come to believe that their eggs have been misused, can they pursue contract claims against intended parents and fertility clinics?

II. THE GROWING DEMAND FOR ALIENABLE EGGS

¶5 Third party fertility arrangements are, at the most basic level, designed to help an individual or a couple achieve parenthood when they are lacking an essential component: healthy sperm, a healthy womb, or healthy eggs.⁷ First, a sperm provider may be sought by heterosexual couples who are unable to conceive due to the male partner's low sperm count or by single women and lesbian couples who seek to achieve parenthood.⁸ This kind of artificial or alternative insemination with donor sperm has been performed routinely since the 1940s and can be completed during a single doctor's visit.⁹

¶6 Second, a healthy womb may be needed if a woman is unable to carry a pregnancy due to medical failing or if a homosexual male couple seeks to achieve parenthood.¹⁰ In either situation, one of two basic arrangements can be made: a surrogate can be inseminated directly with donor sperm or an intended father's sperm, resulting in a child that shares genetic consanguinity with the surrogate (known as a traditional surrogacy arrangement), or a gestational carrier may be implanted with an existing embryo, resulting in a child that is genetically unrelated to the woman who carries the pregnancy (known as a gestational surrogacy arrangement).¹¹

¶7 Finally, healthy eggs may be needed when a woman's own eggs are not viable due to advanced age, medical defect, or when a homosexual male couple seeks to achieve parenthood. In the latter case, one of the male partners' sperm can be used to fertilize the

⁷ See generally AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, *supra* note 4, at 3 (summarizing fertility clinic reports on the use of a variety of fertility treatments).

⁸ *Id.* at 9.

⁹ *Id.* at 9-11.

¹⁰ *Id.* at 13.

¹¹ *Id.* at 3 ("Traditional surrogacy refers to a treatment in which a woman is inseminated with sperm for the purpose of conceiving for an intended recipient. The *surrogate* has a genetic and biological link to the pregnancy she might carry. In contrast, a gestational surrogate . . . is an individual in which embryos created by the intended parents are transferred into the surrogate's *uterus*, which has been prepared hormonally to carry a pregnancy. The gestational surrogate has no genetic link to the fetus she is carrying.").

donor eggs in vitro, resulting in an embryo that is genetically similar to one intended parent, which may then be carried to term by a gestational surrogate.

¶18 Approximately seventy-seven percent of American fertility clinics now provide services involving donor eggs.¹² Procedures involving donor eggs have grown in popularity in recent years, partially because of legal developments that have made traditional surrogacy arrangements less favorable. In traditional surrogacy arrangements, an infertile couple pays a surrogate to first be inseminated with the male partner's sperm and then carry the pregnancy to term. Because the surrogate both contributes genetically to the child and bears the pregnancy, traditional surrogacy arrangements result in children having very close biological ties to their surrogates.

¶19 As one might expect, these types of ART arrangements are widely criticized, and some courts have expressed their unwillingness to enforce surrogacy agreements. For example, in the case of *Matter of Baby M*, a New Jersey couple entered into a surrogacy arrangement with a woman who agreed to be artificially inseminated with the husband's sperm and carry the resulting embryo to term in exchange for \$10,000.¹³ After the baby was born, the surrogate demanded that the baby be returned to her and threatened to commit suicide if the couple did not comply.¹⁴ The dispute eventually reached the New Jersey Supreme Court, which held that the surrogacy contract was unenforceable. In so holding, the court wrote: "While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a 'surrogate' mother illegal, perhaps criminal, and potentially degrading to women."¹⁵

¶10 The holding was a major blow to traditional surrogacy, and in vitro fertilization with donor eggs has emerged as a popular alternative. Instead of contracting with one surrogate, ART clinics may alternatively contract with *both* an egg provider and a gestational surrogate. Once donor eggs are extracted and fertilized in vitro, the embryo can then be implanted into a gestational surrogate. By diffusing the maternal contributions through the use of two women, one providing the eggs and one providing the womb, neither of the women is easily viewed as the "natural mother" of the child, and the holding in *Baby M* becomes less relevant. Thus, the holding in *Baby M* has added a great deal of uncertainty to traditional surrogacy and has created a powerful incentive for ART clinics to use donor eggs.

III. CURRENT STATE OF THE LAW

¶11 Egg transfer procedures and the larger market for alienable eggs remain largely unregulated. While other industrialized nations like the United Kingdom, France, and Canada have taken steps to outlaw the sale of gametes,¹⁶ American legislatures have been slow to respond to scientific advancements in the field of assisted reproductive

¹² ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES, *supra* note 1, at 50.

¹³ 537 A.2d 1227, 1234 (N.J. 1988).

¹⁴ *Id.* at 1236-37.

¹⁵ *Id.* at 1234.

¹⁶ See David B. Resnik, *Eggs for Sale*, 3 J. MED. ETHICS 1 (2000), available at <http://www.ecu.edu/cs-dhs/medhum/newsletter/v3n1.cfm> (United Kingdom and France prohibit the sale of female reproductive cells.); The Assisted Reproduction Act, 2004 S.C., ch. 2 (Can.), available at http://www.parl.gc.ca/37/3/parlbus/chambus/house/bills/government/C-6/C-6_3/C-6TOCE.html (Canadian prohibition on the sale of human eggs).

technology. This section examines three potential sources of egg transfer regulation: (1) the National Organ Transplant Act, (2) regulations within the scientific community governing the use of eggs in stem cell research, and (3) various state regulations.

¶12 In 1984, the U.S. Congress passed the National Organ Transplant Act (NOTA), which is perhaps the closest the federal government has ever come to regulating the American market for eggs.¹⁷ NOTA made it illegal to buy and sell certain body parts for particular purposes, and provides: “It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation.”¹⁸ Violation of this provision calls for fines of up to \$50,000 and up to five years imprisonment.¹⁹ So, while a patient in need of a kidney transplant may seek out a gratuitous donation from family members and friends, she may not offer monetary compensation to potential donors.²⁰ Although NOTA effectively bans the sale of human organs, it is consistently interpreted as insufficiently broad to cover the sale of human gametes.²¹

¶13 Some scholars argue that market inalienability imposed by NOTA ought to apply to human gametes.²² This would presumably result in a system in which infertile parents would have to rely on gratuitous donations of eggs or sperm, just as patients with failing livers and kidneys must now rely on gratuitous donations to meet their demand. This extension, they argue, would not only be consistent with the language of the statute, but it would also give greater effect to the purpose of the statute.²³ The legislative history of NOTA lends some support to this claim.²⁴ For instance, then-Senator Al Gore summarized the position of many legislators leading up to NOTA’s enactment, stating: “It is against our system of values to buy and sell parts of human beings.”²⁵ The fact that lawmakers referred to “organs” and “body parts” somewhat interchangeably illustrates that they were perhaps generally concerned with protecting the human body, not just organs, from commodification.

¶14 Conversely, supporters of the existing open market for human gametes argue that alienability of human body products, including eggs and sperm, is well established in our economy, and that Congress would have had to take a much greater and more explicit step to end all body commodification. For example, the buying and selling of blood is commonplace, and open markets for hair, teeth, and skin also exist.²⁶ Supporters of the current commodification gap between organs and gametes also point to the level of bodily invasion required for harvesting and transplantation. Gamete transfer is far less

¹⁷ National Organ Transplant Act, 42 U.S.C. §§ 274-274e (2004).

¹⁸ *Id.* at § 274e.

¹⁹ *Id.* at § 274e(b) (stating penalties for violating prohibition on organ purchases).

²⁰ See David E. Jefferies, *The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 *IND. J. GLOBAL LEGAL STUD.* 621, 624-27 (1998).

²¹ 42 U.S.C. § 274e(c)(1) (narrowly defining “human organ” as “the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus)”).

²² See Andrew Wancata, *No Value for a Pound of Flesh: Extending Market-Inalienability of the Human Body*, 18 *J.L. & HEALTH* 199, 200 (2003); Kari L. Karsjens, *Boutique Egg Donations: A New Form of Racism and Patriarchy*, 5 *DEPAUL J. HEALTH CARE L.* 57, 89 (2002).

²³ Wancata, *supra* note 22, at 214.

²⁴ *National Organ Transplant Act: Hearings on H.R. 4080 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 125, 128 (1983).

²⁵ *Id.* (quoting Sen. Albert Gore, Jr.).

²⁶ Jefferies, *supra* note 20, at 656.

invasive and risk-prone than organ transfer. Sperm transfer has been done for centuries and requires little or no medical intervention.²⁷ Egg transfer, while more invasive, rarely involves the kind of risk and recovery time common to most organ transplant procedures. Finally, a distinction can be drawn between gametes and other organs based on their relative supply. Unlike the body parts listed in NOTA, sperm is regenerative, and, while eggs do not regenerate, an average woman produces thousands during her lifetime.²⁸ Thus, physiological differences may support the disparate treatment of organs and gametes under NOTA.

¶15 Although this paper focuses on reproductive technology arrangements, it is interesting to note that the scientific community has also addressed the issue of egg alienability for use in stem cell research.²⁹ Human embryonic stem cell research uses cells extracted from human embryos.³⁰ The embryos themselves may be un-implanted embryos created in ART procedures and then donated to research institutions, or they may be embryos created for the sole purpose of stem cell extraction through in vitro fertilization.³¹ In either case, they rely on the use of human female eggs. The National Academy of Sciences has issued guidelines for the collection of raw materials used in human stem cell research that require informed consent and prohibit any payment to egg donors beyond reimbursement of expenses incident to the donation.³² While these guidelines are purely hortatory, they illustrate a movement away from an open market for eggs in the context of human embryonic stem cell research.

¶16 State legislatures have also approached the difficult task of regulating egg transfer in a variety of ways and with varying results. Only two states address the alienability of eggs directly: Louisiana explicitly prohibits the sale of “a human ovum, fertilized human ovum, or human embryo,”³³ and Virginia explicitly sanctions the sale of human eggs.³⁴ Other state statutes do not mention eggs or gametes specifically, but effectively proscribe their alienability by banning payment for all body parts, usually exempting hair and blood.³⁵ In other states, statutory treatment of egg alienability is more ambiguous. For example, the California Penal Code bans the transfer of “any human organ, for purposes of transplantation, for valuable consideration,” but excludes from “human organ” plasma, sperm, and any other renewable or regenerative tissue not otherwise specified.³⁶ Thus, it

²⁷ See John Lawrence Hill, *What Does it Mean to Be a “Parent”?* *The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 374 n.2 (1991).

²⁸ Katherine R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 239 (1997).

²⁹ See Radhika Rao, *Coercion, Commercialization, and Commodification: The Ethics of Compensation for Egg Donors in Stem Cell Research*, 21 BERKELEY TECH. L.J. 1055, 1057 (2006).

³⁰ *Id.* at 1055.

³¹ *Id.*

³² See NAT’L RESEARCH COUNCIL & INST. OF MED. OF THE NAT’L ACADS., GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH 82-89 (2005).

³³ LA. REV. STAT. ANN. § 9:122 (West 2000).

³⁴ VA. CODE ANN. § 32.1-291.16 (Lexis 2004) (exempting “ova” from the general ban on the sale of body parts for any reason).

³⁵ See, e.g., CONN. GEN. STAT. § 19a-280a (2007); FLA. STAT. § 873.01 (2006); 720 ILL. COMP. STAT. ANN. 5/12-20 (West 2005); IND. CODE ANN. § 35-46-5-1 (West 2005); NEV. REV. STAT. § 201.460 (2005); N.Y. PUB. HEALTH LAW § 4307 (Consol. 2007); OHIO REV. CODE ANN. § 2108.12(A) (West 2004); TENN. CODE ANN. § 68-30-401 (2002); TEX. PENAL CODE ANN. § 48.02(b) (Vernon 2003); WIS. STAT. ANN. § 146.345 (West 2004).

³⁶ CAL. PENAL CODE § 367f (West 2000).

is unclear whether the California statute applies to eggs, because, although eggs are not organs, they also are not, technically speaking, regenerative.

¶17 The effect of these statutes on the market for alienable eggs is unclear. In Louisiana, for example, the sale of eggs is prohibited, but young women are still recruited by fertility clinics and offered compensation for the harvesting of their eggs.³⁷ Compensation packages in these cases are said to be for the woman's "services," not for her eggs.³⁸ Thus, while state regulations differ, the availability of donor eggs is likely to depend very little on varying state regulations and more on the varying demand for donor eggs from state to state.

IV. RESPONSIBILITY TO THE RESULTING CHILD

¶18 Women who agree to enter third party fertility arrangements as egg providers are routinely assured that their participation will end with the extraction of their eggs.³⁹ Although egg donors are rarely anonymous, given that the transfer procedure requires a certain level of proximity between donor and recipient, their involvement in pregnancy or child rearing is usually very limited. In fact, contractual arrangements between intended parents and egg providers routinely require that intended parents absolve the egg donor of any responsibility she might have to the resulting offspring following egg transfer.⁴⁰ Presumably, egg providers would be less likely to enter into these arrangements if they perceived a risk of subsequent obligation to provide financial support for the child. It is the position of this Comment, however, that contractual provisions absolving egg providers of parental responsibilities are unenforceable.

¶19 Although American courts have yet to directly address this question, guidance may be gathered from cases involving known sperm providers who agree to help intended parents conceive so long as they absolve the sperm provider of any child support obligations. These cases are significant in the context of egg donor ART arrangements because they relate to the enforceability of contract provisions in which a known provider agrees to donate a gamete on the condition that the intended parents assume all responsibility for the child. In *Kesler v. Weniger*, for example, the Superior Court of Pennsylvania considered a mother's action for child support against the biological father of her son.⁴¹ The parents had been involved in a sexual relationship for fifteen years prior to the birth of their son, and the father did not contest his paternity.⁴² Instead, he argued that he and the child's mother had agreed, before conception, that the mother would assume all financial responsibility for the upbringing of the child.⁴³ Thus, the biological father claimed that he was merely a sperm donor and would never have agreed to help Kesler conceive but for her assumption of his parental responsibility.⁴⁴ Although the

³⁷ E.g., A Woman's Center for Reproductive Medicine, Donor Egg IVF Louisiana, <http://www.ivflouisiana.com/donor-egg.html> (last visited Oct. 8, 2007).

³⁸ *Id.*

³⁹ See e.g., Ova Donation Agreement (posted by intended mother), <http://www.geocities.com/edinc0/>.

⁴⁰ *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136, 140 (Cal. Dist. Ct. App. 2004) (quoting egg donor contract), *rev'd*, 117 P.3d 673 (Cal. 2005).

⁴¹ 744 A.2d 794 (Pa. Super. Ct. 2000).

⁴² *Id.* at 795.

⁴³ *Id.*

⁴⁴ *Id.* at 795-96.

court found that no such agreement between the parties existed, it stated that even if the parties had agreed to such an arrangement, the father would retain responsibility for support of the child.⁴⁵ The court reasoned that agreements by which intended parents bargain away future claims for support are not binding because: “It matters not when an agreement to forego support occurred; the right to support is a right of the child, not the mother or father.”⁴⁶ Thus, the child’s right to support cannot be extinguished by parties to fertility agreements at any time, even prior to the child’s conception.⁴⁷

¶20 The Superior Court of Pennsylvania applied the same reasoning four years later in *Ferguson v. McKiernan*, which also involved a biological father’s challenge to a child support order.⁴⁸ Again, the father argued that the support order was inappropriate because the child’s mother had absolved him of all parenting obligations before conception.⁴⁹ Unlike the father in *Kesler*, the father in *Ferguson* presented substantial evidence that his contribution had been analogous to that of an anonymous sperm donor. The child was conceived through in vitro fertilization, rather than through sexual intercourse, and the mother had illustrated her intent to absolve the donor of financial responsibility by listing her then-husband, rather than the sperm provider, on the baby’s birth certificate.⁵⁰

¶21 The superior court found that the parties had, in fact, contracted to release the sperm provider from any support obligations.⁵¹ However, the court held that the contract was unenforceable and affirmed the lower court’s order of support. Citing *Kesler*, the superior court wrote, “a child’s right to support cannot be bargained away by either parent, and any release or compromise is invalid to the extent it prejudices the child’s welfare.”⁵² The sperm donor successfully appealed, arguing that the Superior Court’s support order unconstitutionally violated his equal protection rights by holding him financially responsible for his genetic child, while sperm providers who donate in clinical settings are not held similarly liable.⁵³ On December 27, 2007, just prior to publication of this article, the Pennsylvania Supreme Court reversed the order of support.⁵⁴

⁴⁵ *Id.* at 795.

⁴⁶ *Id.* at 796.

⁴⁷ *Id.* (“It cannot be bargained away before conception any more than it can be bargained away after birth, nor can it be extinguished by principles of estoppel.”).

⁴⁸ 855 A.2d 121 (Pa. Super. Ct. 2004), *appeal granted in part*, 868 A.2d 378 (Pa. Feb. 2, 2005).

⁴⁹ *Id.* at 123.

⁵⁰ *Id.* at 122.

⁵¹ *Id.* at 123. (The court wrote that the “agreement between the parties that appellant would donate his sperm in exchange for being released from any obligation for any child conceived, on its face, constitutes a valid contract.”).

⁵² *Id.*; *Kesler v. Weniger*, 744 A.2d 794, 795 (Pa. Super. Ct. 2000); *see also Sams v. Sams*, 808 A.2d 206 (Pa. Super. Ct. 2002).

⁵³ Order Granting Appeal in Part, *Ferguson v. McKiernan*, 868 A.2d 378 (Pa. 2005).

⁵⁴ Shortly before publication of this Comment, the Pennsylvania Supreme Court issued an opinion reversing the Superior Court’s holding in *Ferguson v. McKiernan*, No. 16 MAP 2005, 2007 WL 4555436 (Pa. Dec. 27, 2007). The Pennsylvania Supreme Court held that the agreement between the sperm donor and biological mother in *Ferguson* was enforceable, and that known sperm donors, like anonymous sperm donors, are protected from child support actions. *Id.* at *7. The Supreme Court recognized that Pennsylvania had a long history of protecting anonymous sperm donors from such actions and reasoned that there was no reason to treat known sperm donors differently. *Id.* Because there is no similar history of protecting egg donors (who are generally not anonymous) from child support actions, the effect of the Pennsylvania Supreme Court’s holding in the context of enforceability of egg donor agreements is unclear.

¶22 These cases are significant in the context of egg donor ART arrangements because they establish that intended parents may not be able to absolve gamete providers of support obligations where the donor is known. Egg donor agreements rely on the assumption that parental responsibilities can be contracted away, and it is safe to assume that most egg providers would not enter ART arrangements if not for the intended parents' willingness to release the donor of parental responsibility. The above Pennsylvania cases demonstrate, however, that any pre-conception release of a child's right to support may be invalidated to the extent that it prejudices the child's interests.

¶23 Egg donors face an additional risk of being held liable for child support, as compared to sperm donors, because they are not protected from liability by the 1973 Uniform Parentage Act (UPA or the Act). The Act protects sperm donors by stating that a "donor of semen provided . . . for use in artificial insemination . . . is treated in law as if he were not the natural father of a child thereby conceived."⁵⁵ In the nineteen states that have adopted the 1973 version of the Act,⁵⁶ men who provide sperm for physician-assisted ART, regardless of whether they are known to the intended mother, will not be held responsible for a child born as a result of their donations.⁵⁷ The 1973 version of the Act contains no similar protection for egg donors.

¶24 Even in states that have not yet adopted the Uniform Parentage Act, child support liability is a greater risk for egg donors than sperm donors because donations of sperm are often anonymized before being made available to purchasers.⁵⁸ When an intended parent obtains a sperm specimen from a commercial cryobank, personal information that could be used to identify and contact the donor is often not available.⁵⁹ Anonymity in the male gamete market distances donors from the recipients and goes a long way to prevent the kind of litigation discussed above. Anonymity is less common in the female gamete market.⁶⁰ This may be because egg transfer procedures are more successful when eggs

⁵⁵ UNIF. PARENTAGE ACT § 5(a) (1973).

⁵⁶ The states that have enacted the 1973 version of the Uniform Parentage Act in some form are as follows: Alabama, ALA. CODE §§ 27-16-1 to 26-17-22 (1984); California, CAL. FAM. CODE §§ 7600-7730 (West 1975); Colorado, COLO. REV. STAT. §§ 19-4-101 to 19-4-130 (West 1977); Hawaii, HAW. REV. STAT. §§ 584-1 to 584-26 (1975); Illinois, 750 ILL. COMP. STAT. 45/1 to 45/28 (1984); Kansas, KAN. STAT. ANN. §§ 38-1110 to 38-1138 (1985); Minnesota, MINN. STAT. §§ 257.51 to 257.75 (1980); Missouri, MO. REV. STAT. §§ 210.817 to 210.852 (1987); Montana, MONT. CODE ANN. §§ 40-6-101 to 40-6-105 (1975); Nevada, NEV. REV. STAT. §§ 126.011 to 126.371 (1979); New Jersey N.J. STAT. ANN. §§ 9:17-38 to 9:17-59 (West 1983); New Mexico, N.M. STAT. §§ 40-11-1 to 40-11-23 (1986); Ohio, OHIO REV. CODE ANN. §§ 3111.01 to 3111.19 (West 1982); Rhode Island, R.I. GEN. LAWS §§ 15-8-1 to 15-8-27 (1979); Texas, TEX. FAM. CODE ANN. §§ 160.001 to 160.763 (Vernon 2001).

⁵⁷ Pennsylvania has not yet adopted a version of the Uniform Parentage Act, and the cases discussed above would likely have developed differently had the Act been controlling. The genetic father in *Kesler v. Weniger*, for example, would still be held liable under the Act because his child was conceived through intercourse rather than through physician-assisted ART. However, the father in *Ferguson v. McKiernan* would have fared much better under the Uniform Parentage Act because his donation was physician-assisted, and the fact that he was "known" to the mother would not have affected his classification as a non-liable donor under the Act. *Ferguson v. McKiernan*, 855 A.2d 121 (Pa. Super. Ct. 2004), *order rev'd by Ferguson v. McKiernan*, No. 16 MAP 2005, 2007 WL 4555436 (Pa. Dec. 27, 2007).

⁵⁸ See Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 LAW & SOC'Y REV. 257, 263 (2002) (discussing the rise of anonymization in sperm donations).

⁵⁹ *Id.* at 266.

⁶⁰ See Elaine Gordon, *Open Donation: An Intriguing Option*, The American Infertility Association of New York, Oct. 2001, <http://www.eggdonor.com/?section=resources&page=opendonation>.

are implanted into the recipient within days of extraction rather than frozen and stored for later use, as is common with sperm specimens.⁶¹

¶25 Thus, egg providers run a risk of litigation aimed at securing child support because: (1) courts have held that the right to support is a right of the child, and may not be bargained away by the mother or father; (2) the 1973 Uniform Parentage Act, operative in nineteen states, offers no protection for egg donors; and (3) egg donors, unlike sperm donors, rarely remain anonymous.⁶²

V. RIGHT TO PARENTHOOD

¶26 This section explores issues raised by egg donors who seek to assert parental rights over their genetic offspring after waiving such rights at the initiation of the assisted fertility arrangement. Intended parents who enter into third party fertility agreements with egg providers are typically assured by their ART clinics that their egg providers will retain no parental rights over the resulting offspring and egg providers are usually directed to sign consent forms waiving their rights to parenthood.⁶³ One such consent form provides: “I will agree to have eggs taken from my ovaries, in order that they may be donated to another woman” and “[i]t is understood that I waive any right and relinquish any claim to the donated eggs or any pregnancy or offspring that might result from them.”⁶⁴ While these assurances may provide some peace of mind for intended parents, there is no guarantee that such waivers will be enforced. In fact, courts have held that egg providers have standing to assert parentage under the Uniform Parentage Act and that waivers of parental rights may be irrelevant to the court’s determination of parenthood.

¶27 The Uniform Parentage Act is a starting point in considering who has standing to assert parenthood, and how competing claims should be balanced.⁶⁵ For example, the original 1973 Act has a section on artificial insemination, which provides that “the donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.”⁶⁶ Without this provision, sperm donors would be considered “interested parties” under the Act by virtue of their genetic ties and would have standing to assert parenthood.⁶⁷ This provision has an important effect on parentage determinations in the sperm donor context because, by divesting the donor of standing to sue, the Act has made it impossible for sperm donors to assert parentage after donating to a married woman for physician-assisted ART. There is no parallel provision in the 1973 Act for egg donors.

¶28 The 2000 amended version of the Uniform Parentage Act attempts to broaden regulation of assisted fertility arrangements and, unlike the 1973 Act, includes a

⁶¹ AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, *supra* note 4, at 7.

⁶² *See, e.g., J.F. v. D.B.*, 897 A.2d. 1261 (Pa. Super. Ct. 2006).

⁶³ ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES, *supra* note 1, at 485 (“The donor relinquishes all parental rights to any resulting offspring.”).

⁶⁴ *K.M. v. E.G.*, 13 Cal. Rptr. 3d. 136, 140 (Cal. Ct. App. 2004) (quoting egg donor contract), *rev’d*, 117 P.3d 673 (Cal. 2005).

⁶⁵ UNIF. PARENTAGE ACT §§ 1-30 (1973).

⁶⁶ *Id.* at § 5(b).

⁶⁷ *Id.* at § 6(b).

provision applicable to egg donors.⁶⁸ Section 702 of the Act provides: “A donor is not a parent of a child conceived by means of assisted reproduction.”⁶⁹ “Donor” is defined as someone who produces either an egg or sperm used for assisted reproduction, which is defined as any “method for causing pregnancy other than sexual intercourse.”⁷⁰ The term donor does not include “a husband who provides sperm, or a wife who provides eggs, to be used for assisted reproduction by the wife; or . . . a woman who gives birth to a child by means of assisted reproduction,” except if that woman is a gestational surrogate.⁷¹ By referring to gamete donors in a general sense, this provision controls parentage determinations in both egg donor and sperm donor ART arrangements. Because the 1973 sperm donor provision has been held to divest sperm donors of standing to assert parentage,⁷² one might reasonably assume that the 2000 provision similarly divests egg donors of standing to assert parentage. Courts in the six states that have adopted the 2000 Act have yet to interpret the new donor provision, however, and the answer to this question of interpretation remains unknown.⁷³

¶129 The evolution of judicial decisionmaking in this area demonstrates the uncertainty that parties may face when they seek judicial resolution of their parental disputes. The leading case in the area of parental assignment in ART arrangements is *Johnson v. Calvert*, decided by the Supreme Court of California in 1993.⁷⁴ The holding in this case is said to have established the “intention test” for deciding parental disputes between a genetic mother and a gestational surrogate. The dispute began when Anna Johnson, who had agreed to act as a gestational carrier for the Calverts, changed her mind towards the end of the pregnancy and refused to relinquish custody of the baby.⁷⁵ The Calverts sought a declaration of parentage under the Uniform Parentage Act.⁷⁶ The court determined that the Uniform Parentage Act allows women to establish a mother-child relationship through evidence of giving birth to the child or evidence of genetic ties to the child.⁷⁷ Thus, both women were held to have colorable claims to parentage because Ms. Johnson had given birth to the child and Ms. Calvert was the genetic mother of the child.⁷⁸

¶130 The court then held that when two means of establishing parentage under the Act do not coincide in one woman, the woman who “intended to bring about the birth of the child that she intended to raise as her own” is the mother of the child under California

⁶⁸ UNIF. PARENTAGE ACT § 702, 9B U.L.A. 299-376 (2000) (revised 2002).

⁶⁹ *Id.*

⁷⁰ *Id.* at §§ 102(4), 102(8).

⁷¹ *Id.* at § 102(8).

⁷² UNIF. PARENTAGE ACT § 5(b) (1973) (“The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.”).

⁷³ Delaware, DEL. CODE ANN. tit. 13, §§ 8-101 to 8-904 (2004); North Dakota, N.D. CENT. CODE §§ 14-20-01 to 14-20-66 (2005); Texas, TEX. FAMILY CODE ANN. §§ 160.001 TO 160.763 (Vernon 2001); Utah, UTAH CODE ANN. §§ 78-45g-101 to 78-45g-901 (2004); Washington, WASH. REV. CODE §§ 26.26.011 to 26.26.913 (2002); Wyoming, WYO. STAT. ANN. §§ 14-2-401 to 14-2-907 (2003).

⁷⁴ 851 P.2d 776 (Cal. 1993).

⁷⁵ *Id.* at 88.

⁷⁶ Pertinent portions of the 1973 Uniform Parentage Act were adopted by California in 1976. *See* Cal. Fam. Code. §§ 7600-7730 (1994).

⁷⁷ *Johnson*, 851 P.2d at 781.

⁷⁸ *Id.*

law.⁷⁹ The court then examined the parties' intentions as manifested in the ART agreement, and found that it was the genetic mother, Mrs. Calvert, who "from the outset intended to be the child's mother."⁸⁰ Thus, after recognizing that each woman had a colorable claim to parenthood, the court ruled in favor of the genetic mother and assigned full parental rights to the Calverts.⁸¹

¶31 Although *Johnson v. Calvert* did not deal directly with a dispute between intended parents and an egg donor, its holding has two important implications for egg donor arrangements. First, the *Johnson* holding establishes that egg donors, unlike sperm donors, have standing to bring actions to determine parentage under the Uniform Parentage Act. They are considered "interested parties" for the purpose of assigning parenthood in third party fertility arrangements. This is because the Act recognizes genetic consanguinity as a means of establishing father-child relationships, and then prescribes that "insofar as practicable, the provisions of the Act applicable to the father and child relationship" apply to determinations of a mother and child relationship as well.⁸² Thus, just as Section Three provides that "a natural mother may be established by proof of her having given birth to the child," genetic consanguinity was also held to be a means of determining a child's natural mother.⁸³ Second, the *Johnson* holding establishes that where competing biological claims to parenthood exist as a result of an ART arrangement and either woman would be recognized as a mother under the Uniform Parentage Act, the *intent* of the parties as manifested in the initial agreement will serve as the tiebreaker.

¶32 The *Johnson* intention test was further developed in the case of *K.M. v. E.G.*⁸⁴ In that case, appellant K.M.'s eggs were extracted, fertilized in vitro, and implanted into the womb of her lesbian partner, E.G., who carried the pregnancy to term.⁸⁵ The couple agreed that only E.G. would be the parent of the resulting offspring, but after twin girls were born, both women took on parenting responsibilities.⁸⁶ The women separated five years later, and K.M. filed a petition to establish her parental relationship with the children.⁸⁷ In response, E.G. filed a motion to dismiss the petition on the ground that K.M. lacked standing to assert parentage.⁸⁸

¶33 The court of appeals held that although both women had standing to bring action to determine parentage under the Uniform Parentage Act,⁸⁹ the egg donor consent forms signed by K.M. indicated that she had waived her parental rights.⁹⁰ The court concluded that K.M. did not qualify as a parent under the Uniform Parentage Act, despite her

⁷⁹ *Id.* at 783.

⁸⁰ *Id.*

⁸¹ *Id.* at 787.

⁸² UNIF. PARENTAGE ACT § 21 (1973).

⁸³ *Id.* at § 3.

⁸⁴ 117 P.3d 673, 678 (Cal. Dist. Ct. App. 2004), *rev'd*, 117 P.3d 673 (Cal. 2005).

⁸⁵ *Id.* at 141.

⁸⁶ *Id.* at 140-41.

⁸⁷ *Id.* at 142.

⁸⁸ *Id.*

⁸⁹ *Id.* at 144 (The court wrote "here, in light of K.M.'s genetic connection to the children, we conclude that K.M. qualified as an 'interested party' for purposes of obtaining a judicial declaration of her status as a parent.").

⁹⁰ *Id.* at 140. Before her eggs were extracted, K.M. signed a consent form that read partially "I waive the right of relationship or inheritance with respect to any child born of this procedure." *Id.*

genetic ties to the children, because the parties intended that only E.G. would have parental status over the children when they entered into the initial fertility agreement.⁹¹ Further, the court rejected the notion that both women could be recognized as natural mothers because the *Johnson* holding established that California law recognizes only one natural mother for any child.⁹²

¶34 This holding was a major advancement for the *Johnson* intention test and would have contributed significantly to predictable enforcement of the third party fertility agreements. However, the Supreme Court of California reversed the decision in 2004.⁹³ While the Supreme Court agreed that K.M. had “explicitly donated her ovum under a clear written agreement by which she relinquished any claim to offspring born of her donation,” the court stated that K.M.’s waiver had no effect on its determination of parentage and ruled that both lesbian partners were parents of the twin girls.⁹⁴ The court reasoned that the holding in *Johnson*, that California law recognizes only one natural mother, did not preclude the court from determining that a child has two parents, “both of whom are women.”⁹⁵ Also, the court found it significant that in this case, unlike *Johnson*, the two women’s claims of parentage were not mutually exclusive. The court wrote, “K.M. does not claim to be the twins’ mother *instead* of E.G., but in *addition* to E.G.,” and opined that the “*Johnson* intent test does not apply when there is no ‘tie’ to break.”⁹⁶ Thus, the majority carved out an exception to the *Johnson* intention test for egg donors who have “supplied . . . ova to impregnate [a] lesbian partner in order to produce children who would be raised in their joint home,” ruling that the egg provider is a parent of the resulting children, despite any earlier manifestations of her intent *not* to be a parent.⁹⁷

¶35 As the dissenting opinion by Judge Werdegarr pointed out, the majority’s rejection of the intention test and willingness to void a third party fertility agreement is problematic. Judge Werdegarr wrote that the intention test established in *Johnson* was significant because it allowed parties to assisted fertility agreements “to create, before conception, settled and enforceable expectations about who would and would not become parents.”⁹⁸ By undermining the predictive function of the *Johnson* intention test, the Supreme Court of California’s decision in *K.M. v. E.G.* will contribute to the level of uncertainty in egg provider arrangements. Although the majority’s opinion is narrow in the sense that it foregoes the *Johnson* intention test only where there is an understanding that the child is to be raised in the parties’ “joint home,” the opinion threatens the enforceability of all egg donor contracts because of its willingness to disregard the intention test and its emphasis on the genetic relationship between the egg donor and the child. Even though the majority did not dispute the fact that K.G. manifested her intention to waive parenthood, they still found in her favor, reasoning that her “claim to be the twins’ mother because the twins were produced from her ova is equal to, and arose

⁹¹ *Id.* at 147.

⁹² *Id.* at 150; *Johnson v. Calvert*, 851 P.2d 776, 781 (Cal. 1993).

⁹³ *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005).

⁹⁴ *Id.* at 682.

⁹⁵ *Id.* at 681.

⁹⁶ *Id.*

⁹⁷ *Id.* at 682.

⁹⁸ *Id.* at 688 (Werdegarr, J., dissenting).

at the same time as, E.G.'s claim to be the twins' mother because she gave birth to them."⁹⁹

¶36 In sum, case law in the area of egg provider parental assertion suggests that consent forms stripping donors of their parental rights are far from airtight. As a result of their genetic relationship to their children, egg providers have standing to assert parenthood under the Uniform Parentage Act. Also, as seen in *K.M. v. E.G.*, courts may be willing to hold that parental waiver consent forms signed by egg providers are irrelevant to their determination of parenthood.

VI. RIGHT TO PURSUE CONTRACT CLAIMS AGAINST INTENDED PARENTS AND FERTILITY CLINICS FOR MISUSE OF EGGS

¶37 The previous section explored cases in which egg providers seek to prevent the enforcement of certain provisions in their donor contracts. This section examines an alternate situation. What if an egg donor feels she has been deprived of the benefit of her bargain and seeks judicial *enforcement* of an egg donor contract? This section explores three basic scenarios: unconsented transfer of eggs, unconsented destruction of eggs, and misuse of eggs in biomedical research.

¶38 When egg donors are asked to explain their interest in participating in third party fertility arrangements, it is common for them to say that they want to help an infertile couple achieve parenthood.¹⁰⁰ However, there is no guarantee that the provider's eggs will be used to that end. Between the times eggs are harvested and a child is born, one or more parties to the ART arrangement may decide they no longer want to carry or raise a child. Thus, a disagreement might arise between a party who wants a way out of the ART arrangement and parties who want to continue with an ART arrangement until a child is born.

¶39 The Supreme Court of Washington faced such a dispute in *Litowitz v. Litowitz*.¹⁰¹ This case involved an agreement between an infertile married couple (the wife had undergone a hysterectomy) and an egg donor.¹⁰² Pursuant to their agreement, five eggs were extracted from the egg donor and fertilized in vitro with the husband's sperm.¹⁰³ Three of these fertilized eggs, or preembryos, were then implanted in a gestational surrogate, resulting in the birth of a girl.¹⁰⁴ The other two preembryos were cryogenically preserved.¹⁰⁵ The couple then divorced and was unable to agree as to the disposition of the preserved preembryos.¹⁰⁶ The wife wanted to have the preembryos thawed and implanted into a gestational surrogate so that she might have another child.¹⁰⁷ The

⁹⁹ *Id.* at 682.

¹⁰⁰ Bonnie Miller Rubin, *The Incredible, Sellable Egg: What Was Once a Personal Journey Has Become a Booming Business for Donors and Recruiters*, CHI. TRIB., Mar. 4, 2007, at A1.

¹⁰¹ 48 P.3d 261 (Wash. 2002).

¹⁰² *Id.* at 262.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 262-63.

¹⁰⁶ *Id.* at 264.

¹⁰⁷ *Id.*

husband, however, did not want another child and wanted instead to donate the remaining preembryos to another “adoptive” couple.¹⁰⁸

¶40 Although the egg donor was not a party to the litigation, the court was moved to consider her role because the Litowitz’s egg donor contract required written permission from the egg donor before the eggs could be transferred to another couple according to the father’s wishes.¹⁰⁹ The court concluded that this provision conferred no rights on the egg donor in the present conflict because “the eggs no longer existed as they were identified in the egg donor contract as they were later fertilized with Respondent’s sperm and their character was then changed to preembryos.”¹¹⁰ Thus, the egg donor’s right to protect her eggs from being transferred to unknown intended parents dissolved at the moment they were fertilized. This holding is significant because it greatly diminishes an egg donor’s ability to prevent unwanted transfer of genetic material by requiring her consent, because an opposing party may simply avoid consent requirements by fertilizing the egg.

¶41 Also, even if such contractual consent requirements were broadened to require consent of the egg donor before an egg or a resulting embryo is transferred to another party, egg donors would still have little hope of securing the originally intended use of their eggs. While a donor could prevent unwanted transfer by refusing consent, she could not ensure that her eggs are used to create a child according to the parties’ original intent because intended parents retain a right not to procreate.

¶42 In *Litowitz v. Litowitz*, the Supreme Court of Washington held that, even though the husband had expressed his intention to become a parent in the egg donor contract, he was not bound by that contract to become a parent.¹¹¹ When enforcement of a contract to create a child would impair an intended parent’s constitutional right not to procreate, courts will typically refuse enforcement.¹¹² Thus, even if an intended mother and egg donor want preembryos to be gestated, requiring no further contribution from the father, a court will grant the father’s wish to destroy or transfer the embryos. The father retains his constitutional right not to procreate, which outweighs the wife’s wishes to procreate.¹¹³ Thus, the *Litowitz* court, faced with a husband and wife who could not agree about the disposition of their preembryos following divorce, held that the husband was not bound by the egg donor contract because he retained his right not to procreate even after the eggs were fertilized with his sperm.¹¹⁴

¶43 Similar reasoning was applied by the Massachusetts Supreme Court in *A.Z. v. B.Z.*¹¹⁵ Divorced litigants called on the court to resolve a disagreement regarding the disposition of frozen preembryos.¹¹⁶ The wife wanted the preembryos released to her for implantation so that she might have another child, while the husband sought to enjoin her use of the preembryos.¹¹⁷ In this case, the wife relied on a consent form signed by her ex-

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 269.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 270-71.

¹¹² *See also* J.B. v. M.B., 751 A.2d 613 (N.J. Super. Ct. App. Div. 2000).

¹¹³ *Litowitz*, 48 P.3d at 271.

¹¹⁴ *Id.*

¹¹⁵ 725 N.E.2d 1051 (Mass. 2000).

¹¹⁶ *Id.* at 1051.

¹¹⁷ *Id.*

husband prior to the IVF procedure resulting in the disputed preembryos. The consent form stated if the parties were to separate, “both [parties] agree to have the embryo(s) . . . returned to the wife for implantation.”¹¹⁸ The court held that the consent form was legally insufficient for several reasons and that, even if these insufficiencies were resolved, the court would refuse to enforce any agreement that compelled an IVF participant to become a parent against his wishes.¹¹⁹ “Forced procreation,” the court wrote, “is not an area amenable to judicial enforcement.”¹²⁰ Therefore, even if all parties manifest their intent to create a child, an egg donor is unable to enforce these provisions because intended parents retain a right not to procreate until the embryos are implanted into a carrier.

¶144 Even after a donor’s eggs are fertilized and implanted for gestation, she is unable to ensure that her contribution will result in the birth of a child, because the woman carrying the pregnancy, whether intended mother or gestational carrier, retains the right to terminate the pregnancy even if she has previously expressed her intent to carry the fetus to term. Although courts have yet to face the question directly, other case law suggests that egg donors will be left with little relief if another woman terminates a pregnancy that relied on the egg donor’s contribution.

¶145 In *Planned Parenthood of Central Missouri v. Danforth*, the Supreme Court considered a challenge to a Missouri abortion statute that required spousal consent before a married woman could obtain an abortion.¹²¹ The Court declared the provision unconstitutional, reasoning in part that a husband’s clear interest in the birth of his child is outweighed by a woman’s interest in non-procreation if she chooses to terminate the pregnancy.¹²² The Court stated: “Inasmuch as it is the woman who physically bears the child and who is more directly and immediately affected by pregnancy, as between the two, the balance weighs in her favor.”¹²³ Thus, when parties disagree about whether to carry a pregnancy to term, the party who gestates the embryo is the ultimate decision maker, even if her decision opposes the wishes of a genetic contributor.

¶146 This rule has been further developed in cases involving disputes between intended parents and surrogates. For example, in *Matter of Baby M*, the Superior Court of New Jersey considered a contract between intended parents and a surrogate that included a clause prohibiting the surrogate from obtaining an abortion without the intended father’s consent.¹²⁴ The court declared this provision void and unenforceable. It stated:

After conception, only the surrogate shall have the right, to the exclusion of the sperm donor, to decide whether to abort the fetus. . . . *Roe [v. Wade]* establishes and recognizes the unique and singular quality of woman.

¹¹⁸ *Id.* at 1054.

¹¹⁹ *Id.* at 1057.

¹²⁰ *Id.* at 1058.

¹²¹ 428 U.S. 52 (1976).

¹²² *Id.* at 71.

¹²³ *Id.*

¹²⁴ 525 A.2d 1128, 1159 (N.J. Super. Ct. Ch. Div. 1987), *rev’d on other grounds*, 537 A.2d 1227 (N.J. 1988).

That only woman has the constitutionally protected right to determine the manner in which her body and person shall be used.¹²⁵

¶147 Therefore, although many egg donors are apparently induced by the prospect of effectuating the birth of a child, they have little likelihood of success in bringing contract claims against either intended parents or gestational carriers for transferring or destroying their eggs or terminating a resulting pregnancy.

¶148 Egg donors might also seek enforcement of contractual provisions against intended parents or fertility clinics in the event of misuse of donor eggs. Cryogenically preserved embryos are routinely used for medical research, and the development of biomedical products often depends on the availability of human tissue like gametes and embryos.¹²⁶ Because scientific advancements in these areas can be extremely profitable, the issue of ownership of the body materials involved becomes pressing.¹²⁷ If a woman's eggs are used without her consent in the development of a commercially successful biomedical product, can she sue for a share of the profits? Does she maintain a property interest in her eggs once they are removed from her body? Or is it improper for eggs to be considered property at all?

¶149 In the case of *Moore v. Regents of the University of California*, the California Supreme Court held that a patient does not retain a property interest in material extracted from his body.¹²⁸ The Plaintiff in *Moore* was a patient at UCLA medical center.¹²⁹ During the course of his treatment for hairy-cell leukemia, significant amounts of his blood, blood serum, skin, and bone marrow were removed.¹³⁰ Moore consented to each of these removals because he was informed that they were necessary to advance his treatment or prolong the spread of his disease.¹³¹ Then, two years after Moore's first visit to the Medical Center, his attending physician established a cell line from Moore's body material, which was later patented by the Regents of the University of California.¹³² Moore's physician and the University then entered into a commercial agreement with Genetics Institute in which the University agreed to provide exclusive access to their materials and research in exchange for 75,000 shares of common stock and at least \$330,000 over three years.¹³³

¶150 Moore sued under thirteen separate causes of action.¹³⁴ In a controversial decision, the Supreme Court of California held that while the plaintiff's rights were protected by the doctrine of informed consent, he could not bring a conversion claim against the defendants because he did not maintain a proprietary interest in his body material after it was removed.¹³⁵ Thus, while Moore could sue his physician for failing to disclose a

¹²⁵ *Id.* at 1159.

¹²⁶ See generally Lori Andrews, *The Battle Over the Body*, TRIAL, Oct. 2006, at 22, 22 (discussing the growing monetary value of human tissue).

¹²⁷ Brian Budds, *Toward a Just Model of Alienability of Human Tissue*, 37 U.S.F. L. REV. 757, 758 (2003) ("the body becomes the stuff of which products are made").

¹²⁸ 793 P.2d 479 (Cal. 1990).

¹²⁹ *Id.* at 480.

¹³⁰ *Id.* at 481.

¹³¹ *Id.*

¹³² *Id.* at 481-82.

¹³³ *Id.* at 482.

¹³⁴ *Id.* at 483 n.4.

¹³⁵ *Id.* at 489, 483.

financial interest in the extraction of his body material, Moore could not sue for a share of the cell line profits because the court was unwilling to recognize that Moore had a title to his own bodily material once it was extracted from his body. In dissent, Justice Mosk wrote of the majority's holding the position that "plaintiff cannot own his tissue, but that [the defendants] can, is fraught with irony."¹³⁶

¶51 In the egg donor context, *Moore* seems to establish that women do not maintain a proprietary interest in their eggs once they are harvested, unless there is an agreement otherwise. Thus, if a woman's eggs are donated in an ART arrangement and are then sold or donated for commercially successful research, the woman's only avenue for relief is through the doctrine of informed consent.¹³⁷ While fertility clinics have a duty to disclose any auxiliary financial interest in the harvesting of a woman's eggs, if the eggs are then used as raw material in the development of profitable biomedical products, the donor can not bring an action for conversion.

¶52 The *Moore* holding was examined in the context of gamete transfer three years later in *Hecht v. Superior Court*, which involved a dispute over the disposition of cryogenically preserved sperm.¹³⁸ Over a period of time, William Kane deposited fifteen vials of his sperm for cryopreservation at a sperm bank.¹³⁹ He then took his own life, leaving a will outlining his intent to become a father posthumously.¹⁴⁰ He directed that the sperm be released to his long-term girlfriend, Deborah Hecht, for fertilization so that she might bear his genetic child.¹⁴¹ Kane's two adult children from a previous marriage opposed the release of their father's sperm, and the court was called on to decide, as a threshold matter, whether Kane's sperm was "property" within the probate court's jurisdiction.¹⁴² Kane's adult children argued that their late father's bodily material was not property under the *Moore* rationale and that the probate court was, therefore, without jurisdiction to decide the disposition of the sperm.¹⁴³ The court disagreed and found that the sperm was a sui generis form of property and that the decedent had an interest in his sperm, therefore falling within a broad definition of property.¹⁴⁴ The court also distinguished gametes from other body parts, reasoning that gametes are entitled to "special respect" because of their potential for human life.¹⁴⁵

¶53 The *Hecht* decision illustrates that courts still suffer from a lack of guiding principles when it comes to recognizing property rights in the human body. Even in the state of California, where the *Moore* court expressed an unwillingness to recognize a plaintiff's property right in his own excised cells, the law is unsettled. The debate over the existence or extent of a property interest in one's body is likely to intensify in the gamete context as the growing frequency of gamete transfer provides growing

¹³⁶ *Id.* at 510 (Mosk, J., dissenting) (quoting Court of Appeals decision).

¹³⁷ See Anne T. Corrigan, *A Paper Tiger: Lawsuits Against Doctors for Non-Disclosure of Economic Interests in Patients' Cells, Tissues and Organs*, 42 CASE W. RES. L. REV. 565, 585 (1992) (traditional informed consent claims may be insufficient to accommodate situations involving physician misuse of bodily material).

¹³⁸ 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

¹³⁹ *Id.* at 276.

¹⁴⁰ *Id.* at 276-77.

¹⁴¹ *Id.*

¹⁴² *Id.* at 280-81.

¹⁴³ *Id.* at 281.

¹⁴⁴ *Id.* at 281-83.

¹⁴⁵ *Id.* at 281.

opportunities for abuse. The *Hecht* decision also illustrates that a separate and distinct paradigm may be needed to address gamete ownership. The court indicated that in the gamete context, little guidance can be gained from cases involving the disposition of other bodily materials, like transplantable organs, pituitary glands, or corneal tissue, because, unlike sperm and eggs, they do not hold the potential for human life.

¶54 In sum, egg providers have little chance of protecting their eggs from misuse following extraction. Although egg providers are commonly assured that their eggs will be used to effectuate pregnancy, eggs may be destroyed at any stage before implantation. Even after implantation, the pregnancy carrier maintains a right to terminate the pregnancy. Also, although the doctrine of informed consent requires fertility clinics to disclose any financial interest in a provider's eggs, if eggs are extracted for use in biomedical research without the provider's consent, the provider cannot maintain an action for conversion to share in the profits of the research.

VII. CONCLUSION

¶55 Advances in reproductive technology will continue to push American courts to define the boundaries of reproductive choice. As a result, judges will be called on to weigh important conflicting interests, such as the interest in protecting procreative freedom and the interest in preserving potential life. This paper has attempted to elucidate some of these conflicts in the context of egg donor ART arrangements. As described above, people who are considering entering into an egg donor fertility arrangement, either as intended parents or as egg providers, need to be aware of the legal uncertainty surrounding their agreements.

¶56 First, intended parents should understand that their egg provider will not be a legal stranger to a child born as a result of her genetic contribution. Contractual provisions requiring egg donors to relinquish all parental rights to their genetic children have not been endorsed by American courts. Second, egg donors should be aware that contractual provisions, in which intended parents assume financial responsibility for the resulting child, are likely unenforceable. This is because courts have held that the right to support may not be bargained away before a child's conception. Finally, egg donors should be aware that their eggs may be transferred or destroyed without their consent.

¶57 Because legislative bodies have been slow to address public policy concerns raised by egg transfers, parties to egg donor ART arrangements must rely on the judiciary when their agreements go sour. Legal uncertainties surrounding egg transfers will only become more problematic as the procedure gains popularity. In the past ten years, egg donor ART arrangements have become more mainstream, and donated eggs were used in three times as many ART arrangements last year than in 1996.¹⁴⁶ As more procreative decisions rely on the availability of egg transfer, courts should strive for consistency and predictability in the enforcement of egg donor contracts.

¹⁴⁶ Rubin, *supra* note 100, at A8.