NOTE

Unauthorized Embryo Transfer at the University of California, Irvine Center For Reproductive Health

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"The embryos they stole, they were my children!"[1]

I. Introduction

Deborah and John Challender had been trying to conceive a child for ten years.[2] Almost hopeless, they came to the Center for Reproductive Health[3] at the University of California, Irvine,[4] looking for a miracle.[5] In 1992, Deborah gave birth to a son as a result of CRH's services.[6] Three years later, they discovered that their doctor had also implanted some of Deborah's eggs into a woman in another county—who had given birth to twins.[7] Neither Deborah nor the woman knew of the transfer until the discovery years later.[8]

Others, not as fortunate as Deborah, were unable to conceive with CRH's help. Diane Porter also came to CRH hoping to conceive.[9] She was

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1. Statement by John Challender, one of the victims of the scandal at the fertility clinic. Michelle Nicolosi, *Fertility: Family Speaks Out*, ORANGE COUNTY REG. June 8, 1995, at 3.
2. *See* Kathryn Wexler, *Egg-Swapping Scandal Still Unfolding: Infertility Clinic's Practices Put Doctors, University Under Scrutiny*, WASH. POST, Oct. 16, 1995, at A1.
3. Hereinafter referred to as "CRH."
4. Hereinafter referred to as "UCI."
5. *See* Wexler, *supra* note 2.
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*

not so lucky—after spending $40,000, she went home childless to Nebraska.[10] Four years later, she learned that she was an unsuspecting donor of four eggs to an equally unsuspecting recipient.[11] Similarly, Loretta and Basilio Jorge spent over $30,000 for fertility treatment with no results.[12] Without her consent, Loretta's eggs were given to another couple who subsequently gave birth to twins.[13] Yet another patient donated her eggs for research at CRH, with the understanding that they would be used to specifically benefit her own fertility,[14] only to later discover that her eggs had been sent to a Wisconsin zoologist.[15]

These are only a sampling of the horrifying stories that have emerged from the unfolding investigation at CRH.[16] UCI doctors allegedly shipped embryos for research without consent, transferred embryos to unknowing recipients, and destroyed or hid information relating to ownership of frozen embryos.[17]

Since the scandal first broke in May 1995, experts estimate that more than sixty women have been unwillingly involved in improper egg transfers.[18] Ten of those women subsequently gave birth and the genetic parents are still unknown.[19] Now there are unwilling genetic parents and unknowing gestational mothers.

The scandal at UCI encompasses scenarios which challenge legal vocabulary. Several charges were brought against the doctors allegedly responsible, including fraud, breach of fiduciary duty, conversion, and breach of contract.[20] In addition, one of the doctors faced federal mail fraud and income tax charges.[21] The alleged criminal conduct of the doctors at CRH

10. *See id.*

11. *See id.*

12. *See* Diane Seo, *Ex-UCI Patient Seeks to Meet Twins Born to Someone Else*, L.A. TIMES, Feb. 19, 1996, at B1.

13. *See id.*

14. *See A Hearing to Investigate UC Irvine's Fertility Clinic Before Senate Select Comm. on Higher Education*, June 14, 1995.

15. *See id.*

16. *See id.*

17. *See* Julie Marquis, *UC Fertility Case Doctor Sells Home*, L.A. TIMES, Oct. 24, 1995, at A3.

18. *See* Susan Kelleher et al., *Fertility Clinic Investigation; UCI Scandal Doubles*, ORANGE COUNTY REG., Nov. 4, 1995, at 1.

19. *See Suit Filed for Custody of Twins in UC Fertility Clinic Scandal*, SACRAMENTO BEE, Mar. 3, 1996, at B5.

20. *See* Shirley J. Paine et al., *Ethical Dilemmas in Reproductive Medicine*, 18 WHITTIER L. REV. 51, 66 (1997).

21. *See* Kim Christensen and Jim Muluaney, *Doctor Disputes Accusations in Fertility Clinic Scandal*, ORANGE COUNTY REG., Mar. 3, 1996, at B1. One doctor fled the United States to Mexico and the other to Chile where, interestingly enough, both have resumed their medical practices. *See Settlements OK'd in UCI Fertility Suits*, SAN DIEGO UNION-TRIB., Aug. 16, 1997, at A6.

lies in settled areas of the law. But the law is uncertain on the issue of custody in light of the reproductive technology. How will the law decide ownership with respect to the result of this reproductive technology when the intent to parent is equal on both sides? How will the law decide whose right of privacy takes precedence when an outside third party created the situation?[22]

The judicial system is ill-equipped to resolve ethical questions resulting from breakthrough advances in reproductive technology.[23] Courts have utilized a variety of approaches in adjudicating reproductive technology issues.[24] The right to procreate is encompassed within the right of privacy, a *constitutional* guarantee that courts have used in resolving surrogacy and embryo disposition conflicts.[25] *Contract law* gives preference to the party who intended to parent.[26] *Property law* focuses upon the embryo as tangible material whose owner has the sole right to determine its disposition.[27] *Family law* focuses upon the definition of parenthood and best interest of the child, looking at gestational, genetic, and social ties.[28] Courts have traditionally used combinations of these substantive areas of law when resolving reproductive technology disputes.[29] However, when desperate couples flocked to the CRH looking for a chance to conceive,[30] never envisioning these horrific outcomes, they subject themselves to the risks of the new and largely untested fertility industry.[31] The ethical and legal

22. Since May 1995, over 100 couples have filed suit against UCI and the doctors. As of September 1997, 80 of those claims have been settled for a total of $14 million. *See* Mary Micheletti, *Stolen Dreams*, CAL. L. BUS., Sept. 2, 1997, at 28. The legal issues presented, however, have yet to be resolved by any court.

23. *See* BARRY FURROW & SANDRA JOHNSON, BIOETHICS: HEALTH CARE LAW AND ETHICS 113 (2d ed. 1991).

24. *See* Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1490 (1995) (identifying and analyzing constitutional, contractual and property approaches to resolving dilemmas posed by new reproductive technologies).

25. *See id.* at 1496; *see also* discussion *infra* Part III.A.

26. *See* Rao, *supra* note 24, at 1496. *See also* discussion *infra* Part III.B.

27. *See* Rao, *supra* note 24, at 1496. *See also* discussion *infra* Part III.C.

28. *See* Rao, *supra* note 24, at 1496. *See also* discussion *infra* Part IV.

29. *See infra* Part III.

30. *See* Elizabeth Heitman, *Infertility as a Public Health Problem: Why Assisted Reproductive Technologies Are Not the Answer*, 6 STAN. L. & POL'Y REV. 89 (1995), for an interesting discussion of infertility as a public health problem which in vitro fertilization technology is not addressing.

31. *See* Michelle Nicolosi, *Fertility Industry Outruns Ethics*, ORANGE COUNTY REG., 1995, at 9. Legislative response has been forthcoming. California State Senator Tom Hayden introduced a bill, later passed by both state houses, making it a felony to implant or transfer embryonic material without the written consent of the donor or recipient. Section 367 subsection g of the California Penal Code provides that:

> (a) It shall be unlawful for anyone to knowingly use sperm, ova, or embryos in assisted reproduction technology, for any purpose other than that indicated by the sperm, ova, or

questions remain unsolved in an environment where the affected parties' have invested great emotions and where the medical field is laregely unregulated.[32]

Among the many issues left unresolved, one is the compensation, if any, which the genetic donors should receive for genetic material used for research purposes.[33] Another is the disposition of frozen embryos of unknown origin.[34] The third unresolved issue, and the subject of this Note, is the proper resolution of custody and visitation rights where unauthorized embryo transfer results in live birth. Who raises the child: unknowing donors like Deborah or Loretta George, or the equally unknowing recipient who gave birth to the child?

Property law, contract law and constitutional law provide inadequate guidance for resolving this question of custody.[35] The best interests of the child standard, borrowed from family law principles, supplies the best answer.[36] This standard, coupled with a presumption in favor of the gestational mother, will promote stability in the child's life, accord with society's value of existing family relationships, and foster certainty in a largely unregulated field.[37]

II. The Process of in Vitro Fertilization

To understand the impact created by the CRH scandal, it is important to understand the technology used. CRH used in vitro fertilization (hereinafter referred to as "IVF") which is a medical process whereby infertile couples can conceive their own child.[38] First, a couple is carefully screened

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embryo provider's signature on a written consent form. (b) It shall be unlawful for anyone to knowingly implant sperm, ova, or embryos, through the use of assisted reproduction technology, into a recipient who is not the sperm, ova, or embryo provider, without the signed consent of the sperm, ova, or embryo provider and recipient. (c) Any person who violates this section shall be punished by imprisonment in the state prison for three, four, or five years, by a fine not to exceed fifty thousand dollars ($50,000), or by both that fine and imprisonment. CAL. PENAL CODE § 367(g) (West Supp., 1993).

32. *See* Bill Davidoff, *Frozen Embryos: A Need for Thawing in the Legislative Process*, 47 SMU L. REV. 131, 133 (1993).

33. *See* Joel N. Ephross, *In Vitro Fertilization: Perspectives on Current Issues*, 32 JURIMETRICS J. 447, 461-62 (1992) (discussing liability and damages for unauthorized research).

34. *See id.* at 467-70.

35. *See* discussion *infra* Parts III.A.-C.

36. *See* discussion *infra* Part IV.

37. *See* discussion *infra* Part IV.B. A task force convened in July 1995 recently submitted recommendations to the Board of Regents for ensuring against similar misappropriations in the future. *See* Pamela Burdman, *UC Fertility Clinics to Bolster Rules*, S. F. CHRON., Mar. 13, 1996, at A11. The recommendations include closer monitoring of clinic operations, standardizing consent procedure to include a two-level documenting system, and mandatory annual reports from clinic directors to the corresponding medical school. *See id.*

38. *See* Davidoff, *supra* note 32, at 131.

to determine if they have the type of infertility problem that IVF is designed to solve.[39] If so, an ovum is fertilized outside of the woman's body and subsequently implanted in her uterus.[40] Thereafter, the woman receives fertility drugs which control her ovulation to stimulate eggs.[41] The eggs are then removed either by laparoscopy or ultrasound transvaginal aspiration.[42] One method, laparoscopy, involves making small incisions into the abdomen and extracting the eggs using a laparoscope and hollow needle.[43] The second method, ultrasound transvaginal aspiration, a newer and less painful technique, involves inserting a suctioning needle, with an ultrasound viewing device, into the abdomen or vagina, and extracting the egg through the suctioning needle.[44] After removal, the eggs are fertilized with sperm.[45] A pre-embryo forms and begins to divide.[46] During the four or eight-cell-division stage, the physician uses a thin catheter to transfer the embryo to the uterus, ideally effecting implantation.[47] The unused eggs are frozen for later use.[48]

An essential aid to this IVF procedure is cyropreservation, which allows embryos to be frozen anytime during the two to eight-cell-division stage.[49] This technique allows doctors to delay embryo implantation until the debilitating effects of hormone stimulation have ceased.[50] In addition, having frozen embryos allows patients to undergo the expense and pain of laparoscopic or ultrasound transvaginal aspiration only once while being able to implant as many times as there are embryos available until success is achieved.[51] This creates efficiency because the risk of failure in the IVF procedure is high.[52]

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39. Selection criteria include age, medical history, and health. *See id.* at 134. IVF is useful in cases where infertility is due to male dysfunctions, tubal factors, mucas abnormalities, and immunity to spermatozoa. *See id.*

40. *See* Tanya Feliciano, *Davis v. Davis: What About Future Disputes?* 26 CONN. L. REV. 305, 307 (1993).

41. *See id.*

42. *See* Perry Clifton & L. Kristen Schneider, *Cyropreserved Embryos: Who Shall Decide Their Fate?*, 13 J. LEGAL MED. 463, 467 (1992).

43. *See id.*

44. *See* Feliciano, *supra* note 40, at 307.

45. *See* Clifton & Schneider, *supra* note 42, at 467.

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.* The embryos are stored in liquid nitrogen at 195 degrees below zero centigrade, which suspends germ cell division. *See id.* The fertilized ova can be stored for up to two years safely; however, the full effects of long-term cyropreservation are not yet known. *See id.*

50. *See id.*

51. *See id.*

52. *See id.* at 469. For example, eggs may not develop, fertilization may not occur, or implantation may fail. *See id.*

The IVF procedure itself is a difficult experience for participants.[53] Every aspiration and implantation procedure costs about $10,000, and usually more than one procedure is required for successful implantation.[54] Further, "[t]he IVF experience is physically taxing for the prospective mother and emotionally draining for both prospective parents. Clinics report that couples attempting IVF often show an abnormal attachment to the embryos, sometimes even naming them, and experience deep depression if successful implantation does not occur."[55] Participants' emotions are at their peaks during the process of the IVF regarding procedure.

Disputes regarding disposition of embryos are thus especially painful due to the emotional nature of the IVF procedure, which is further magnified by the alleged criminal acts of the doctors at CRH.

There were allegations that the doctors at CRH implanted genetic material from one couple into another woman without either party's consent or knowledge.[56] In at least two cases, the recipients of the unauthorized transfers subsequently gave birth, with the identity of the genetic parents discovered after the fact.[57] Although the clinic utilized record-keeping procedures, evidence shows that the doctors were deliberately sloppy.[58] In one case, for example, fourteen eggs were extracted from a patient.[59] Four were used in the GIFT procedure.[60] Of the remaining ten, three were earmarked for another woman scheduled to undergo the IVF procedure.[61] Allegedly, the doctor told the first patient that only seven eggs had been extracted, and four of those had been placed in her Fallopian tubes.[62] By the end of the day, however, all of the remaining eggs had been fertilized[63] and the medical chart recording the transfers is now missing.[64] As can be expected the intensity of emotions are carried into the legal arena where the current

53. *See* Davidoff, *supra* note 32, at 136-37.

54. *See* Feliciano, *supra* note 40, at 308.

55. *Id.* at 308-09, (citing Andrea L. Bonnicksen, *Embryo Freezing: Ethical Issues in the Clinical Setting*, 18 HASTINGS CENTER REP. 26, 27 (1988)).

56. Doctors at CRH invented and utilized the gamete intra-fallopian transfer (GIFT) procedure in which an egg is extracted normally, but semen and the egg are then placed together in the fallopian tubes, where fertilization takes place. *See* FURROW & JOHNSON, *supra* note 23, at 120.

57. *See* Tracy Weber & Julie Marquis, *In Quest for Miracles, Did Fertility Clinic Go Too Far?*, L.A. TIMES, June 4, 1995, at A1.

58. *See* Susan Kelleher & Kim Christensen, *O.C. Woman's Eggs Were Fertilized and Put in Another Patient at UCI Clinic, Documents Indicate*, ORANGE COUNTY REG., May 19, 1995, at 1.

59. *See id.*

60. *See id.* GIFT was invented by two of the doctors involved in the scandal. Tracy Weber, *Inquiries Target Fertility Clinic at UC Irvine*, L.A. TIMES, May 20, 1995, at A1.

61. *See* Kelleher & Christensen, *supra* note 58.

62. *See id.*

63. *See id.*

64. *See id.*

frameworks under constitutional law, contract law and property law are inadequate in resolving these disputes.

III. Inadequacy of Constitutional Law, Contract Law and Property Law Approaches in Reproductive Technology

A. Constitutional Law

1. Right of Privacy

The right of privacy, stemming from substantive liberty interests of the 14th Amendment is the foundation in resolving reproductive disputes under the Constitution. This right originated in *Griswold v. Connecticut*,[65] where the Supreme Court upheld the privacy right of married couples to use contraception without state interference, noting that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[66] Justice Douglas found the marital relationship to lie within a zone of privacy created by these constitutional guarantees.[67] In *Eisenstadt v. Baird*,[68] the Court extended the use of contraceptives to unmarried persons. Justice Brennan emphasized that "[i]f the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[69]

The court subsequently applied the right of privacy espoused in *Griswold* and *Eisenstadt* to a woman's right under the Due Process Clause to terminate pregnancy without state influence in *Roe v. Wade*.[70] In *Planned Parenthood v. Casey*,[71] the Supreme Court reaffirmed the constitutional protection of the decision to procreate, stating that "[those decisions to use contraception] support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it."[72]

Such statements by the Supreme Court arguably demonstrate that there is a certain constitutional right to privacy which recognizes a private sphere into which the state may not enter. These pronouncements also indicate

65. 381 U.S. 479 (1965).
66. *Id.* at 484.
67. *See id.* at 485.
68. 405 U.S. 438 (1972).
69. *Id.* at 453.
70. 410 U.S. 113, 165 (1973).
71. 505 U.S. 833 (1992).
72. *See id.* at 852-53.

that this right of privacy ensures against the state's interference with an infertile couple's desire to conceive their own biological children.

2. The right to privacy is not equal to the right to raise a child

The right to privacy, however, is inadequate in resolving the difficult issues posed by reproductive technology.[73] The concept of parenthood has changed in such a way that the right to procreate, as limited as it may be today, does not provide a comprehensive approach to answering the question of which type of bond creates the superior right to raise a child: genetic, gestational or social.[74]

Since *Roe*, the Court has chipped away at state assistance of an individual's right to make reproductive choices.[75] Even a restrictive reading of *Roe* itself would make the right of privacy developed therein inapplicable to an embryo outside of a woman's body as opposed to a fetus inside her body.[76] In other words, "if a significantly developed fetus is not afforded legal protection, it is inconsistent to extend such protection to an eight-cell entity."[77] Moreover, the right to privacy encompasses an individual's decision to procreate, but does not solve the difficult dilemma of choosing between gestational or genetic parents. Even if the right to reproduce was accompanied by the right to raise one's biological child, "how do we determine which procreator—the gamete contributors, the gestator, or the intending parents—possesses these related rights?"[78]

The biological parents of a child conceived through unauthorized embryo transfer could not assert a privacy right to the child analogous to that of a woman asserting a privacy right to the fetus in her body.[79] "The very agreement that enhances the infertile couple's constitutional right to privacy of procreation may impair the surrogate mother's constitutional rights

73. The right of privacy is too weak to assert child-rearing rights, but it has been used to support the right of parents to the IVF procedure itself. *See* JOHN ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994); *see also* Kristine E. Luongo, *The Big Chill: Davis v. Davis and the Protection of "Potential Life," 29* NEW ENG. L. REV. 1011, 1026 (arguing that the recognition of privacy rights in marriage and procreation would also extend to any type of procreation, including IVF).

74. *See generally* Vicki G. Norton, *Unnatural Selection: Nontherapeutic Preimplantation Genetic Screening and Proposed Regulation*, 41 UCLA L. REV. 1581, 1624-29 (1994) (arguing that the decision to use IVF relates to the personal decision to bear genetically related children, therefore couples have right of access to IVF).

75. *See* Maher v. Roe, 432 U.S. 464, 479 (1977) (holding that there is no unqualified constitutional right to an abortion); Harris v. McRae, 448 U.S. 297, 327 (1980).

76. *See* Luongo, *supra* note 73, at 1038; *see also* Rao, *supra* note 24, at 1484-85.

77. Feliciano, *supra* note 40, at 345.

78. Rao, *supra* note *24*, at 1487.

79. *See id.* at 1494.

to privacy of person . . . ."[80] However, to the extent that such a privacy right would waive contractual obligations, it further demonstrates its indeterminacy.[81]

The right of privacy simply does not answer the question: Which set of parents possesses the superior right to raise a child, genetic or gestational? According to the California Supreme Court in *Johnson v. Calvert*,[82] for example, the right to procreation does not include a right to raise a child which is superior to the rights of other parties involved.[83] In *Johnson*, the court refused to entertain the gestational surrogate mother's privacy interest in the child, stating: "the choice to gestate and deliver a baby to its genetic parents . . . is [not] the equivalent, in constitutional weight, of the decision whether to bear a child of one's own."[84]

Additionally, the final decision about who has the right to raise the child at issue is not private in nature. It will affect at least two families fighting for custody, as well as affect the actions of future parties contemplating IVF as a solution to infertility. In *Davis v. Davis*,[85] the Tennessee Supreme Court, finding that the right to avoid genetic parenthood is encompassed within the individual right to privacy, asserted: "the existence of the right [to procreational autonomy] itself dictates that decisional authority rests in the gamete-providers alone, *at least to the extent that their decisions have an impact upon their individual reproductive status*."[86] Resolving the custody dispute of a child conceived because of illegal embryo transfer thus cannot rest upon the right of privacy because more than one party is impacted.

In sum, the right of privacy affords a limited right to procreate free from state interference, but is too narrow to resolve the competing parenthood interests presented by the new reproductive technology.

B. Contract Law

1. Intent

Contract law also provides an approach to adjudicating disputes which stem from new reproductive technology. The intent to procreate is the key element that courts use to resolve custody or surrogacy disputes.[87] Fur-

80. *Id.*
81. *See* discussion *supra* Part III.A.
82. 851 P.2d 776 (Cal. 1993).
83. *See id.* at 786.
84. *Id.* at 787.
85. 842 S.W.2d 588 (Tenn. 1992).
86. *Id.* at 602 (emphasis added).
87. *See* Anne Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 279 (1995).

thermore, contract law encourages observance of prior disposition agreements as manifestations of that intent to procreate.[88]

Indeed, clinics offering IVF services often make agreements with their patients regarding consent and disposition of the frozen embryos.[89] Such embryo disposition agreements are similar to those that provide for disposition of frozen embryos in the event of certain enumerated contingencies and should be enforced as any other contract.[90] Adherence to disposition agreements "present[s] the best way to maximize the couple's reproductive freedom, . . . give advance certainty to couples and IVF programs, and . . . minimize disputes and their costs."[91] It also respects the parties' intent to procreate.

By fragmenting the procreative process and allowing the assignment of roles to particular parties, gamete donation affords individuals an unprecedented degree of choice and control in procreation,[92] especially where gametes have been donated by third parties.[93] Thus, the intent reflected in disposition agreements should be respected as a critical, inherent part of the procreative process.

Courts have used intent as the critical element in resolving custody disputes despite prior agreements. In *Johnson,* the California Supreme Court granted genetic parents custody of a child, born of a surrogate, based upon their intent to be parents.[94] According to the Court, the genetic parents "affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist."[95] The Court followed this intent-based approach by finding the prior agreement valid.[96]

2. *Inadequacy of Intent*

The "intent to procreate" approach satisfactorily resolves custody disputes between contracting parties, but it is not applicable to custody disputes of children conceived through unauthorized embryo transfer. The

88. *See* Davidoff, *supra* note 32, at 151-52.

89. *See* Ephross, *supra* note 33, at 469-70.

90. *See* Davidoff, *supra* note 32, at 148-49.

91. John Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 414 (1990).

92. *See* Schiff, *supra* note 87, at 279.

93. *See id.*

94. *See* 851 P.2d at 787.

95. *Id.* at 782.

96. *See id.* at 785. The Court stated, "Certainly in the present case it cannot seriously be argued that Anna, a licensed vocational nurse who had done well in school and who had previously borne a child, lacked the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract." *Id.*

intent to procreate presumes voluntary and informed consent and provision for all possible contingencies.[97] Further, even if such an intentional, bargained-for contract exists, courts do not always compel specific performance.[98] The "unsuitability" of doing so "is even more clear when the concept of specific performance is used to determine the course of the life of a child."[99]

In general, prior disposition agreements do not demonstrate comprehensive resolution of all possible scenarios. Death, divorce, risk of loss through human error, and disagreement are the most common contingencies enumerated on a consent form.[100] Conceivably, a consent form could likewise dictate resolution of cases where egg misuse occurs. However, the provider of medical service, i.e., the fertility clinic, under these circumstances, would have excessive authority over issues of parenthood.[101] Thus, the "intent to procreate" approach is not applicable to cases like the CRH scandal where live birth resulted from unauthorized embryo transfers.[102]

Neither of the parties involved in the CRH scandal intended this type of birth. For example, Loretta Jorge did not intend for her embryo to be implanted into another woman; the recipient of Loretta Jorge's embryo did not intend to give birth to a child who was not genetically related to her. If there are no intentions to procreate like that, then the intent-based approach of contract law simply cannot apply.

C. Property Law

1. Labor, Investment and Ownership

If gamete material is the embryo and considered property, then property rights can apply to resolve the disputes. Property law grants rights on the basis of labor, investment, and ownership.[103] "The rights to control,

97. *See Johnson*, 851 P.2d at 796 (Kennard, J., dissenting).

98. *See id.*

99. *Id.* "Their delivery cannot be ordered as a contract remedy on the same terms that a court would, for example, order a breaching party to deliver a truckload of nuts and bolts." *Id.* at 797.

100. *See* Davidoff, *supra* note 32, at 160-64.

101. For a thorough discussion of the problems with disposition agreements generally, see Feliciano, *supra* note 40, at 342-45.

102. Evidence shows that consent forms at CRH were tampered with to demonstrate consent to donation. *See* Michelle Nicolosi, *Fertility: Family Speaks Out*, ORANGE COUNTY REG., June 8, 1995, at 21. "A color photocopy of a consent form signed by the Challenders in black ink shows an 'X' in a box next to the donation option—in blue ink. Both [Mr. and Mrs. Challender] vouched for their signatures, but denied checking the box approving donation." *Id.*

103. *See* Barry Brown, *Reconciling Property Law with Advances in Reproductive Science*, 6 STAN. L. & POL'Y REV. 73, 75 (1995).

possess, use, exclude, profit and dispose, which are the major components of the bundle of rights attaching to property, are also terms commonly used when considering dispositional issues in human reproductive rights."[104]

In the past, courts have been hesitant to grant unlimited property rights in gamete material or body tissue. In *York v. Jones*,[105] a fertility clinic in Virginia refused to transfer the Yorks' frozen embryo to a hospital in California for implantation.[106] The district court held that the Yorks had a property interest in the frozen embryo, citing language in the Cyropreservation Agreement and a report of the American Fertility Society.[107]

One year later, in *Moore v. Regents of the University of California*,[108] the California Supreme Court refused to grant a property interest in human cells.[109] While undergoing treatment for hairy-cell leukemia, doctors had removed Moore's spleen cells for research purposes without his consent.[110] Moore sued his doctors for conversion after researchers patented a billion dollar cell-line from his spleen cells.[111] The court refused to find a "property interest" for purposes of a conversion claim, because they feared, among other things, that such a claim would obstruct medical research and development.[112]

Similarly, treatment of gametes as property was rejected by the Tennessee Supreme Court in *Davis v. Davis*.[113] Instead, the court there relied upon the standards set forth by the American Fertility Society in concluding that "pre-embryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[114]

Interestingly enough, in *Hecht v. Superior Court*,[115] the California Court of Appeal relied upon *Davis* in recognizing property interest in sperm.[116] The court reasoned that sperm is analogous to embryos and therefore is unlike any other human tissue because it can be used for repro-

104. *Id.*
105. 717 F. Supp. 421 (E.D. Va. 1989).
106. *See id.* at 424.
107. *See id.* The report states that "[i]t is understood that the gametes and concepti are the property of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these items." *The American Fertility Society's Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY AND STERILITY 89 (1986).
108. 793 P.2d 479 (Cal. 1990).
109. *See id.* at 492.
110. *See id.* at 481.
111. *See id.* at 482.
112. *See id.* at 493.
113. 842 S.W.2d 588, 596 (Tenn. 1992).
114. *Id.* at 597.
115. 20 Cal. Rptr. 2d 275, 283 (1993).
116. *See id.*

ductive purposes.[117] Therefore, decedent had decision-making authority to bequeath sperm due to his interest in the nature of ownership.[118]

Extending the laws of personal property to reproductive technology would lend stability to the public policy quagmire in the fertility industry.[119] Although "the same bundle of rights does not attach to all forms of property,"[120] limited property rights could be recognized in embryos.[121]

2. Inapplicability of labor, investment, and ownership principles

Property law, like contract law, is inadequate in resolving custody disputes stemming from egg misuse because of the complex relationship among the parties and the complicated ownership issues of an embryo and a child. Proprietary rights in reproduction focus upon who owns, and therefore controls, disposition.[122] Application of property principles would set definite limits on the decision-making rights of parents, involved third parties, and the role of reproductive technology.[123]

However, the fact remains that ownership of an embryo does not confer ownership of the result, the child. Neither the gestational nor the genetic parents could claim the child on the basis of a property interest. "Our most fundamental notions of personhood tell us it is inappropriate to treat children as property. . . . [T]he originator of the concept of a child can have no such rights, because children cannot be owned as property."[124]

Similarly, the principle of invested labor helps neither genetic nor gestational parents. Both sets of parents have invested resources in the IVF procedure. The procedure itself is painful, expensive, and emotionally draining, to say nothing of the pregnancy.

In addition, labeling an embryo as property devalues its significance and runs counter to prevailing notions of morality. "Although the notion of treating the embryo as property may have a basis in scientific fact, the theory ignores the tremendous importance society places on life, and more specifically on embryos as the symbol of life."[125] Thus property law re-

117. *See id.*

118. *See id.*

119. *See* Brown, *supra* note 103, at 177.

120. *Moore*, 793 P.2d at 509 (Mosk, J., dissenting).

121. Even though the *Davis* court rejected the view of an embryo as property, it described the "interim" category in property-based terminology. *See* Brown, *supra* note 103, at 76-77.

122. *See* Janet Dolgin, *The Law Debates the Family: Reproductive Transformations*, 7 YALE L. J. & FEMINISM 37 (1995).

123. *See* Brown, *supra* note 103, at 77-80.

124. *Johnson*, 851 P.2d at 796 (Kennard, J., dissenting).

125. Kim Schaefer, *In-Vitro Fertilization, Frozen Embryos, and the Right to Privacy—Are Mandatory Donation Laws Constitutional?*, 22 PAC. L.J. 87, 96 (1990). Defining an embryo as property creates additional problems related to disposition (specific discussion of which is beyond

solves disputes of this intimate nature on a one-dimensional, academic level without resolving them on a practical level.

IV. Family Law

A. Parenthood & Best Interests of the Child

Family law by presenting a multi-layered approach to legal issues involving intimate relationships, provides the best legal framework.[126] On one level, family law deals with divorce, child custody, adoption, and post-dissolution allocations such as child support and alimony.[127] On a second, more theoretical level, it involves constitutional analysis of laws restricting marriage or divorce.[128] On a third level, family law "examin[es] what constitutes a family, an issue that implicates sociology, politics, religion, economics."[129] It is on this third level that family law provides the best approach in redefining parenthood and family within the context of reproductive technology.

Family law looks beyond the narrow focus of ownership, intent and privacy to the larger view of the family as a fluid structure, subject to changing ideology due to developments in science. Theoretically, the notion of having more than one mother might seem ideal. However, the structure of our society precludes such a concept because taxes, government benefits, and inheritance laws define family as consisting of one mother and one father.[130]

Working within the limited parameters of the societal structure, the California Supreme Court in *Johnson,* for example, refused to recognize the existence of two "natural" mothers.[131] That court recognized that reproductive technology made such an outcome possible, but stated: "To recognize parental rights in a third party . . . would diminish Crispina's [genetic parent] role as [a] mother."[132] Arguably, such resistance to three-parent

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the scope of this note). "If the embryo is viewed as possessing independent rights, the parties may be unable to destroy it. If the embryo is viewed as not possessing rights separate from the parents, then the embryo can be destroyed." Luongo, *supra* note 73, at 1022.

126. *See* Dolgin, *supra* note 122, for a review of the transformation of the family from a biogenetic relationship to collection of individuals subject to rules in the marketplace.

127. *See* Naomi Cahn, *Family Law, Federalism, & the Federal Courts*, 79 IOWA L. REV. 1073, 1126 (1994).

128. *See id.*

129. *Id.*

130. *See* Mark Curriden, *No Benefits for 'Miracle' Baby*, 81 A.B.A. J., Mar. 18, 1995, at 18. Nancy Hart gave birth to Judith after being artificially inseminated with her husband's sperm. Louisiana law defines "natural father" as one who is alive when his children are conceived. Due to this, Judith is unable to receive $700 in survivor benefits. *See id.*

131. 851 P.2d at 781.

132. *Id.* at n.8.

families is also due to society's uneasiness with drastic conceptual change in its definition of a family.[133]

The "best interests of the child" is a fundamental principle of family law used in custody disputes.[134] Parenthood, under this principle, is predicated on an ability to contribute to the child's emotional, mental and social well-being. Factors that are pertinent to good parenting, and thus that are in a child's best interests, include the ability to nurture the child physically and psychologically and to provide ethical and intellectual guidance. Also crucial to a child's best interest is the "well recognized right" of every child to "stability and continuity."[135]

The "best interests of a child" principle also takes into account the child's preference, as well as accounting for the interests and disposition of the parents to the extent that they affect the child.[136] The undefined nature of the standard permits acceptability of non-traditional family lifestyles as long as the child is in a nurturing and caring environment.[137]

In *Ex Parte Devine*,[138] the Alabama Supreme Court enumerated factors a trial court should consider in deciding "best interests." These factors included the sex and age of the children,[139] respective home environments,[140] effect on the child of disrupting existing custody arrangements,[141] recommendations from experts or investigators,[142] and any other relevant evidence.[143]

Additionally, states follow statutory guidelines in applying the "best interests" doctrine. The Uniform Marriage and Divorce Act[144] requires

133. *See* Barbara L. Shapiro, *Non-Traditional Families in the Courts: The New Extended Family*, 11 J. AM. ACAD. MATRIM. LAW 117-19 (1993) (asserting that multiple marriages, long-term cohabitation relationships, changing social and economic role of women, and new reproductive technologies have caused departure from traditional notions of family which the courts have been slow to address).

134. Robert Cochran, *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker of Joint Custody Preferences*, 20 U. RICH. L. REV. 1 (1985).

135. *Johnson*, 851 P.2d at 800 (Kennard, J., dissenting), (citing In re Marriage of Carney, 598 P.2d 36 (Cal. 1979)); *see* Burchard v. Garay, 724 P.2d 486 (Cal. 1986) (Mosk, J., concurring).

136. *See* Natalie Young, *Frozen Embryos: New Technology Meets Family Law*, 21 GOLDEN GATE U. L. REV. 559, 575-76 (1991), (citing In re Miller, 3 Cal. Rptr. 450 (1960)); Taber v. Taber, 290 P.2d 36 (Cal. 1930).

137. *See* Myra G. Sencer, *Adoption in the Non-Traditional Family—A Look at Some Alternatives*, 16 HOFSTRA L. REV. 191, 191-95 (1987).

138. 398 So.2d 686 (Ala. 1981).

139. *See id.* at 696.

140. *See id.*

141. *See id.* at 697.

142. *See id.*

143. *See id.*

144. UNIF. MARRIAGE AND DIVORCE ACT § 402 (1973).

courts to consider the wishes of the child,[145] the wishes of the parents,[146] the child's interaction with his parents and/or siblings,[147] the child's adjustment to his/her community,[148] and the mental and physical health of all individuals involved.[149] Further, the Act specifically forbids the court to "consider conduct of a proposed custodian that does not affect his relationship to the child."[150]

The "best interests of the child" doctrine provides the most flexible approach in adjudicating custody disputes arising from unauthorized embryo transfers. It requires the court to take a comprehensive approach by considering all factors involved in ensuring the well-being of a child.

B. Best Interests of the Child Standard Provides the Solution

Courts should apply the best interests doctrine when deciding custody disputes resulting from unauthorized embryo transfers like those in the CRH case. Traditionally, modification or change of custody is not made unless the custodial parent is shown as unfit.[151] Sexual orientation,[152] handicap,[153] and race,[154] though not decisive, are factors which courts have considered.[155] However, in the CRH case, where the genetic parents are suing for change of custody, their change of custody petitions will not be based upon allegations of parental unfitness. Rather, the petitions will be based upon the right of genetic parents to raise children genetically related to them. Here, courts face the crux of the issue presented by reproductive technology: what constitutes legal parenthood?

The genetic tie is one more factor to consider in determining custody, but it should not be the controlling factor. IVF technology exists because of parents' need, in our society, to create genetic offspring.[156] Indeed, "[the] ability to tinker with the genes children inherit . . . exaggerates the genetic tie's importance in defining personal identity."[157]

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145. *See id.*
146. *See id.*
147. *See id.*
148. *See id.*
149. *See id.*
150. *Id.*
151. *See* Feldman v. Feldman, 189 Misc. 564 (N.Y. 1947).
152. *See* M.A.B. v. R.B., 510 N.Y.S.2d 960, 968-69 (N.Y. 1986). Homosexuality is not per se factor of parental unfitness. *See id.*
153. *See* In re Marriage of Carney, 598 P.2d 36, 42 (Cal. 1979). Handicap is not per se factor of parental unfitness. *See id.*
154. *See* Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984). Race cannot be used as a sole factor in depriving custody. *See id.*
155. *See* Cochran, *supra* note 134, at 14 (discussing the development of "best interests").
156. *See* Dorothy Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 222 (1995).
157. *Id.* at 223.

However, the genetic tie is not necessary to define personhood.[158] Noted commentator Dorothy Roberts maintains, for instance, that "Black Americans . . . developed a race consciousness rooted in a sense of peoplehood . . . . For them, ethnic identity is a conscious decision based primarily on considerations other than biological heritage."[159] Using the genetic tie as just one factor, "best interests" doctrine recognizes its value as an important bond, but also gives credence to relationships built upon cultural preservation, love, and caring as well.[160]

The best interests doctrine provides the most flexible approach to address new conceptions of family. At the very least, it will provide an urgently needed interim solution until legislators can promulgate laws that more accurately reflect society's decision about how to address this new potential for scientific abuse.

Family law has the built-in flexibility to adapt to changing times. Its once popular "tender years" presumption, for example, has been abandoned, for the most part, as outdated.[161] Some courts have gone further and ruled the tender years presumption unconstitutional.[162] In *Garska v. McCoy*,[163] the West Virginia Supreme Court of Appeals replaced the tender years presumption with a more neutral presumption for primary caretaker in recognition of the changing gender roles in society.[164]

Thus, even though the best interests doctrine offers the most flexible method of determining custody disputes regarding children conceived from unauthorized embryo transfer, as society integrates new reproductive technologies into mainstream thought, it too may become outmoded or in need of modification.

For now, however, the courts should use the best interests standard with a presumption toward the gestational mother. The genetic parents should only be given custody if they meet the high burden of proof set forth

158. *See id.* at 231.

159. *Id.* at 233-34.

160. *See id.* at 273.

161. In the mid-twentieth century, the maternal preference doctrine was a guiding principle in inter-parent custody disputes. *See* Katherine Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1536 (1994). The courts focused on young children, of "tender years," who were thought to benefit from placement with mother. *See id. See generally* Bazemore v. Davis, 394 A.2d 1377 (D.C. 1978); In re Marriage of Bowen, 219 N.W.2d 683 (Iowa 1974); Commonwealth ex. rel Spriggs v. Carson, 368 A.2d 635 (N.Y. 1977).

162. *See* Ex parte Devine, 398 So.2d 686 (Ala. 1981) (finding the "tender years" presumption violates the equal protection clause.

163. 278 S.E.2d 357 (W. Va. 1981).

164. *See id.* at 361-63.

in statutory requirements for change or modification of custody suits.[165] This burden guards against abrupt changes in custody, and this protects the stability of a constant environment for the child. Furthermore, the extant family's role is protected.[166] Such certainty and stability in an unregulated field, which the presumption toward the gestational mother provides, offsets concerns that genetic ties may be overlooked. Parties entering IVF transactions, aware of the presumption, will be more conscious of consent forms and the placement of frozen embryos. The best interests standard, though not perfect, provides the best solution because it attempts to address and resolve conflicting interests.

V. Conclusion

Reproductive technology has achieved prominence and success at a breathtaking, unregulated pace. At CRH, embryos were stolen, misappropriated, or transferred without authorized consent or knowledge. Regulations concerning proper embryo transfers are scarce. Improper and unethical embryo transfers are difficult to regulate or criminalize because law has not advanced at an equal pace with technology.

Science has thus again presented law with a question that existing analysis cannot answer. Two couples, wanting desperately to conceive, go for help to the same fertility clinic. Both couples engage in the time-consuming, painful, and emotionally excruciating procedure. One couple fights the odds and walks away with their miracle baby. The other couple is not so lucky. A couple of years later, the horrifying truth is revealed. The lucky couple finds out that they do not share a genetic bond with their child. The genetic parents are now fighting for visitation rights, maybe even custody. Who wins? Should we "consider parenthood to be a bundle of rights, much as we have come to view property?"[167] And if parenthood is viewed as a bundle of rights, "should these rights be separated out and split among several people?"[168]

Courts should consider the genetic tie as one factor under family law's best interests doctrine to resolve a custody dispute regarding a child conceived through unauthorized embryo transfer. Given the inapplicability or inadequacy of constitutional law, contract law, and property law to handle

165. Of course, in cases of intentional misappropriation, the gestational mother presumption would not be so readily applied.

166. *See* Michael H. v. Gerald D., 491 U.S. 110, 124 (1988) (upholding statute establishing presumption of legitimacy for child born to married woman living with her husband as promoting an extant family's integrity and privacy).

167. FURROW & JOHNSON, *supra* note 23, at 111.

168. *Id.*

such custody disputes, the best interests standard, in addition to the gestational mother presumption, will provide the best solution to such a difficult and sensitive issue.