CONTRACTS TO MAKE BABIES: AN EXAMINATION OF ARTIFICIAL REPRODUCTIVE TECHNOLOGY FROM A PHILIPPINE CONTRACT LAW PERSPECTIVE*

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> And a woman who held a babe against her bosom said, Speak to us of children.
> And he said:
> Your children are not your children.
> They are the sons and daughters of Life's longing for itself.
> They come through you but not from you,
> And though they are with you yet they belong not to you.[1]

I. INTRODUCTION

"Science has made us gods before we are even worthy of being men."[2] The wonders of modern science have stretched the limits of man's imagination while creating legal and ethical dilemmas that society is ill-prepared to resolve. The reason for these quandaries are arguably attributed to the nature of the legal system – a legal system that seeks to draw its answers to modern problems from ancient rules and regulations, formulated at a time when extraordinary scientific developments could not have been anticipated.[3]

The last two decades have seen rapid advancements in the field of artificial[4] reproductive technologies (ART). These procedures have already helped a

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[1] KAHLIL GIBRAN, THE PROPHET 13 (1984 ed.).

[2] DAVID W. MEYERS, THE HUMAN BODY AND THE LAW 206 (2ND ed. 1990).

[3] Domingo Castillo et al., *A Legal Perspective on Artificial Insemination*, 51 PHIL. L. J. 142, 142 (1976).

[4] Assisted reproductive technology is defined as "techniques to assist infertile women to conceive and give birth." Ellen A. Waldman, *Dispute Over Embryos: of Contracts and Consent*, 32 ARIZ. ST. L. J. 897, 902,

significant number of infertile couples[5] that are incapable of conceiving normally. Indeed, studies have shown that 15 per cent of all couples of reproductive age encounter some problems having children.[6] For many infertile couples, ART procedures have become the proverbial light at the end of a dark tunnel. This eagerness to have children has spurred the rapid growth of the ART industry, with revenues amounting to four billion dollars annually.[7]

However, ART is said to be creating changes in the way society traditionally views familial relationships. The biological truths that once firmly anchored our thinking about families have been challenged by the acceptance and use of these technologies. Indeed, the traditional notion that families stem from and reflect biogenetic unity is being widely supplanted by the idea that families can be grounded on notions of choice.[8] This has led to criticism that reproductive technologies serve to undermine the traditional notions of family, bringing about the commercialization and commodification of human life.[9] Despite this, there are commentators who see the quest for reproductive technologies as the embodiment of an infertile couple's dreams to have the traditional family, by providing them the opportunity to create biologically related children.[10]

The use of reproductive technologies places third parties–doctors, lawyers, egg or sperm donors, and surrogates—in the middle of the exercise of one of the

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n.22 (2000). The term is synonymous to artificial reproductive technology. Artificial is preferred because it connotes that reproduction was not done in the normal manner while assisted implies the aid of a third person.

[5] The term "couples" is interpreted to mean married, heterosexual couples. A discussion on homosexual couples seeking ART methods to conceive children is outside the scope of this paper. *See* Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147 (2000) (discussing the social and economic barriers that prevent homosexuals from access to reproductive services and disputes the claim that homosexuals raising children is detrimental).

[6] Samuel A. Gunsburg, *Frozen Life's Dominion: Extending Reproductive Autonomy Rights to In Vitro Fertilization*, 65 FORDHAM L. REV. 2205, (1997).

[7] Lori Andrews, *Reproductive Technology Comes of Age*, 21 WHITTIER L. REV. 375, 377 (1999). Couples seeking in vitro fertilization (IVF) can expect to pay anywhere from $44,000 to $200,000 for a single successful pregnancy.

[8] Janet L. Dolgin, *'An Emerging Consensus: Reproductive Technology and the Law*, 23 VERMONT L. REV. 226, 229-230 (1998). Dolgin cites noted American anthropologist David M. Schneider who describes a traditional family as consisting of two married parents living in one household with their biological children. Familial relationships were said to "arise out of the processes of human sexual reproduction." *Id.* at 229-230. They were defined "in terms of sexual intercourse as a reproductive act, stressing the sexual relationship between husband and wife and the biological identity between parent and child, and between siblings." *Id.*

[9] *See* Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 46 HASTINGS L. J. 951 (1996). Rao criticizes the use of reproductive technologies to create families and argues that:

"[W]hen families are assembled by means of arms-length transactions between individuals who purchase and sell raw materials with which to produce a child, this dramatically reveals the commercial nature of families blurring the boundary between the realm of the family and the realm of the market." *Id.* at 964.

[10] *See*, generally, John Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L. J. 911 (1996).

most sacred private rights – the right to procreate.[11] Their participation has moreover created legal disputes as to the rights and responsibilities of each party and the nature and scope of procreative freedom and the right to contract.

Many of the problems that have arisen stem from the stipulations agreed upon in the ART contract. Poorly drafted agreements have failed to protect patients' interests and to provide answers to unforeseen situations.[12] This paper takes a look at the different contracts used in procedures involving artificial reproductive technology and seeks to suggest guidelines to ensure their enforceability and validity.

II. Scope and Limitations of the Paper

This paper seeks to examine ART contracts in the light of Philippine civil law, specifically contract law. Part I provides a brief introduction of the paper while Part II provides its scope and limitations. Part III outlines the different ART methods most familiar to Filipino couples seeking fertility treatments – artificial insemination, in vitro fertilization and surrogacy. Part IV describes what an ART contract is in general, as well as the specific contracts that are executed for each ART procedure. Part V discusses the principles governing Philippine contract law. Part VI analyzes ART contracts using as framework the essential requisites of a contract – object, consent, and cause. Part VII discusses the probable liabilities for breach of the contract. This paper concludes with an assessment of the applicability of existing contract law to the ART contract.

III. Artificial Reproductive Technologies: A Basic Background

Before analyzing the various legal issues related to ART, it is important to understand the medical technology associated with ART. Indeed, such understanding would provide the common ground between the legal and medical fields. Creating common definitions would help achieve consistency in the regulation of ART.

The main reason why couples employ artificial methods of reproduction is because one or both of the couple suffer from infertility[13] problems.[14] The causes of

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[11] Dolgin, *supra* note 8, at 225.

[12] *See* Melanie Blum, *Legal Aspects of Assisted Reproductive Technologies*, 20 WHITTIER L. REV. 345 (1998). A reproductive law practitioner needs to have a good understanding of contract, family, and medical malpractice law. He must understand the reproductive procedures in order to draft the kinds of agreements necessary to effect the intent of all the parties. *Id.*

[13] Infertility is a disease of the reproductive system that impairs the body's ability to conceive children. It may depend on any of these factors:

- production of healthy sperm by the man and healthy eggs by the woman
- unblocked fallopian tubes that allow the sperm to reach the egg
- the sperm's ability to fertilize the egg when they meet

infertility in men involve problems in sperm production and delivery.[15] Female infertility, on the other hand, is caused by abnormalities in the fallopian tube and the uterus and ovulation defects.[16] Although some of the defects can be treated with conventional therapies,[17] ART is resorted to when these remedies prove ineffective.

For this paper, discussion is limited to the most common ART methods used worldwide. These methods are artificial insemination, in vitro fertilization, and surrogacy. Newer ART methods are not discussed since they are mere offshoots of either artificial insemination or in vitro fertilization.[18]

A. Artificial Insemination

Artificial insemination (AI) is defined as the impregnation of a female (usually the wife) with semen from a male (ideally from the husband) without sexual intercourse.[19] More technically, it is the "introduction of seminal fluid with spermatozoa in the generative tract of a woman by means of syringe, pippete, irrigation or other similar means."[20]

AI is classified according to whose semen is used. Semen may be secured from the husband and injected by instrument into the woman's reproductive tract in order to induce pregnancy. This process is known as homologous artificial insemination or artificial insemination by the husband (AIH).[21] This is done when the husband has live spermatozoa of adequate number but cannot deposit them in the woman for conception to take place.

- the ability of the fertilized egg to become implanted in the woman's uterus; and
- a hormonal environment adequate for the embryo's development.

FAQS-St. Luke's Medical Center-Advanced Reproductive Care Unit, *at* http://www.stluke.com.ph/services_arcu.html (2001) [hereinafter St. Luke's Web site].

[14] John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 423 (1983).

[15] Waldman, *supra* note 4, at 902.

[16] *Id.*

[17] St. Luke's Web site, *supra* note 13. *See also* Waldman, *supra* note 4, at 902.

[18] Other ART techniques continue to proliferate. Infertile couples may avail of any of the following surgical procedures: Gamete Intra-fallopian Transfer ("GIFT"), in which eggs are removed from the ovaries, placed in a catheter with sperm and deposited in the fallopian tubes, where, it is hoped, fertilization and implantation will occur; Zygote Intra-fallopian Transfer ("ZIFT"), in which the one-celled egg, a zygote is fertilized with sperm extra-corporeally and the resulting embryos transferred to the fallopian tube two days after fertilization; Zona Drilling and Partial Zona Dissection, in which small holes are drilled into the outer covering (the zona pellucida) of the egg to assist sperm penetration; Microsurgical Epididymal Sperm Aspiration ("MESA"), in which several sperm are extracted directly from the epididymis and placed in contact with the egg; Intracytoplasmic sperm injection ("ICSI"), in which a single sperm is injected into the egg's cytoplasm; Subzonal Insemination ("SUZI"), in which several sperm are injected underneath the outer covering of the egg, but not directly into the egg's cellular fluid. Waldman, *supra* note 4, at 904 (citations omitted).

[19] Flerida Ruth P. Romero, *Legal Aspects of Artificial Insemination*, 58 PHIL. L. J. 280, (1983).

[20] Castillo, *supra* note 3, at 142.

[21] *Id.*

When the husband suffers from a complete absence of live spermatozoa, low sperm count, or clinical sterility, the sperm of a donor may be used.[22] It is also used when there are genetic disorders. The sperm of an anonymous donor will be used by the couple to induce pregnancy. This is known as heterologous artificial insemination (AID).

The third process is called confused or combined artificial insemination (AIC). This is done by mixing the sperm of the husband and the donor. It is resorted to in order that the husband may still entertain some hope that it was his seed that successfully brought forth the resulting child.[23]

Artificial insemination has actually been in use for centuries.[24] Its first use was made on animals as early as 1322.[25] The first reported case of AI on a human being occurred in 1799 when a husband's sperm was used to impregnate his wife.[26]

Philippine law expressly recognizes artificial insemination. The Family Code provides:

> Art. 164. Children conceived or born during the marriage of the parents are legitimate. Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided, that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registrar together with the birth certificate of the child.

This provision shows the progressiveness of the Code in taking into account modern technologies that were yet to be regulated under positive law.[27] Furthermore, this settles the question of the status of the child born under AID.

AID presents many of the problems in AI because it introduces a foreign element into the procreative process within a marriage. A third party, the donor, takes part in the making of the couple's child. Questions were raised as to whether or

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[22] *Id.* at 143.

[23] Romero, *supra* note 19, at 281.

[24] The first Catholic Church decision to address the issue of artificial insemination was made as far back as 1897. When asked the question of whether AI is permissible, the cardinals with the approval of Pope Leo XIII replied, "Non Licere." It was only in 1949 that they formulated a policy. In an address by Pope Leo XII to Catholic doctors, he condemned AI as immoral and illicit except when it "serves as an auxiliary to the natural union of the spouses and of fecundation." Castillo, *supra* note 3, at 143, n.4.

[25] *Id.*

[26] *Id.*

[27] ARTURO TOLENTINO, I COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 521 (1997 ed.) [hereinafter I TOLENTINO].

not this constitutes adultery.[28] Our law seems to have settled the question in Philippine jurisdiction.

To protect the rights of the parties to AID, certain guidelines have been proposed. These are:

> 1. AID should be permitted to be done only by qualified medical practitioners on an informed written consent from the needy couple. A consent form on file signed by the parties will prevent a husband or wife from disavowing his/her consent to AID at a later date. Also, requiring the consent of both parties to AID prevents the wife from having AID performed without the consent of the husband.
>
> 2. Selection of suitable donor should be the responsibility of the performing physician. A proposed donor should be given a standard serological test for syphilis and smear for gonorrhea. If said donor is found to be affected with venereal disease, TB, or any congenital disease or defect he should not be used as a donor.
>
> 3. The donor's identity should not be revealed under any circumstance. This protects the privacy and reputation of the donor. Furthermore, it will encourage semen donation from donors since possibility of litigations, blackmailing, etc., is avoided.
>
> 4. The husband should be designated as the legal father. This is intended to abolish problems regarding inheritance rights, support, parental authority, use of surnames, etc.[29]

Certain problems still need resolution regarding the regulation of AI. Beyond establishing the legitimacy of the child, the law on artificial insemination does not regulate its actual practice. This creates the impression that regulation issues are dealt with by existing principles of contract law or good medical practices.[30]

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[28] When AI was relatively new, jurisprudence from other countries was conflicting on the status of the child under AI, particularly if the sperm was taken from a donor. In *Orford v. Orford*, the Canadian court declared that it was adultery for a woman living with her husband to have a child by artificial insemination using the sperm of a man who is not her husband. The Court ruled that the "essence of the offense of adultery, consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person, and any submission of those powers to the service or enjoyment of any person other than the husband comes within the definition of 'adultery'. *See* Orford v. Orford, 58 D.L.R. 251 (1921); Romero, *supra* note 19, at 290.

[29] Proposed guidelines by the World Congress on Medical Law held in Manila on July 16-19, 1976, *cited in* Castillo, *supra* note 3, at 162.

[30] D. MEYERS, *supra* note 2, at 66.

A. Surrogacy

Surrogacy is defined as the "practice whereby a woman carries a child for another with the intention that the child should be handed over after birth."[31] This method is resorted to when the problem lies in the infertility of the wife who is unable to carry to term.[32] It is an arrangement between a third person, called the surrogate, and a contracting couple, whereby the surrogate carries a baby to term and turns over the child after birth to the contracting couple. The surrogate then relinquishes all parental rights over the child.

Surrogate motherhood is not limited to any particular method of conception.[33] There are at least four possible situations involving surrogate mothers. *First*, a surrogate is artificially inseminated and the child is then surrendered to the sperm donor. This involves the use of the surrogate's own egg to be fertilized by either the husband or a donor's sperm. *Second*, the surrogate carries a zygote created through in vitro fertilization,[34] with the child going to the ovum donor at birth. The husband's or a donor's sperm may be used. *Third*, the zygote is created through in vivo fertilization with the child going to the ovum donor at birth. A *fourth* possibility follows the same procedure as the second and the third with the child going to a third person, typically, the sperm donor. This arises when the egg used is from a donor fertilized by the husband's sperm.

Surrogacy is classified as either traditional or gestational. Traditional surrogacy is a situation where the sperm of the intending father is used to fertilize a surrogate's ovum. Gestational surrogacy refers to an instance where the zygote of the couple is implanted into the uterus of a surrogate who carries it to term. This distinction becomes significant in the light of judicial decisions on surrogacy, particularly *In Re Baby M*[35] and *Johnson v. Calvert*.[36]

The surrogate and the contracting parties enter into a contract prior to the execution of the arrangement.[37] The contract contains the condition that the surrogate must have the ability to bear children and restrictions on any of the listed actions that may cause harm to the child. The contract also provides for the

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[31] Report of the Committee of Inquiry into Human Fertilization and Embryology (Dame Mary Warnock, Chairman) (1984), London: HMSO, Cmnd. 9314, at par. 8.1.

[32] JOHN K. MASON, MEDICO-LEGAL ASPECTS OF REPRODUCTION AND PARENTHOOD 226 (1990).

[33] Arthur Serratelli, Note, *Surrogate Motherhood Contracts: Should the British or Canadian Model Fill the U.S. Legislative Vacuum?* 26 GEO. WASH. J. INT'L. L. & ECON. 633, 635 (1993).

[34] *See* discussion of in vitro fertilization, *infra*.

[35] 537 A.2d 1227 (N.J. 1988).

[36] 851 P.2d 776 (Cal. 1993).

[37] For sample contracts, see Annexes "G" and "H".

relinquishment of the child to the contracting couple after birth and the amount to be paid to the surrogate as her compensation for services rendered.

The use of private agreements as a way to create families certainly drew sharp criticism.[38] Some commentators are of the view that payment to a surrogate devalues the contributor and the sanctity of human life.[39] Others argue, however, that "money is one dimension of human interaction and valuing."[40] This highlights the idea that the services offered by a surrogate has worth and must be compensated, as it is part of our nature to pay for things of value.

The parties determine their post-birth relationships prior to the formation of the embryo.[41] The surrogate is usually informed that parental rights will devolve unto the contracting couple. She will not have the right to interfere with the child's care and manner of rearing.[42] This issue as to the custody of the child is a problem usually encountered. It arises when the surrogate changes her mind about giving up the baby upon its birth. Courts are then forced to step in and to decide on private rights. Such decisions are never easy. It entails a determination of which among competing sensitive interests should prevail.

Can a woman validly waive the exercise of her reproductive rights to a third person? This was the issue in the controversial *Baby M* case decided in 1988.[43] It was the first case to bring surrogacy into the realm of public consciousness. In this case, the court was asked to decide who was entitled to Baby M – the biological mother, the surrogate, or the sperm donor (the husband). The New Jersey Supreme Court reversed the ruling of the lower court upholding the surrogacy contract. It held that traditional surrogacy contracts are unenforceable because they conflict with sound public policy and existing adoption laws that prohibit enforcement of

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[38] Rao, *supra* note 9, at 964. The Warnock Committee on Human Fertilization and Embryology was set up by the British government in 1982 in order to address issues regarding reproductive technologies. The Committee was alarmed by the possibility of surrogacy and provided a lengthy discussion to support its sharp criticism against it:

"The objections turn essentially on the view that to introduce a third party into the process of procreation which should be confined to the loving partnership between two people, is an attack on the value of the marital relationship. Further, the intrusion is worse than in the case of AID, since the contribution of the carrying mother is greater, more intimate and personal, than the contribution of a semen donor. It is also argued that it is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else's child. The objection is not diminished, indeed it is strengthened, where the woman entered into an agreement to conceive a child, with the sole purpose of handing the child over to the commissioning couple after birth.." *Supra* note 31.

[39] Andrews, *supra* note 7, at 379.

[40] *Id.* The critical issue is not whether the agreement involves monetary exchanges but whether it is treated as reducible solely to its monetary considerations.

[41] Cynthia Fruchtman, *Considerations in Surrogacy Contracts*, 21 WHITTIER L. REV. 429, 431 (1999).

[42] *Id.* at 431-432.

[43] *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

preconception or prenatal agreements concerning the rearing of children.[44] Furthermore, they placed children into homes strictly upon financial considerations without regard for the contracting couple's suitability as parents.[45]

Because her egg is used, the surrogate mother is considered the natural mother of the child. However, the situation becomes complicated when the embryo of the couple is implanted into the surrogate mother's womb. Both could then be considered "natural" mothers of the child. The judge must decide who the rightful mother of the child is.[46]

This was the issue in *Johnson v. Calvert.* Arriving at a very different result from *Baby M*, the Court explicitly recognized the preconception intention of the parties to determine whether the genetic or the gestational mother would have the right to rear the child.[47] "Because the two women each have presented acceptable proof of maternity, we do not believe that this case can be decided without inquiring into the parties' intentions as manifested in the surrogacy agreement."[48] The court held that either genetics or gestation could be used to establish a mother-child relationship and that intention should only be invoked to break a tie.

What have been the legislative responses to surrogacy contracts? There are four possible categories considered: prohibition, facilitation, regulation, and a static approach.[49]

Prohibition refers to efforts to prevent surrogacy arrangements. It is divided into two categories: criminalization and null and void contracts.[50] Such a response is based on public policy arguments, like the commodification of the babies, the possible psychological harm to the mother who relinquishes custody of the child, and the failure to consider the child's best interests.[51]

In facilitation, the government acts to enforce the agreements made by consenting parties. This approach supports commercial services involved in the surrogacy process.[52]

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[44] *Id.* at 240-250.

[45] *Id.* at 248-249.

[46] Such decisions can even be considered 'solomonic,' after the biblical King Solomon who resolved a dispute between two women each claiming to be the mother of a child. I *Kings* 3:23-28.

[47] 851 P.2d 776, 782 (Cal. 1993).

[48] *Id.*

[49] Ian McAllister, *Modern Reproductive Technology and the Law: Surrogacy Contracts in the United States and England*, 20 SUFFOLK TRANS. L. REV. 303, 308 (1996).

[50] Susan A. Ferguson, Comment, *Surrogacy Contracts in the 1990's: The Controversy and the Debate Continues*, 33 DUQUE L. REV. 903, 922-923 (1995).

[51] *Id.* at 905-914.

[52] McAllister, *supra* note 49, at 308.

A regulatory scheme, on the hand, would enforce surrogacy contracts that meet ordered criteria.[53] This can include the requirement of judicial review of all surrogacy contracts or the use of a state agency for matching participants. Although this will settle all controversies regarding the legal status of the child and custody rights, there is the danger that such an approach would lead to excessive government interference.[54]

The static approach provides that even absent legislative guidelines, courts may address questions regarding custody and validity of contracts. Courts are more likely to consider them as voidable rather than void per se. This has been criticized in *Johnson v. Calvert* where the Court regarded the legislature as the proper forum to create guidelines.[55] Any attempt by the courts to prohibit reproductive technologies not addressed by the legislature is tantamount to judicial legislation.[56]

In the Philippines, the view has been taken that surrogacy contracts should be declared void for being against public policy. Although prohibition is the least attractive option, it would be favored in our country because of the conservative standpoint held by most of the citizens influenced by religion and the belief that such an arrangement tends to denigrate the sanctity of marriage.

B. In vitro fertilization

In vitro fertilization[57] (IVF) is a very controversial[58] ART method. It provides infertile couples the opportunity to bear children with the same genetic makeup as their parents. It duplicates the natural fertilization process that takes place within a woman's fallopian tube, but performed outside the woman's body.[59] First, the woman's uterus is medically stimulated to produce eggs. The eggs are then

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[53] *Id.*

[54] *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) where it is warned that deciding parentage on the basis of the child's best interest can create excessive government interference in matters implicating our most fundamental notions of privacy.

[55] 851 P.2d 776, 784 (Cal. 1993).

[56] *Id.*

[57] Erroneously called the 'test tube baby' technique, in vitro fertilization is actually performed in a Petri dish. "In.vitro" is Latin for "in glass." Dr. Jerome Lejeune, a great French geneticist once said: "Chemical contraception is really like making love without making a baby; in vitro fertilization is making a child without making love; abortion is undoing the child; pornography is undoing love – all of these are contrary to the true nature of human love and life." *See The Truth about In-vitro Fertilization, at* http://home2.pacific.net.ph/~life/ivfl.html (last visited Feb. 3, 2002).

[58] The first baby produced from in vitro fertilization was Louise May Brown on July 25, 1978 at Oldham Hospital in England. Ma. Nelia S. Bernardo, *Explorations into In vitro Fertilization and Embryo Transfer: Their Philo-Ethical and Legal Implications,* 60 Phil. L.J. 1 (1985). The first Philippine IVF baby was born in 1998. Personal interview with Dr. Leonardo Almeda, Reproductive Endocrinologist and Fertility Expert, Reproductive Medicine Center (Feb. 15, 2002).

[59] Gunsburg, *supra* note 6, at 2210.

surgically removed from the ovary and mixed with the sperm in a Petri dish.[60] Since the procedure would normally entail more than one attempt at conception, several eggs are collected. The fertilized eggs (preembryos) are then transferred transcervically by a catheter to the uterus.[61]

Improved medical technology has led to the prevalence of IVF use in more developed countries. Despite its controversial background, ART has even found its way into Philippine hospitals and clinics. Childless Filipino couples can now turn to fertility centers in Metro Manila,[62] such as the Reproductive Medicine Center (RM Center)[63] and St. Luke's Medical Center.[64] However, no law specifically governs the practice of IVF here in the Philippines. The Family Code only provides for artificial insemination to the exclusion of the other methods of ART. This leaves the fertility industry in the Philippines largely unregulated by government bodies. These centers then rely on the guidance provided by international bodies or experts. According to Dr. Leonardo Almeda, a noted reproductive endocrinologist, they rely mainly on the international guidelines agreed upon by fertility experts worldwide.[65] This is laudable because it provides patients with a measure of assurance that the quality and standards maintained by the clinic are at par with other countries.

RM Center, however, has modified their policies to be more acceptable to Filipino norms and customs.[66] IVF and other reproductive technologies are only practiced within the "natural context of marriage."[67] Only married couples can avail

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[60] St. Luke's Web site, *supra* note 13.

[61] Gunsburg, *supra* note 6, at 2211.

[62] *Ethics, Morality of In Vitro Fertilization Tackled*, Malaya, Aug. 24, 2001, at 7.

[63] RM Center was founded in 1998. Its clinic is located at the posh East Greenhills residential neighborhood in San Juan, Metro Manila. Information obtained from personal interview with Dr. Leonardo Almeda, Reproductive Endocrinologist and Fertility Expert, Reproductive Medicine Center (Feb. 15, 2002).

[64] The St. Luke's Medical Center is found along E. Rodriguez Jr. Ave in Quezon City. It has a special section in its Obstetrics and Gynecology department exclusively catering to the needs of couples with fertility problems. This is the Advanced Reproductive Care Unit. Information is available at the St. Luke's Medical Center website, *supra* note 13.

[65] Some of the guidelines are taken from the American Society for Reproductive Medicine ("ASRM"). The ASRM is an organization of around 10,000 member-doctors dedicated to helping bring awareness of reproductive issues to the general public. Information about the organization can be accessed through their web site, http://www.asrm.org [hereinafter ASRM web page].

[66] Personal interview with Dr. Leonardo Almeda, Reproductive Endocrinologist and Fertility Expert, Reproductive Medicine Center (Feb. 15, 2002).

[67] Personal interview with Dr. Leonardo Almeda, Reproductive Endocrinologist and Fertility Expert, Reproductive Medicine Center (Feb. 15, 2002). The doctor has been invited to a meeting with Jaime Cardinal Sin, the Archbishop of Manila, to explain the process of in vitro fertilization. This was a reaction to the fact that Dr. Almeda's clinic was located in Cardinal Santos Medical Center, a Catholic hospital. At present, IVF is tolerated but not encouraged. RM Center is likewise prohibited from advertising their services. Their clients are mostly referrals.

of the clinic's services.[68] In the past four years that the center has been in operation, it has provided IVF to around 300 infertile couples with about 100 resulting in actual live births. A valid marriage certificate must be presented before the physicians agree to see the patients. The husband and wife must give their consent to the treatment. The physician then examines both parties to be able to detect who between the husband and wife has fertility problems. It is later determined through a screening process whether they are candidates for IVF. Before this, the physician will attempt less intrusive methods like medication or artificial insemination.

IVF, as used in the Philippines, is more limited since it refers to the fertilization of the wife's egg and the husband's sperm outside the wife's body. Third parties are not allowed to participate in the process. This precludes the use of a surrogate, or an ovum or sperm donor. If there is a total absence of either the husband's sperm or the wife's egg, they cannot undergo IVF. Neither can they dispose of their extra embryos for use by another couple.

Age is also acknowledged as a legitimate factor in the IVF process. The doctors discourage IVF for women above 40.[69] The reasons are well meaning. More mature women are more prone to suffer from the side effects associated with IVF. The chances of a successful pregnancy are also diminished significantly as the age of the woman advances. Such considerations seek to provide the infertile couple with factors to consider before choosing ART as an infertility option at great physical and financial cost.

C. Cryopreservation

The process of retrieving eggs from a woman's ovaries poses significant risks.[70] Repeated attempts to extract eggs are expensive and can be invasive for the woman who has to undergo the procedure. To minimize the physical, emotional, and financial burden imposed by repeated attempts of egg extraction, the multiple eggs removed from the woman are usually frozen in a process called cryopreservation. Cryopreservation is defined as the "maintenance of the viability of

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[68] Single women and homosexuals may protest the clinic's stringent policy restricting participants in the light of jurisprudence in other countries giving equal protection to married and unmarried couples to avail of ART. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972). In this case, the Court held that it is the right of the individual, married or single, to be free from unwarranted government intrusion. Such a discussion, however, is outside the scope of this paper.

[69] Personal interview with Dr. Leonardo Almeda, Reproductive Endocrinologist and Fertility Expert, Reproductive Medicine Center (Feb. 15, 2002).

[70] In most instances, the woman suffers side effects from the drugs taken to stimulate egg production. Additionally, the process of extracting the egg can be burdensome with reports of infection and abdominal and vaginal discomfort. *See* Waldman, *supra* note 4, at 903-904.

excised tissues or organs at extremely low temperatures."[71] It involves a process wherein the embryos are frozen in liquid nitrogen at sub-zero temperatures.[72]

Cryopreservation is encouraged for many reasons. *First*, it reduces the need for women to undergo multiple egg extraction processes and allows the untransferred embryos to be saved for use in a later attempt if the first attempt proves unsuccessful or when the couple wants more children.[73] This also cuts down the cost of achieving pregnancy since each egg retrieval process costs several thousands of dollars. *Second*, it permits embryo transfer during a natural cycle and reduces the likelihood of multiple births.[74] The process becomes less intrusive for the woman who is able to rid herself of the effects of the stimulating drugs used during the egg retrieval phase. *Finally*, it gives the couples time to decide the manner of disposition of the frozen embryos. At the local RM Center, for example, the couples are allowed to store their embryos for a period of five years. During that time, they are charged a monthly fee for its maintenance and preservation.[75]

In other countries, the problems with cryopreservation arise when unforeseen circumstances present themselves and require decisions regarding the disposition of the embryos or as to who among the donors have the right to determine the fate of the embryos.[76] Courts have been previously asked to step in to adjudicate on these conflicting interests.[77]

At present, there is no law regulating IVF in the Philippines. The only provision under Philippine law on ART is the provision of the Family Code on artificial insemination.[78] Some proponents are of the notion that this provision may apply suppletorily to IVF. Given the inherent differences between the two procedures, problems will surely arise. A special law needs to be enacted to address

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[71] Jennifer M. Stolier, *Comment, Disputing Frozen Embryos: Using International Perspectives to Formulate Uniform U.S. Policy*, 9 TUL. J. INT'L. & COMP. L. 459, 462 (2001), n.17.

[72] Gunsburg, *supra* note 6, at 2211.

[73] The Ethics committee of the American Society of Reproductive Medicine has concluded that cryopreservation is "an essential element of all programs offering IVF." *See* Waldman, *supra* note 4, at 905.

[74] Ellen A. Waldman, *Family Law Conundrums in Assisted Reproduction*, 21 WHITTIER L. REV. 451, 451-452 (1999) [hereinafter Waldman, *Family Law*].

[75] Costs for preservation of the frozen embryo is around P1,000/month. The couples are sent notices to remind them of their obligations. The fees are minimal. One paying patient can cover the cost of preserving hundreds of other patients' embryos. Since the clinic was established only four years ago, no embryos have been destroyed yet. Personal interview with Dr. Leonardo Almeda, Reproductive Endocrinologist and Fertility Expert, Reproductive Medicine Center (Feb. 15, 2002).

[76] Donna M. Sheinbach, *Examining Disputes over Ownership Rights to Frozen Embryos: Will Prior Consent Documents Survive If Challenged by State Law and/or Constitutional Principles?*, 48 CATH. U. L. REV 989, 991 (1999).

[77] *See* Kass v. Kass, 696 N.E.2d 174 (N.Y., 1998); A.Z. v. B. Z., 431 Mass. 150, 725 N.E.2d 1051 (2000); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (involving disputes over the disposition of frozen embryos as a result of a couple's divorce).

[78] FAMILY CODE, art. 164.

the particular issues inherent in IVF. In the meantime, the relationship between patients and the fertility clinics are governed by the contracts they execute at the beginning of the procedure. In the absence of any governing law, the parties may freely stipulate on any matter provided it is not contrary to law, public policy, morals, or good customs.[79] Contracts, when properly conceived and executed, can play a valuable role in clarifying the rights and obligations of all providers and purchasers of reproductive aid.[80] They should reflect the wishes of the parties and clearly set out their intentions. Both parties must also have a thorough understanding of the process involved.

From the start, many problems are apparent. There is a need to look at the various parts of the ART contract from the framework of contract law to see whether they can be given legal recognition here in the Philippines.

IV. ART CONTRACTS

In order to obtain services for ART, several contracts are executed. These contracts vary depending on the type of procedure involved, the physician and/or the fertility clinic performing the services, and the state or country in which the service is applied for. They are usually executed after the intending parents have signified their assent to the process to the physician and before any treatments are undertaken.

A typical contract for AIH would consist of the basic contract for AIH, in the nature of an informed consent form.[81] A typical contract for AID or AIC, on the other hand, is composed of a contract of sale for sperm or a deed of donation involving sperm[82] and the basic contract for AIH.[83]

For IVF, if the husband and wife use both their own sperm and egg, the contracts executed would include a basic contract for consent to IVF[84] and embryo transfer, and a contract for the cryopreservation of the embryos.[85] If the sperm and/or the eggs were donated or sold, a contract for the sale or donation of sperm and a similar contract for the sale or donation of eggs[86] would also be executed in addition to the two other contracts.

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[79] CIVIL CODE, art. 1306.
[80] Waldman, *supra* note 4, at 899.
[81] *See* Annex "A".
[82] *See* Annex "B".
[83] *See* Annex "C".
[84] *See* Annex "D".
[85] *See* Annex "E".
[86] *See* Annex "F".

A surrogacy contract is basically an agreement between the intended parents and the surrogate for the latter to carry the child to term.[87] It would necessarily include a contract for AID if of the traditional type, or IVF with sperm and eggs sold or donated if of the gestational type.

An agreement for ART is thus composed of several independent yet interrelated contracts. The parties per contract differ, and each contract has as its object distinct demandable obligations. These contracts are basically in the form of informed consent contracts.

An Informed Consent contract is a contract that explicitly informs a potential participant of the goals of the procedure, its potential benefits and risks, the alternatives to participating, and the right to withdraw from the procedure at any time.[88] This type of contract is usually executed between a physician and a patient before undergoing any medical surgery or procedure. It is in the nature of a communication by the doctor and must be knowingly consented to by a patient before the latter can avail of difficult or controversial treatment.[89]

Are these ART contracts valid under Philippine law? An elucidation of the basic principles of Philippine contract law is in order.

V. CONTRACTS UNDER THE PHILIPPINE CIVIL CODE

The threshold question to be determined is how the law defines a contract: "A contract is a meeting of the minds between two persons whereby one binds himself, with respect to the other, to give something or to render some service."[90]

The commentator Sanchez Roman further defines a contract as "a juridical convention manifested in legal form, by virtue of which one or more persons bind themselves in favor of another or others, or reciprocally, to the fulfillment of a prestation to give, to do, or not to do."[91]

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[87] For a Traditional Surrogacy contract, see Annex "G". For a Gestational Surrogacy contract, see Annex "H".

[88] Mary Ann G. Cutter, *Informed Consent*, *at* http://www.uni-leipzig.de/~debatin/lectures/sem00/material/consent.html (June 1995).

[89] This type of consent to medical treatment has been required as early 1767 in the case of *Slater v. Baker and Stapleton*, 2 Wils. K.B. 359, 95 Eng. Report 860 (1767): "It is reasonable that a patient should be told what is about to be done to him, that he may take courage and put himself in such a situation as to enable him to undergo the operation." In 1914, the US Supreme Court in the case of *Schloendorff v. Society of New York Hospital*, 105 N.E. 92 (1914 N.Y.), further pronounced: "...every human being of adult years and sound mind has a right to determine what shall be done with his body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."

[90] CIVIL CODE, art. 1305.

[91] Sanchez Roman, as quoted in ARTURO TOLENTINO, IV COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 405 (1997 ed.) [hereinafter IV TOLENTINO].

An agreement for Artificial Reproduction clearly involves a prestation – the obligation to perform the acts that would result in the impregnation of a woman, and ultimately, the birth of a child. This prestation is attainable only through the execution of several other related contracts involving, at the very least, the intended parents and the physician or fertility specialist. In the case of surrogacy, the surrogate mother is of course an indispensable party.[92] If the surrogate mother is married, her husband is a necessary party.[93]

A contract has four characteristics: obligatory force, autonomy, mutuality and relativity.[94]

A. Obligatory force

"Contracts are perfected by mere consent, and from that moment the parties are bound not only to the fulfillment of what has been expressly stipulated but also to all the consequences which, according to their nature, may be in keeping with good faith, usage and law."[95]

This provision refers to the obligatory or binding force of contracts. A contract, once perfected, binds the parties to perform their respective obligations. Thus, in all contracts involving artificial reproduction, the parties must fulfill the prestations required from them under the agreement; any breach thereof renders the reneging party liable for specific performance or damages.

This provision mandates the existence of consensual contracts in this jurisdiction. As applied to ART contracts, this would mean that the sale or donation[96] of an egg or sperm, the service of insemination, in vitro fertilization or surrogacy, and the obligation to freeze the excess embryos are all to be perfected by

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[92] Indispensable parties are those parties in interest without whom no final determination can be had of an action. RULES OF COURT, Rule 3, sec. 7.

[93] RULES OF COURT, Rule 3, sec. 8.

Sec. 8. *Necessary Party.* –A necessary party is one who is not indispensable but who ought to be joined as a party if complete relief is to be accorded as to those already parties, or for a complete determination or settlement of the claim subject of the action.

[94] DESIDERIO JURADO, COMMENTS AND JURISPRUDENCE ON OBLIGATIONS AND CONTRACTS 356 (1993).

[95] CIVIL CODE, art. 1315.

[96] Sperm can be sold or donated, either with or without consideration. In the latter case, the cause of the contract would be considered the liberality of the donor, and its only requirement is that it must conform to the formalities of donations. The former case would refer to onerous contracts, where the consideration given is in return for services to be performed. *See* ARTURO TOLENTINO, II COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 541-542 (1997 ed.) [hereinafter II TOLENTINO]. These donations are governed by the rules on contracts, as prescribed by the CIVIL CODE, art. 733.

mere consent, which need not be made expressly. No added act is required to perfect the contract.

Considering the nature of ART contracts however, it may not be advisable to make the contract effective through mere consent. This is because it involves not only real or personal rights, but also the potential creation of a human being. Some formalities may be preferable, if only to act as a safeguard against unconscionable attempts at pregnancy. Perhaps the intervention of the State might be required in the nature of a clearance or license, as is done before a marriage can be celebrated.[97]

The obligatory force of contracts also means that a contract is not limited to what is expressly stipulated, but extends to all consequences which are the natural effects of the contract, considering its true purpose, the stipulations it contains, and the object involved.[98] Thus, express stipulations in ART contracts have been necessarily construed to include issues on paternity, legitimacy, support and custody.[99] Whether such rights can be determined through the medium of a contract, however, is questionable.

It has been suggested that ART contracts merely determine in whom parental rights vest; they do not transfer or terminate rights.[100] The problem with this suggestion is that statutory law itself determines in whom parental rights vest,

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[97] Such condition, however, may run afoul of the right to procreate. In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), an Oklahoma statute mandating the sterilization of habitual criminals was assailed as being violative of the Equal Protection Clause. The US Supreme Court declared that the statute was unconstitutional. It said:

"We are dealing here with legislation which involves one of basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects...There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty...[s]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of equal protection of laws is a pledge of the protection of equal laws...[I]f such a classification were permitted, the technical common law concept of a 'trespass' based on distinctions which are very largely dependent upon history for explanation could readily become a rule for human genetics.

Requiring state approval for the artificial procreation of children, already legally valid for certain procedures, might readily violate the equal protection clause, as those who procreate naturally would require no such approval. It would only be allowed if some "substantial difference" is found between couples who procreate naturally and couples who require artificial assistance in order to have a child."

[98] IV TOLENTINO, *supra* note 91, at 441.

[99] In *Jane Doe v. John Doe*, 710 A.2d 1297 (Conn. 1998), the Connecticut Supreme Court awarded custody of a child born from a traditional surrogate arrangement to the intended parent, who was not in any way genetically related to the child. The court based its finding on the previous contractual agreement of the parties. The California Supreme Court issued a similar holding though with reference to a gestational surrogacy contract. In *Johnson v. Calvert*, 19 Cal. Rptr. 2d 494 (1993), the egg donor-wife was granted custody over the gestational surrogate after the court analyzed the surrogacy contract and found that the intent of the arrangement was to produce a child for the husband and wife.

[100] Kermit Roosevelt, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39 SANTA CLARA L. REV. 79, 107 (1998).

and this is done in the state's exercise of *parens patriae*, or as parent or guardian of the country.[101]

With regard to the paternity and legitimacy of children born of AIH, AID, or AIC, the Family Code is clear:

> Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided, that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registrar together with the birth certificate of the child.[102]

This provision necessarily implies that a child born though the process of AIH, AID, or AIC is the child of the intended parents, putting to rest any controversy regarding their paternity, filiation, and legitimacy.[103] It may also be inferred that the child's right to demand support from the intended parents and the parental rights of such intended parents over the child necessarily follows.

With regard to children born through in vitro fertilization or surrogacy (traditional or gestational), no pronouncement has been made by the legislature. In the event that such stipulations on paternity, legitimacy, custody, and support are challenged before Philippine courts, such stipulations might be found to contravene existing laws, as the court will likely interpret the issues based on genetic relationship.[104] It may furthermore be argued that in the event such stipulations are made, they could easily be considered as illegal because such matters are indeed matters of public policy that cannot be bargained away through the medium of contracts.

B. Autonomy

The Constitution itself recognizes the autonomy of contracts: "No law impairing the obligations of contracts shall be passed."[105]

Indeed, the policy of the law is that the freedom of persons to enter into contracts should not be lightly interfered with.[106] Consequently, article 1306 of the Civil Code provides:

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[101] FEDERICO B. MORENO, PHILIPPINE LAW DICTIONARY 675 (1988 ed.).

[102] FAMILY CODE, art. 164.

[103] Romero, *supra* note 19, at 290.

[104] *See* CIVIL CODE, arts. 163-193. It is clear that parental ties are established though blood relationship. Adoption is the only exception under our laws.

[105] CONST., art. III, sec. 10.

[106] Ferrazini v. Gsell, 34 Phil. 697, 709 (1916).

> The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order or public policy.

An ART contract, in actuality, is an exercise not merely of the right to contract but the right to procreate. Though no case regarding the right to procreate has been directly adjudicated upon by our highest court, such right is generally considered as contained in the Due Process Clause. In the US Case of *Skinner v. Oklahoma*,[107] it was held that such right indeed exists, and is enforceable. A contract that thus seeks to exercise the right to procreate, if examined from this angle, would appear to be valid.

The validity of a contract, however, is determined on the basis of the totality of its provisions, such that all its conditions must past the test of validity in order for the contract to be enforced in its entirety.[108] The law then provides that the stipulations in contracts should not contravene any existing law, recognized morals, good customs or public policy, as well as public order.

An existing provision of law validates the execution of a contract for AIH, AID, or AIC.[109] There are no similar laws for IVF or traditional or gestational surrogacy; nor are there any laws against it. Some obstetrician-gynecologists here are already performing IVF in the Philippines.[110] No cases, however, have reached the courts regarding the legality of such procedures.

Morals may be considered as meaning good customs, or those generally accepted principles of morality that have received some kind of social or practical confirmation. Any contract that has an immoral purpose is contrary to good customs.[111] It is also accepted, however, that morality is relative, that is, it is to be considered in relation to the community in which the contract is to be given effect. The problem, thus, would be as regards which community standard is to be given greater heed. This would be the reason for the difficulty in arriving at a worldwide

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[107] 316 U.S. 535 (1942).

[108] If a contract is divisible however, and illegal provisions can be separated from the legal ones, the latter may be enforced (*See* CIVIL CODE, art. 1420). It is submitted that this provision can only be valid if the ART process itself is valid. Otherwise, the contract would be indivisible, as the ART process itself is the very reason for the existence of the contract.

[109] FAMILY CODE, art. 164.

[110] Personal interview with Dr. Leonardo Almeda, Reproductive Endocrinologist and Fertility Expert, Reproductive Medicine Center (Feb. 15, 2002).

[111] IV TOLENTINO, *supra* note 91, at 418.

consensus as to the propriety of ART procedures. Indeed, countries vary in their appraisal of ART contracts.[112]

Within the Philippines itself, such problem is manifest. The standards of morality and good customs observed by the legislature and by the judiciary are greatly affected by the dictates of the major religions, the most influential of which are the Roman Catholic and the Islam faiths. Even between these two religions, there is already a noticeable diversity of opinion. The Roman Catholic hierarchy has categorically denounced the use of ART procedures as immoral.[113] On the other hand, the Islamic faith accepts procedures done only between married couples, allowing the use of AIH and IVF with the egg and sperm only of the husband and wife. As for surrogacy contracts, Islamic marriage procedures allow for the husband to have more than one wife; the second wife may thus act as surrogate mother, precluding any problems as to legitimacy.[114]

These two diverse opinions, though representative only of religious sentiments, is enough to show that the probability of determining a community standard, not to mention an acceptable compromise, would be difficult, to say the least. Members of Congress, as the primary determinants of legality, would have to decide among themselves the course of action to take. Any position adopted, however, is bound to have its share of detractors.

A contract that is neither prohibited by law nor condemned by judicial decision, nor contrary to public legislation or constitutional prohibition, is not against public policy.[115] There is no law or promulgated judicial decision in the Philippines expressly declaring void any ART contract or procedure. A constitutional prohibition against IVF and surrogacy can be argued to exist,[116] but this theory is yet to be litigated before the courts.

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[112] In the Philippines, only AIH and AID have been expressly allowed by the State. In other countries, AIH, AID and IVF are allowed. Very few states have allowed surrogacy.

[113] There are three distinct reasons why ART procedures are judged to be immoral by the Catholic Church: (1) the medical procedure violates the nature and structure of reproduction by separating the sexual act from reproduction itself; (2) the process is extremely risky for the fertilized human ovum and the subsequent embryo, which is already considered a "person"; and (3) the process actually includes abortion within it, i.e., several conceived persons are destroyed in the process. *See* Very Rev. Kevin Michael Quirk, JCD, *Fertility, at* http://www.dwc.org/questions/Morality/artifical.htm (last modified Jan. 10, 2002).

[114] *New Techniques in Human Reproduction, at* http://www.al-islam.org/m_morals/chap5.htm (last visited Feb. 3, 2002).

[115] IV TOLENTINO, *supra* note 91, at 420.

[116] CONST. art. III, sec. 12 mandates the protection of the unborn: [The State] shall equally protect the life of the mother and the life of the unborn from conception. This provision can probably be used against in-vitro fertilization and surrogacy, as it would, in theory, protect embryos which might be destroyed in the process.

C. Mutuality

It is a general principle of law that no one may be permitted to change his mind or disavow and go back upon his own acts, or to proceed contrary thereto, to the prejudice of the other party.[117] The Civil Code thus states: "The contracts must bind both contracting parties; its validity or compliance cannot be left to the will of one of them."[118]

A party cannot renege on an obligation as soon as an agreement is perfected. The unilateral act of one party in terminating the contract without legal justification makes him liable for damages.[119]

With regard to ART contracts, the same principle would appear to apply. A party's non-fulfillment of any obligation in the ART contracts would constitute a breach, making a person liable for damages. Considering the nature of ART contracts, however, this proposition would be difficult to enforce. As will be seen later, the event of a breach can have serious consequences for a possible child, and the quantification of damages in monetary terms is almost impossible.

D. Relativity

Generally, only parties can maintain actions to enforce obligations arising from a contract. Assigns or heirs, however, may also step into the shoes of the original party, by express provision of law:

> Contracts take effect only between the parties, their assigns and heirs, except in case where the rights and obligations arising from the contract are not transmissible by their nature, or by stipulation or by provision of law. The heir is not liable beyond the value of the property he received from the decedent.[120]

Rights and obligations under a contract are automatically transmitted to the heirs of the parties in case of death or incapacity of the original party. At such time, these assigns or heirs cannot be considered as mere third parties as they immediately become indispensable parties;[121] there is privity of interest between them and their predecessor.[122]

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[117] IV TOLENTINO, *supra* note 91, at 425.

[118] CIVIL CODE, art. 1308.

[119] IV TOLENTINO, *supra* note 91, at 425.

[120] CIVIL CODE, art. 1311, 1st par.

[121] Indispensable parties are those parties in interest without whom no final determination can be had of an action. RULES OF COURT, Rule 3, sec. 7.

[122] Galasinao v. Austria, 97 Phil. 82 (1955).

In ART contracts, can an assign or heir take over any of the obligations involved when the original party is unfit or incapable of doing so? Can an heir enforce the implantation of a zygote in a surrogate mother? Can the heir claim ownership over frozen embryos? Can an heir of a surrogate mother be compelled to carry a child in case of the latter's incapacity to do so?

An ART contract, by its very nature, involves very personal obligations. The right of a person to procreate and create a family are rights that cannot be exercised by an assign or heir; only the parties themselves can perform these rights. Thus, the death or incapacity of a party will extinguish the obligation.[123] The only exception to this rule would appear to be with regard to cryopreservation contracts, where the parties involved are spouses and one dies or becomes incapacitated. Contracts of this type usually stipulate as to the effect of such death or incapacity.[124] It is possible then for the surviving spouse to continue with the contract.

The issues as to assigns and heirs also call to mind the possibility of the contracts creating some benefit in favor of a third person, as in the case of traditional surrogacy. The basic contract in this case will involve a woman surrogate and a man who is not her husband. The intended parents, however, would be the man and his wife. The wife, though not a party to the contract, would directly benefit from such an arrangement. Seen this simply, the law is clear:

> If a contract should contain some stipulation in favor of a third person, he may demand its fulfillment provided he communicated his acceptance to the obligor before its revocation. A mere incidental benefit or interest of a person is not sufficient. The contracting parties must have clearly and deliberately conferred a favor upon a third person.[125]

Would this type of stipulation apply? Some states immediately recognize the wife-beneficiary as the legal mother,[126] in effect allowing the contract to directly

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[123] See IV TOLENTINO, *supra* note 91, at 272.

[124] A typical stipulation would read:

In event of Husband's Death of Incompetence. In the event the Husband dies, survived by wife, or becomes permanently incompetent, stored embryos shall be considered the property of the Wife, and she has the right to request transfer to herself.

In Event of Wife's Death, Incompetence or Hysterectomy. In the event that Wife dies, becomes incompetent, undergoes hysterectomy or otherwise becomes medically incapable of accepting transfer while our embryos are being stored, our embryos may be donated to fertile couples.

See http://www.midiowafertility.com/register.htm (last visited Feb. 15, 2002) [hereinafter Mid-Iowa Fertility].

[125] CIVIL CODE, art. 1311, par. 2.

[126] In the United States, the individual states vary as to their treatment of surrogacy. Among those states that enforce these contracts are Florida, Nevada, New Hampshire and Virginia. Such acceptance is not absolute however, as several conditions must first be complied with. *See* Weldon E. Havins, M.D., J.D., *Artificial Reproductive Technology, at* http://www.lvcm.com/whavins/artrepro.htm (last visited Feb. 1, 2002) [hereinafter ARTIFICIAL REPRODUCTIVE TECHNOLOGY].

benefit the wife, an outsider to the contract. Contract law, under the above quoted provision, would appear to allow such arrangement.

To constitute a valid stipulation in favor of a third party,[127] it must be the purpose and intent of the stipulating parties to benefit the third person, and it is not sufficient that the third person may be incidentally benefited by the stipulation. Such determination would depend upon the intention of the parties as disclosed in the contract.[128] A wife-beneficiary must be clearly stated to be such.

Strictly speaking, the beneficiaries of a traditional surrogacy contract are both the husband and wife as intended parents. The husband however, is already a party to the contract and is expected to realize some benefit from it. Indeed, the inclusion of the wife as a party to the contract might appear to be superfluous, for any contract involving conjugal property necessarily includes the participation of both the wife and the husband, as the administration and enjoyment of the community property belong to both spouses jointly.[129] This statement can be considered true, however, only if embryos can be considered property, albeit for a limited purpose.

E. Characterizing the Contract

It has been explained that ART procedures often involve the execution of several contracts. It has been the practice of many fertility clinics, however; to include these contracts into one very long contract, printed in small letters and compressed into a few sheets of paper only. With this description, it is obvious that it can be characterized as a contract of adhesion.

A contract of adhesion has often been described as one on a "take it or leave it" basis, and on some occasions, has been held as invalid by our courts.[130]

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[127] This type of beneficial stipulation is also known as a stipulation *pour autrui*.

[128] *See* IV TOLENTINO, *supra* note 91, at 433.

In *Florentino v. Encarnacion*, No. L-27696 (1977), the Supreme Court laid down the requisites of this article:

> (1) the application in favor of a third person should be a part, not the whole, of the contract;
>
> (2) the favorable stipulation should not be conditioned or compensated by any kind of compensation whatever; and
>
> (3) neither of the contracting parties bears the legal representation or authorization of the third party.

[129] FAMILY CODE, art. 96.

[130] In *Fieldman's Insurance Co. Inc. v. Vda. de Songco*, G.R. No. L-24833, 25 SCRA 70 (1968), the court decided against an insurer after finding that the contract was drafted unfairly: "The courts cannot ignore that nowadays monopolies, cartels and concentration of capital, endowed with overwhelming economic power, manage to impose upon parties dealing with them cunningly prepared 'agreements' that the weaker party may not change one whit, his participation in the 'agreement' being reduced to the alternative to 'take it or leave it' labeled since

Though the primary prejudice against such contracts is the exploitation of a stronger party over a weaker one, the situation can readily apply in the situation of spouses versus the physician or fertility clinic. The spouses, repeatedly disappointed due to failed attempts at pregnancy, would be ecstatic at the mere hope of finally having their own child. Taking advantage of this situation, a fertility clinic or physician might introduce stipulations into the contract to the disadvantage of the spouses. A contract of this nature would be easily glossed over by the excited spouses.

F. Interpreting Contracts

Certain rules govern the way contracts are to be interpreted. In Roman law, the shift was gradual from the *verba* to the *voluntas*,[131] from a strictly objective to an excessively subjective approach. In archaic Roman law, the emphasis was on the creation of a definite form for every legal act. The form was very strict and rigid; any mistake in form will invalidate the contract regardless of the intention of the parties.[132] Slowly, this view has given way to a more flexible approach to the interpretation of contracts.[133] *Nullum esse contractum, nullam obligationem, quae non habeat in se conventionem:* no matter whether a contract of sale, a mutuum, or a stipulation had been concluded, the transaction was ultimately based on the consent of the individual parties concerned.[134]

Modern Philippine laws on interpretation of contracts have adapted many of the special rules and maxims of Roman law. Thus, various stipulations of a contract shall be interpreted together, attributing to the doubtful one the sense that may result from all of them taken jointly.[135] Furthermore, Art. 1375 of the Civil Code provides that words which may have different significations shall be understood in that which is most in keeping with the nature and object of the contract.[136] All these, as well as the other rules for the interpretation of contracts[137]

Raymond Saleilles 'contracts by adherence' (contrats d'adhesion), in contrast to those entered by parties bargaining on equal footing, such contracts of which policies of insurance and international bills of lading are prime examples) obviously call for greater strictness and vigilance on the parts of courts of justice with a view to protecting the weaker party from abuses and imposition and prevent their becoming traps for the unwary."

[131] REINHARD ZIMMERMAN, THE LAW ON OBLIGATIONS ROMAN FOUNDATION OF THE CIVILIAN TRADITION 625 (1996).

[132] *Id.* at 622.

[133] *Id.* at 627. To a great extent, this was brought about by the trade links established with non-Romans and the increasing popularity of new, informal types of transactions that relied more on the intention of the parties than on the formality by which it was created. *Id.*

[134] *Id.* at 627-628.

[135] CIVIL CODE, art. 1374. *Incivile est nisi tota lege perspecta una aliqua particula eius proposita iudicare vd respondere.* Every clause in a contract must be interpreted in the light of all other clauses, whether they precede or follow it. ZIMMERMANN, *supra* note 131, at 637.

[136] *Id.* at 637-638. A similar provision is provided for under the German Civil Code. *Quotiens idem sermo duas sententias exprimit, ea potissimum exciapiatur, quae rei gerendae aptior est:* of two possible constructions, the one which is most agreeable to the nature of the contract must be chosen.

[137] Other provisions on the interpretation of contracts in the Civil Code include the following:

have been established as a result of the more subjective approach given to contracts. If the intention of the parties govern, these provisions help clarify this intention when the statement in the contract is absent or defective. These rules will help us come into a better understanding of ART contracts and how courts should interpret them.

One rule of construction that may prove relevant to the study of ART contracts is the *contra proferentum* rule.[138] The rule states that in case of ambiguity, the interpretation unfavorable to the stipulator will be adopted. This is embodied in our Civil Code as:

> Art. 1377. The interpretation of obscure words or stipulations in a contract shall not favor the party who caused the obscurity.

If the contract is one of adhesion, any resulting dispute must then be resolved against the party who drafted the contract and caused the confusion. For an ART contract, this party would be the fertility clinic – the one normally responsible for the preparation of the pre-printed consent forms in small fonts embodying a multitude of issues.

VI. THE ESSENTIAL REQUISITES OF A CONTRACT

There is no contract unless the following requisites concur:

(1) Consent of the contracting parties;

Art. 1370. If the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, the literal meaning of its stipulations shall control.

If the words appear to be contrary to the evident intention of the parties, the latter shall prevail over the former.

Art. 1371. In order to judge the intention of the contracting parties, their contemporaneous and subsequent acts shall be principally considered.

Art. 1372. However general the terms of a contract may be, they shall not be understood to comprehend things that are distinct and cases that are different from those upon which the parties intended to agree.

Art. 1373. If some stipulation of any contract should admit of several meanings, it shall be understood as bearing that import which is most adequate to render it effectual.

Art. 1376. The usage or custom of the place shall be borne in mind in the interpretation of the ambiguities of a contract, and shall fill the omission of stipulations which are ordinarily established.

Art. 1378. When it is absolutely impossible to settle doubts by the rules established in the preceding articles, and the doubts refer to incidental circumstances of a gratuitous contract, the least transmission of rights and interests shall prevail. If the contract is onerous, the doubt shall be settled in favor of the greatest reciprocity of interests.

If the doubts are cast upon the principal object of the contract in such a way that it cannot be known what may have been the intention or will of the parties, the contract shall be null and void.

[138] ZIMMERMAN, *supra* note 131, at 639. The underlying idea is *interpretatio contra eum qui clarius loqui debuisset*.

(2) Object certain which is the subject matter of the contract;

(3) Cause of the obligation which is established.[139]

All of these requisites must be present. The absence, defect or illegality of one renders the entire contract void,[140] voidable,[141] or unenforceable.[142]

A. Consent

Under Philippine law, consent is manifested by the meeting of the offer and acceptance upon the thing and the cause that are to constitute the contract.[143] The essence of consent in contracts is the "conformity of the parties on the terms of the contract, the acceptance by one of the offer made by the other; it is the concurrence of the minds of the parties on the object and the cause which shall constitute the contract."[144]

The nature of consent is rooted deeply in respect for individual autonomy.[145] This is in recognition of the fact that a person's body and physical being is inviolable.[146]

For ART contracts, the consent needed is more specific. As a medical procedure, informed consent is required. It is technically defined as a duty that is imposed on the physicians to fully disclose to their patients all their available medical choices available and to explain all possible risks and benefits that may arise from whatever treatment they choose.[147] This is a by-product of the effort to ensure patient autonomy in the doctor-patient relationship.[148]

The doctrine of informed consent serves three major roles. *First*, it serves to respect the freedom of persons to contract with others knowingly and

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[139] CIVIL CODE, art. 1318.

[140] CIVIL CODE, art. 1409.

[141] CIVIL CODE, art. 1390.

[142] CIVIL CODE, art. 1403, par. 3.

[143] CIVIL CODE, art. 1319.

[144] IV TOLENTINO, *supra* note 91, at 447, *citing* Sanchez Roman and Manresa.

[145] D. MEYERS, *supra* note 2, at 122.

[146] *Id.* The crime of assault and battery was established to protect this physical inviolability and to punish any transgression. In this vein, medical treatment would be considered prima facie battery and failure to get the person's consent is an invasion of his person even if such treatment was warranted. *Id.*

[147] Judith Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 609, 628 (1997) [hereinafter Daar, *Regulating Reproductive Technologies*].

[148] Judith Daar, *Informed Consent: Defining Limits Through Therapeutic Parameters*, 16 WHITTIER L. REV. 187 (1995). This is a reflection of the evolution of the doctrine of informed consent from purely physician paternalistic molds in order to promote, at least theoretically, informed decision-making by the patient [hereinafter Daar, *Informed Consent*].

intelligently. *Second*, it serves to promote their best interests. The persons contracting are deemed to be the best judge of their individual welfare. Informed consent enables them to determine the course of their own care. *Third*, it serves to provide the necessary permission. The patient's signature on the informed consent form serves as an acknowledgment that the patient has read the information and agrees to proceed with the treatment.[149]

To achieve true informed consent, it is necessary that such consent to any form of treatment be obtained after adequate disclosure. This presents the problem of what is adequate disclosure. Here, two theories are proposed to define what is adequate disclosure. One theory requires doctors to disclose information significant to a reasonable person in the patient's position. This is the "patient-based standard."[150] The second theory is the "professional or community standard."[151] This requires the physician to disclose based on the practices followed within the medical community. The extent of information to be disclosed is that which "a skilled practitioner of good standing would provide under similar circumstances."[152] RM Center follows the professional standard and complies with international guidelines provided by the International Federation of Fertility Specialists (IFFS), the international regulatory body for fertility clinics.[153] Without such permission, the act of the physician will be assailed as an intrusion into the privacy of the patient.

In an effort to guide parties involved in ART contracts, the American Society for Reproductive Medicine (ASRM) has released a report on the elements to be considered in obtaining informed consent for ART:

> All informed consents must be in writing, signed by all the participating parties, and properly witnessed. In addition to information about chance of success and financial obligations, the following issues should be addressed in the process of obtaining consent. It is also important that couples be provided full information concerning alternative procedures available to manage their specific infertility problems including procedures that are not performed by the treating center, as well as non-medical options such as adoption and non-treatment. Couples must be informed about the federal and reporting requirements and possible contact for follow-up. Couples will

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[149] Waldman, *supra* note 4, at 920.

[150] For an exhaustive discussion of the standards of disclosure required from doctors, *see* Richard E. Shugrue, *The Practitioner's Guide to Informed Consent*, 24 CREIGHTON L. REV. 881 (1991). For more recent trends on the doctrine of informed consent, *see* Daar, *Informed Consent*, *supra* note 148, at 187.

[151] Shugrue, *supra* note 150, at 899-905.

[152] Kinikin v. Heupel, 305 N.W.2d 589, 594 (Minn. 1981).

[153] International Federation of Fertility Societies is the international regulatory body for fertility experts throughout the world. Their success rates are reported to the federation for accurate monitoring. *See* Annex "I", Elements to Be Considered in Obtaining Informed Consent For ART, an opinion made by the Practice Committee of the ASRM. It enumerates the specific procedures and risks associated with different ART contracts.

> be informed through consent forms that this cycle-specific data will be provided to the CDC and that all personal identifiers will be protected under the Privacy Act. If a patient indicates that she does not want this personal identifier reported, the identifier will not be included and this noted in the consent form.[154]

Although these guidelines seem helpful in theory, their application may present occasions for dispute. Legal requirements do not always translate well into successful practice. The informed consent doctrine is criticized for its inability to be a true safeguard of the rights of the patients.[155] One reason may be that patients who undergo fertility treatment challenge the doctrine of informed consent. The goals of the patient and the multitude and complexity of treatment available make it difficult for patients to understand and for physicians to disclose the needed amount of information.[156]

In ART contracts, the consent of the respective parties is embodied in the informed consent form. The need for them cannot be emphasized enough. "From an ethical perspective, informed consent underscores the value of individual autonomy, a value that both flows out of and protects human dignity."[157]

Questions have been raised about the ability of these forms to appraise couples of the full consequences of the procedures they have selected to do. The usual practice is for the fertility clinics and hospitals to provide these forms, pre-printed, to which the patient conforms by signing in the allotted area. Such forms contain a description of the medical treatment and the attendant associated risks. The signature on the allotted space signifies the patient's assent. The duty of explaining the contents of these forms devolves upon the physician. However, the physician himself may find himself unable to communicate well with his patients. The patients themselves feel uncomfortable about such personal discussions and avoid having conversations about medical risks. More unscrupulous physicians avoid such discussions because they want to be able to charge their patients for appointments and procedures that could be unnecessary. The fact that the need for informed consent originated as a legal requirement could have seriously affected its value among physicians. They see it as a burden imposed on them to be followed mechanically.[158]

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[154] *Elements to be Considered in Obtaining Informed Consent for ART*, at http://www.asrm.org/Media/Practice/informedART.html (released June 1997).

[155] *See* Waldman, *supra* note 4, at n.137.

[156] Daar, *Regulating Reproductive Technologies*, *supra* note 147, at 628.

[157] *See* Waldman, *supra* note 4, at n.131.

[158] Waldman, *supra* note 4, at n.143.

Despite the physician's best intentions, the patients may still find themselves unable to comprehend the full impact of the procedures. The reason may lie within the infertility patients themselves. Several studies show that these patients present a "unique, dichotomous psychological profile."[159] The patients tend to be very emotional given the nature of the contract. Facing the problem of infertility can cause a high level of anxiety and distress among couples. Going for treatment and approaching a medical professional can cause further stress.[160] They will often opt for any treatment that may offer them even the slimmest of hopes regardless of the physical, psychological, and financial price.[161] The couples tend to be well educated regarding the mechanics of reproduction, their condition, and the newest technological innovations designed to supplement natural conception.[162] However, possession of such knowledge does not usually enlighten them as to the relatively low success rate promised by these innovations. The ray of hope it offers obscures even the most rational of couples.[163] This has not gone unnoticed by the ASRM.[164] They conduct studies that help explore the impact of infertility treatments on couples and their relationships in order to provide better health care for their patients.

1. Consent for Artificial Insemination Contracts

Philippine law requires the consent of both the husband and the wife for artificial insemination.[165] This consent must be in writing and executed and signed by both parties before the child's birth.[166] Such instrument must be recorded in the civil registry together with the birth certificate of the child.[167] Dr. Tolentino is of the opinion that the formalities of a written instrument are not essential to the legitimacy

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[159] Daar, *Regulating Reproductive Technologies*, *supra* note 147, at 629.

[160] Waldman, *supra* note 4, at 922-923. Couples struggling with infertility reports high rates of depression, loss of self-esteem, stress, and anger. *Id.* at 923. They "feel at odds with society, betrayed by nature, their bodies, and each other." Studies have also shown that when couples have different perceptions of stress also tend to report more depression. Agreeing on the level of stress being experienced helps couples manage their stress. *Highlights from the 57th Annual Meeting of the American Society for Reproductive Medicine Couples with Different Levels of Stress Have More Difficulty Coping with That Stress*, *at* http://www.asrm.org/Media/Press/couplestress.html (released Oct. 22, 2001).

[161] Waldman, *supra* note 4, at 922-923. Araceli Keh, the oldest woman to give birth at 63, faced a USD50,000 medical bill for her in vitro fertilization procedure. *Oldest mom reveals identity*, *at* http://www.lubbockonline.com/news/042797/oldest.htm (April 27, 1997).

[162] Waldman, *supra* note 4, at 923.

[163] Even IVF has a relatively low likelihood of success. The average success rate here in the Philippines at the RM Center is 28%. This is already comparable to the success rate of ASEAN neighbors like Singapore. Personal interview with Dr. Leonardo Almeda, Reproductive Endocrinologist and Fertility Expert, Reproductive Medicine Center (Feb. 15, 2002).

[164] Michael Soules, M.D., president of ASRM, observed: "We often speak about treating couples, and not just patients, in reproductive medicine. This work reminds us we need to attend to the psychological health of the couple, not just the physical needs." ASRM web page, *supra* note 65.

[165] CIVIL CODE, art. 164.

[166] CIVIL CODE, art. 164.

[167] CIVIL CODE, art. 164.

of the child produced by artificial insemination.[168] Such instrument is merely evidentiary in nature and in the absence of a written agreement; its terms are provable by other admissible evidence. This is in line with the rule that any doubt should be resolved in favor of legitimacy for the child's best interest.

The husband's consent is essential for the legitimacy of the child.[169] Such consent need not be given before the insemination since ratification before the birth of the child is allowed. If the child is born during wedlock, the legitimacy of the child is presumed. The burden of proof shifts to the husband to prove that his consent to the use of artificial insemination was vitiated by mistake, fraud, violence, intimidation, or undue influence. Only if he proves the vitiation of his consent will the child be declared illegitimate.[170]

Our Family Code provision has likewise helped settle the dilemma of whether sperm can be collected from men in comas or men who have died.[171] Since consent of the husband is needed, artificial insemination would not be allowed in the above-mentioned circumstances. But what if there had already been a valid agreement between the couple prior to the husband's death and incapacity? They could also have been in the process of undergoing AI with the husband's sperm already extracted and stored with the fertility clinic. Can the wife demand that the contract be performed? What would be its effect on the child's legitimacy? Such questions remain unresolved without a judicial or legislative declaration to settle the issue.

2. Consent for IVF Contracts

For the practice of IVF in the Philippines, RM Center has resolved many of the dilemmas faced by more liberal international fertility clinics regarding consent of contracting parties through the policy of limiting IVF within the natural context of marriage. Since there are no third parties involved, there are fewer complications involved. The consent needed is limited only to that of the husband and wife undergoing the procedure. To ensure that the patients are fully informed of what the procedure would entail, they are given a step-by-step explanation of the process.[172] Both husband and wife are required to be present for every step of the process to be adequately appraised of the progress of their treatment.[173]

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[168] I TOLENTINO, *supra* note 27, at 523.

[169] *Id.*

[170] CIVIL CODE, art. 166(3).

[171] The same problem is widely discussed in the United States and has yet to be resolved. *See* Andrews, *supra* note 7, at 371.

[172] Dr. Almeda also stressed that couples go through a screening process to evaluate their fitness to undergo IVF. IVF is only recommended when simpler, less invasive procedures have been attempted and have been proven unsuccessful.

[173] Personal interview with Dr. Leonardo Almeda, Reproductive Endocrinologist and Fertility Expert, Reproductive Medicine Center (Feb. 15, 2002).

3. Consent for Surrogacy Contracts

A very problematic stipulation between the surrogate and the intending parents is that involving the surrogate's promise to surrender the child after birth. In the United States, legal constraints are provided to guard against flippant and ill-considered surrender of reproductive opportunities.[174] Laws provide that certain criteria must be met and the judge must ascertain that the consent of all the parties was voluntarily given.[175] The judicial and statutory restrictions placed upon the enforcement of reproductive waivers respect the biological tie between mother and child and acknowledge that intention regarding child rearing can change over time.[176]

If the surrogate can transfer her rights in the egg, presumably to the intending mother, then the intending parents will be the legal parents. Given this, the contract must be a personal service contract for gestation, since parental rights vest initially in the intending parents and are never transferred. There can be no question of baby selling, since the child is simply given to its legal parents. Specific performance would not be needed as a remedy for the surrogate's refusal to turn over the child.[177]

States are hesitant to recognize surrogacy contracts because of the uncertainty regarding the capacity of the surrogate mother to surrender her child. This thinking reinforces the traditional understanding of the presumption of biology reflected in the ancient dictum *mater est quam gestation demonstrat* (by gestation the mother is demonstrated).[178] It is questionable whether a surrogate mother can even give real consent before pregnancy.[179] One commentator explains that "[c]hildbirth is such a major change in circumstances that one should not be reasonably held to foresee how one would arguably feel about child rearing until after the birth has occurred."[180] This seemingly justifies turning aside agreements made prior to gestation.

4. Consent for Disposition of Embryos

A special challenge involves patients' consent regarding the disposition of the extra embryos produced during the IVF process. Normally, the provision regarding the disposition forms one of the many stipulations under the ART informed consent form. This raises doubts as to the couple's understanding of the dispositional agreement. Some commentators feel that to include these dispositional

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[174] Waldman, *supra* note 4, at 932.
[175] *Id.* at 934.
[176] *Id.* at 935.
[177] Waldman, *supra* note 4, at 935.
[178] Roosevelt *supra* note 100, at 115-117.
[179] D. MEYERS, *supra* note 2, at 65.
[180] Waldman, *supra* note 4, at 935.

agreements within the body of the informed consent may be considered unconscionable.[181]

> This process could be considered procedurally deficient in three aspects:
>
> 1) They are drafted by the fertility clinic which frequently offers a constricted set of dispositional options and presents these options to the couple on a take it or leave it basis;
>
> 2) They are embedded in forms that treat entirely different subject matter; and
>
> 3) Their language is both intellectually and emotionally hard to assimilate.[182]

As to the first defect, such contracts would be properly called contracts of adhesion. Such contracts arise when there is already a printed form containing the stipulations of the agreement prepared by one of the parties and the other party merely "takes it or leaves it."[183] In these instances, it would be difficult to say that there is a "meeting of the minds" between the parties. The patients are left with no other alternative but to agree to the terms provided by the fertility clinic even if they turn out to be very onerous for them. Most patients are willing to take any chances for the opportunity to beget a child. Most infertility clinics are aware of the couple's predicament and may take advantage of the situation.

The second defect refers to the terms of the informed consent forms and the dispositional agreements. The difference is not only a matter of semantics. Medical consent forms cover situations that are about to happen. These thus refer to the steps of the procedure. On the other hand, a dispositional agreement refers to hypothetical scenarios that at first glance seem unlikely to the point of absurdity.[184] For example, a sample provision provides:

> 1. Instructions. We wish the embryo(s) disposed of in the following fashion (one and only one of the paragraphs below must be checked "YES" or completed):
>
> A. We hereby release and transfer all of our interests in the embryo(s) with the understanding that the embryo(s) shall be used by infertile persons, if otherwise permitted by applicable law:
> YES ____ NO ____

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[181] *Id.* at 926.
[182] *Id.* at 929.
[183] IV TOLENTINO, *supra* note 91, at 566.
[184] Waldman, *supra* note 4, at 930.

> B. The embryo(s) shall be disposed of and not donated to infertile persons in accordance with the policies of the Program in a manner consistent with professional and ethical standards, and applicable legal requirements:
> YES _____ NO _____
>
> C. The embryo(s) shall be transferred to the following specified institution to be stored and preserved for me. We agree to pay in advance the fees and expenses, if any, which you will incur in packaging and delivering the embryo(s):
>
> Name of institution: _____
> Address: _____
>
> The embryo(s) shall be transferred to the following named individual(s) to be used in efforts to produce pregnancy. We agree to pay in advance the fees and expenses, if any, which you will incur in packaging and delivering the embryos:
> Name of person: _____
> Address: _____
>
> 2. Waiver. We understand that we hereby waive our right to change our decision in this regard at any future time.
>
> 3. Release. We hereby fully release the Physician(s) and the Program and any person or corporation acting as agent, employee, or subcontractor of the Physician(s) of the Program, and hold them harmless from any and all liability, other than due to negligence, resulting from their acts or omission taken pursuant to these directions.

Even assuming there is a valid agreement as to the disposition, potential conflicts of interests may still take place. First, the donor's consent is indicated at the start of the process. Such manner may change over time. However, the dispositional agreement provides a waiver of the patient's right to change their minds about the manner of disposition. This should be seen more as an effort to stabilize and protect the integrity of the contracts entered into between the parties.

In a recent New Jersey Supreme Court decision, *J.B. v. M.B.*,[185] the court held that (1) any contract purporting to address the issue of disposition of the free embryos needed a formal written contract, and (2) such document would not be enforced if one of the parties changed their mind about the disposition of the embryos prior to their use or destruction.[186]

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[185] No. A-9, 2001 N.J.Lexis 955 (N.J. Aug. 14, 2001).

[186] Seth J. Chandler, *New Jersey Supreme Court Restricts Use of Contract in Determining Disposition of Frozen Preembryos, at* http://www.law.uh.edu/healthlawperspectives/Reproductive/010827NewJersey.html (Aug. 27, 2001).

This decision followed a recent Massachusetts ruling that had created an outright bar to the use of such dispositional agreements.[187] The case arose when J.B. (egg donor) and her husband M.B. (the sperm donor) underwent successful in vitro fertilization efforts. The couple signed a written agreement with the clinic relinquishing control over the "tissues" to the clinic in the event of a divorce, unless the relevant court were to specify who took control of the tissues. M.B. testified that he and his wife J.B. had agreed prior to undergoing the in vitro fertilization that any unused preembryos would be donated to infertile couples or not destroyed by his wife. The court ruled that "the better rule, and the one we adopt is to enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos." It is submitted that such a clause renders a contract insignificant if both parties reserve the right to change their minds when the time for performance arrives.[188]

The third difficulty comes from the complex and emotional nature of both informed consent forms and dispositional agreements. Dispositional agreements are included amidst complex medical information that requires a high level of sophistication to read and understand. Some consent forms, for example, are twelve pages long, single-spaced and requires a college-level education to understand. Enfolding dispositional agreements into the informed consent form's recitation of worst-case scenarios virtually ensures their neglect. [189]

5. Resolution of Disputes

How are disputes over the embryos best resolved? The American model has shown us that when there is no uniform policy regarding their disposition, the courts find themselves at a loss. When the contracts are incomplete or when they fail to consider possible scenarios, there are no reliable indicators of the couple's consent and intent regarding the disposition of their embryos. This would be responsible for the inconsistent decisions made by the courts that are forced to decide cases on a case-to-case basis.

In the Philippines, no such cases have been decided. This should not prevent the creation of measures to prevent a similar situation from arising even as the legislature hesitates to provide for a clearly defined policy on IVF and other related ARTs. Fertility specialists can agree to provide for a uniform consent agreement for the disposition of embryos. Such agreement should not be a mere reproduction of international agreements but should be drafted with Philippine considerations in mind. A well-drafted agreement will provide much-needed stability

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[187] A.Z. v. B.Z., 431 Mass. 150, 725 N.E.2d 1051, 1057-58 (2000).
[188] Chandler, *supra* note 186.
[189] Waldman, *supra* note 4, at 931-932.

and predictability to the field of reproductive medicine. It will assure the patients and the clinics that their agreement as to the disposition of the embryos as embodied in their contract will prevail. This will also create a strong incentive for couples to make careful decisions when resorting to ART.[190] Doctrinal consistency demands that courts scrutinize the process by which dispositions of embryos are undertaken in order to be able to prepare standard guidelines.

6. Effect of Want of Consent on a Contract

It is apparent from a study of the different ART contracts that the consent contemplated must be knowing and intelligent. It must be given freely after a deliberate assessment of the rights. A defect in the consent of one of the parties will give rise to a voidable contract. The Civil Code provides:

> Article 1390. The following contracts are voidable or annullable, even though there may have been no damage to the contracting parties:
>
> (1) Those where one of the parties is incapable of giving consent to a contract;
>
> (2) Those where the consent is vitiated by mistake, violence, intimidation, undue influence or fraud.

B. Object of contracts

The object of a contract is the thing, right, or service that is the subject matter of the obligation arising from the contract.[191] It has been said that of all the requisites of a contract, the object is the most indispensable.[192]

In onerous contracts, the object is the thing or service itself. Contracts for artificial insemination, in vitro fertilization and surrogacy basically involve the performance of an act to artificially impregnate a woman and carry a child to term. The object would then be the service of doing such.

We have seen, however, that ART contracts are by no means individually executed; the process involves the execution of a number of contracts dealing with the different stages of the artificial reproduction process. Therefore, contracts are also executed for the sale of sperm and the sale of eggs, and for the cryopreservation of embryos. For the sale of egg and sperm, the objects would be the egg and sperm themselves. The object for cryopreservation contracts would be the service of providing such.

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[190] Stolier, *supra* note 71, at 481.
[191] IV TOLENTINO, *supra* note 91, at 520.
[192] *See* JURADO, *supra* note 94, at 453.

As a general rule, all things or services may be the object of contracts, subject to the following requisites: *First*, the object should be within the commerce of men, i.e., it should be susceptible of appropriation and transmissible from one person to another. *Second*, the object should be real or possible, i.e., it should exist at the moment of the celebration of the contract, or at least, it can exist subsequently or in the future. *Third*, the object should be licit, i.e., it should not be contrary to law, morals, good customs, public order or public policy. *Fourth*, the object should be determinate, or at least, possible of determination, as to its kind.[193] For the purposes of ART contracts, the pertinent requisites would be the first and the third requisites. The second requisite should present no controversy; the object of ART contracts undoubtedly exists. The fourth requisite is also self-evident; there is no issue as to the object's determination.

1. Within the commerce of man

The Civil Code provides that:

> All things which are not outside the commerce of men, including future things, may be the object of a contract. All rights which are not intransmissible may also be the object of contracts.[194]

Things that are outside the commerce of man are those things which are not susceptible of appropriation or private ownership, and which are not transmissible.[195]

Whether or not human body parts are capable of being alienated and disposed of is an ongoing debate. Many are wary of treating the human body as property, though it is clear that individuals, to some extent, use their bodies as property – it is a property right to possess one's body, a property right to exclude others from its use of it, and one's own right to use it.[196] A common argument in favor of treating body parts, as property would run as follows:

> 1. If I am not a slave, nobody owns my body. Therefore
>
> 2. I must own my body and each and every part of it. Therefore
>
> 3. If any part of my body is separated from me, I continue to own that separated bodily part.[197]

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[193] *Id.* at 454.

[194] CIVIL CODE, art. 1347, par. 1.

[195] IV TOLENTINO, *supra* note 91, at 521.

[196] These rights correspond to the laws against slavery, physical injury and assault. It is the underlying basis for civil liberties. Roosevelt, *supra* note 100, at 81.

[197] J.W. HARRIS, PROPERTY AND JUSTICE 356-357 (1996).

In the Philippines, human body parts are capable of appropriation and disposition, though only immediately before or after death. A law allows disposition of one's own body parts, but only if done as a donation or legacy.[198] The receipt of compensation for such organs is objected to by many sectors, as they involve basically ethical issues. However, those who favor compensation for organs question the fairness of a system that offers no compensation to the families of those who give the "gift of life."[199]

On the other hand, blood, hair, sweat, semen, ovum, teeth, urine and pieces of skin and muscle have all been sold without controversy.[200] These renewable substances and materials produced by the body are considered as personal property capable of disposition. Thus, in other jurisdictions where artificial reproductive technologies have been widely available for many years,[201] the service of providing these to the public has indeed become a lucrative business. Sperm banks are not uncommon in many countries. Ova banks too, because of improvements in cryopreservation, are now technologically possible.[202] Their treatment as property is all the more highlighted by the fact that after the disposition, the donor is usually relieved of all rights and responsibilities for future use,[203] implying complete and full transfer of ownership and all its accessory rights.

A case that exemplifies such belief is the case of *McDonald v. McDonald*,[204] tried before the courts of the state of New York. Eggs that were obtained from another woman and fertilized with the husband's sperm were implanted into the wife's uterus. In the legal battle for custody of the child, the court held that because the ovum was "donated," any rights or claims of the genetic mother were severed. There has not been a similar case adjudicated before Philippine courts.

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[198] Rep. Act No. 7170, otherwise known as the Organ Donation Act of 1991.

[199] Wagner, *Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology*, 33 DUQ. L. REV. 931, 945 (1995).

[200] Roosevelt, *supra* note 100, at 81.

[201] In the United Kingdom, it is estimated that 1,500 to 2,000 children are born each year as a result of AID and more than 1,000 children have been born as a result of IVF. See D. MEYERS, *supra* note 2, at 58. In the Philippines, RM Center, a clinic that specializes in artificial insemination and in vitro fertilization, has reported 100 successful pregnancies in four years. Personal interview with Dr. Leonardo Almeda, Reproductive Endocrinologist and Fertility Expert, Reproductive Medicine Center (Feb. 15, 2002).

[202] *See* Artificial Reproductive Technology, *supra* note 126.

[203] *Id.* Some commentators believe that this is a better view since the recognition of property rights in human biological materials may diminish the fear created by advancing biotechnology since people are more secure because they hold certain rights over their person. Amy S. Pignatella Cain, *Property Rights in Human Biological Materials: Studies in Species Reproduction and Biomedical Technology*, 17 ARIZ. J. INT'L & COMP. LAW 449, 474 (2000). Recognition of rights in the human body also diminishes the international market in human body parts and fears of commodification of the human body. *Id.* at 476-477.

[204] 608 N.Y.S.2d 477 (App. Div. 1994).

Contracts for artificial insemination, in vitro fertilization, and surrogacy basically involve the services of a licensed physician. Whether or not these services are within the commerce of man is an ethical, and not necessarily a legal, debate. Services for artificial insemination, because explicitly allowed by law, are legal. Thus, all the stages of artificial insemination, from the collection of sperm to the placement of the sperm into the uterus opening using a tube conduit, is a valid service.

In vitro fertilization also involves sperm collection and insemination. It also includes retrieval of an ovum and the combining of the sperm and ovum in a Petri dish where fertilization occurs. Are the services involved in these procedures within the commerce of man?

No question of this nature has yet been tackled in Philippine courts. In other jurisdictions, however, the service of providing in vitro fertilization has been held to be valid, as physicians are liberally allowed to offer their services to the public, usually for large fees.

As regards surrogacy, the object would ultimately be the services provided by the surrogate mother. For traditional surrogacy, the service would include the surrogate mother being artificially inseminated with the husband's sperm and carrying the child to term. For gestational surrogacy, the service integrally includes in vitro fertilization conducted with the husband's sperm and the wife's eggs, and the embryo's implantation in the surrogate mother.

Whether or not this service is within the commerce of man is again primarily an ethical debate. Many have argued that it is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else's child.[205] Legally though, the issue would again involve looking into the question of the body as property, and whether "leasing out the uterus" is a valid proprietary act.

2. Not contrary to law, morals, good customs, public policy or public order

In determining the lawful objects of a contract, the law also requires that: "All services which are not contrary to law, morals, good customs, public order, or public policy may likewise be the object of a contract."[206]

The object of the contract, as with the contract itself,[207] must not be contrary to law, morals,[208] or public policy.[209] While the law and public policy is easy

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[205] *See* CAROL SMART, FEMINISM AND THE POWER OF LAW 107 (1989).

[206] CIVIL CODE, art. 1347, par. 2.

[207] CIVIL CODE, art. 1306.

[208] Morals may be considered as meaning good customs; or those generally accepted principles of morality which have received some kind of social and practical confirmation. *See* IV TOLENTINO, *Supra* note 91, at 418.

[209] Public order signifies the common weal; it is identical to public policy. *See* IV TOLENTINO, *Supra* note 91, at 419.

enough to be determined, morality, on the other hand, would have to depend on the general sentiments of the community, which can oftentimes be difficult to identify. As has been discussed, the only certain lawful object for ART contracts would be that provided for by AIH, AID or AIC. The licitness, morality, and conformity to public policy of the other types are unsettled under Philippine law.

3. Person or Property?

An issue related to the object of ART contracts is the custody of cryopreserved embryos. These contracts are usually executed in relation to the contract for in vitro fertilization. They are necessary because of the nature of in vitro fertilization; several eggs are harvested from a woman's body, placed in a Petri dish and exposed to sperm. It is likely that several eggs are fertilized in the process. These fertilized eggs are frozen for future use.[210]

The ability to freeze embryo raises many legal issues. For example, there is the question of who owns the embryo, and whether, after legal separation or annulment of the marriage, the embryo is still available for implantation.[211] To prevent protracted legal battles, the provisions of a contract for cryopreservation would often involve provisions for the disposition of the frozen embryos in the event of death of one or both of the spouses, or in the event of dissolution of marriage. From this perspective, it would appear that the object of this agreement is ultimately the embryo itself. The question now arises as to the legality and morality of treating it as such.

Whether an embryo is property or a person is by no means a rhetorical debate. The resolution of many issues hinge upon such characterization. Indeed, if the embryo were to be considered a person, it could not be the object of contracts, as persons are entitled to rights against treatment as property.[212]

If the courts consider the embryos as property, they will apply principles of property law in determining the ownership of the embryos.[213] Such a task would be

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[210] Some countries, like Britain, disallow such storage for more than 10 years. [Human Fertilization and Embryology Act Regulations, 1990 ch. 37 314 (Eng. 1996)].

[211] D. MEYERS, *supra* note 2, at 59.

[212] Nothing less than the Bill of Rights of the Constitution guarantees this right to liberty. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws. CONST. art. III, sec. 1.

[213] *See* York v. Jones, 717 F. Supp. 421, 425 (E.D. Va. 1989). A couple participating in an IVF program in Virginia requested the transfer of their embryos to a facility in California upon their subsequent move there. The IVF clinic refused, claiming that transfer was not an option based on the disposition agreement agreed

relatively simple here in the Philippines considering that Philippine law defines property as a "bundle of rights" in relation to the thing owned. Among the rights are exclusive possession or enjoyment, control over use, disposal, alienability, and devisability. These rights are protected and safeguarded by the State.[214]

Though an absolutely correct determination of its character is philosophically and practically impossible, owing to the myriad diverse religious and pragmatic views, a decision is imminent. New medical technologies are developing at a furious pace, and the law, though slow, must follow.

Resistance to the treatment of embryos as mere property is practiced by not a few who perceive the embryo as persons, or at least, as future persons. They perceive the embryo as an undeveloped human, already in possession of all the characteristics capable of sustaining life. This belief has its roots largely in religious[215] and moral[216] convictions. Scientifically, the belief in the embryo as a person is based on its many similarities to the features of a living person.[217] Indeed, in several controversies involving the unborn, some courts have already recognized a fetus' capacity to act, finding them as capable of inheriting[218] and of sustaining actionable injuries.[219] It should be noted, however, that these cases dealt with a fetus, which is technically much further in development than an embryo.

The Constitution itself recognizes the existence of the unborn and extends to it State protection from the time of conception.[220] The characterization of the

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upon. The court considered the embryo as property and treated the relationship between the parties as one of bailor and bailee.

[214] Under the Constitution, no person shall be deprived of life, liberty, and property without due process of law.

[215] The Catholic Church, for example, has been vigilant in its defense of the embryo as a human being. *See* Quirk, *supra* note 113.

[216] A US Senator, Sam Brownback, is popular for espousing the immorality of treating embryos as property. He writes, "If you believe, as I do, that life begins at conception and that the human embryo is a person fully deserving of dignity and the protection of our laws, the you believe that we must protect this innocent human life from harm and destruction." Senator Sam Brownback, *Person or Property? at* http://www.christianity.com/CC/article/0,,PTID4211|CHID102753|CIID261592,00.html (last visited Jan. 31, 2002).

[217] In Davis v. Davis, 84 S.W.2d 588 (Tenn. 1992), it was stated that "DNA manipulation of molecules of human chromosomes reliably proves cell differentiation. The Court is persuaded that this relatively new technique opens a tiny window to the world to see and be aware of the most intimate and intricate details of man from his very beginning."

[218] Elliot v. Joicey, 1935 S.C. 57 (H.L.), as quoted in D. MEYERS, *supra* note 2, at 8.

[219] In Sylvia v. Gobeille, 220 A. 2d 222 (1966), the court allowed a child to recover for injuries sustained even before viability. Here, the court noted that there was "no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence, and we reject viability as a decisive criterion."

[220] CONST., art. II sec. 12: The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. *It shall equally protect the life of the mother and the life of the unborn from conception.* The natural and primary right and duty of parents in the rearing of the youth for

unborn, however, remains ambiguous and unarticulated. Fr. Joaquin Bernas, a member of the 1986 Constitutional Convention, writes: "It is first of all important to understand what [this provision] does not assert. It does not say that the unborn is a legal person; nor does it deny, however, that the state under certain conditions might regard the unborn as a person."[221]

Despite the intent of the framers, the Constitution itself is bereft of any categorical pronouncement on the status of the unborn, let alone the nature of an embryo. It did not define the term "unborn", nor did it mark the exact period of "conception." Construing this with the Civil Code,[222] it would appear that for purposes of civil personality, it is imperative that a child first be born before the State recognizes it as a person. Before being born, the State merely recognizes its existence as unborn, yet possessing certain rights.

The purpose of the Constitutional provision is thus clearly for the purposes of penal laws against abortion. As stated by Fr. Bernas: "[Article III Section 12 of the Constitution] is intended primarily to prevent the state from adopting the doctrine in the United States Supreme Court decision of Roe v. Wade which liberalized abortion laws.... "[223]

It is here suggested that the state's treatment of abortion will most probably indicate its stance on whether or not an embryo would be a valid object of a contract. The earlier the law recognizes an embryo as a person, the more likely its being treated as a property would be illegal.

The framers of the Constitution agreed that the conception of a human occurs at the moment of fertilization of the egg by the sperm:

> MR. GASCON: When it speaks of "from the moment of conception," does this mean when the egg meets the sperm?
>
> MR. VILLEGAS: Yes, the ovum is fertilized by the sperm.[224]

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civic efficiency and the development of moral character shall receive the support of the Government. (Emphasis supplied)

[221] JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 77 (1996).

[222] CIVIL CODE, art. 40: Birth determines personality; but the conceived child shall be considered born for all purposes that are favorable to it, provided it be born later with the conditions specified in the following article.

CIVIL CODE, art. 41: For civil purposes, the fetus is considered born if it is alive at the time it is completely delivered from the mother's womb. However, if the fetus had an intra-uterine life of less than seven months, it is not deemed born if it dies within twenty-four hours after its complete delivery from the maternal womb.

[223] J. BERNAS, *supra* note 221, at 77-78.

[224] IV RECORD OF THE PROCEEDINGS OF THE 1987 CONSTITUTIONAL COMMISSION 711.

Based on such intent, disposition of the embryos is illegal, as the embryo cannot legally be considered an object of the contract. As a person, the embryo would be outside the commerce of man. As a person, the embryo would also be guaranteed the right to life and liberty under the due process clause, and would thus be free from any rights that ownership over property would entail.[225]

In the previously cited case of *Davis v. Davis*,[226] a married couple sought control over cryogenically preserved embryos. These embryos were produced from their respective eggs and sperm, but were not implanted because they decided to dissolve their marriage. The Tennessee Supreme Court explicitly held that the preserved embryos are human embryos, and as such, are not property. The court, in resolving the issue, refused to decide the case in terms of property rights and instead employed a balancing of interests approach.

This interpretation is not at all universal as other countries treat embryos as property. In Great Britain, for example, the cryopreservation of embryos is allowed for a maximum period of 10 years, after which the embryos are destroyed.[227] Such destruction is not likened to abortion, infanticide or murder. The embryos are simply not considered persons under British law.

Moreover, it has been argued that gamete providers should be accorded at least the functional equivalent of property rights. Given that gamete providers have rights to possess their embryos, to use them and to donate them or to withhold them from others, it would be hard to deny that embryos constitute property.[228] Though practical, this view could lead to the complete commodification of the human embryo. Such treatment of the embryo may accentuate the trend to view children of reproductive technology as consumer goods, leading to a whole new set of social and legal problems.[229] In the United States, the beginnings of such controversy is seen in the selection of sperm and egg donors and surrogate mothers; the donor or surrogate's

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[225] Treating a person as property is a felony under our laws. Article 272 of the Revised Penal Code provides: Slavery – The penalty of *prision mayor* and a fine not exceeding 10,000 pesos shall be imposed upon anyone who shall purchase, sell, kidnap, or detain a human being for the purpose of enslaving him.

[226] 84 S.W.2d 588 (Tenn. 1992).

[227] *See* Artificial Reproductive Technology, *supra* note 126.

[228] Roosevelt, *supra* note 100, at 83.

[229] Lori B. Andrews, *Embryonic Confusion*, *at* http://www.med.howard.edu/ethics/cases/emb.htm (Spring 2002).

physical attributes, intelligence, character, and other personality traits are treated as valid considerations in the choice of which donor or surrogate to choose.

An advocated solution to the problem of determining whether an embryo is strictly property or strictly a person is a compromise between these two extreme views. The legal philosopher Ronald Dworkin notes that the actions of both camps suggest common ground. He writes: "The truth is that liberal opinion, like the conservative view, presupposes that human life has intrinsic moral significance, so that it is in principle wrong to terminate a life when no one's interests are at stake."[230]

The reverence for life should instead lead the way to the creation of a special status for embryos. The embryo is not a person, yet it is certainly a developing form of human life and as such deserves respect; the embryo is not property but deserves less protection than a woman or man. Thus, it should be recognized as "quasi-property" or as an "interim category."[231]

Under current laws, it appears that it is only for artificial insemination that ART contracts have a valid object. For other types of ART, the answer is not as clear-cut. It is impossible to determine the legality of the object of these various contracts, be it the service, the semen, egg or embryo itself, without any policy directive from the State. This is because these objects are not illegal *per se*, as they are clearly allowed in other jurisdictions.

C. Cause of contracts

The cause of the contract is the essential reason that moves the parties to enter into the contract. It is the immediate, direct and proximate reason that justifies the creation of an obligation through the will of the contracting parties.[232]

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[230] As quoted by Paul Lauritzen, *Neither Person nor Property: Embryo research and the status of the early embryo, at* http://www.americapress.org/articles/lauritzen.html (March 26, 2001).

[231] Roosevelt, *supra* note 100, at 83.

[232] IV TOLENTINO, *supra* note 91, at 529.

In our jurisdiction, cause and consideration are used interchangeably. *Causa* is merely the civil law term, while consideration is the common law term.[233] It is however undisputed that cause is a much broader term, as it includes also liberality or moral duties.[234]

The law expressly defines the cause for the different types of contracts:

> In onerous contracts the cause is understood to be, for each contracting party, the prestation or promise of a thing or service by the other; in remuneratory ones, the service or benefit which is remunerated; and in contracts of pure beneficence the mere liberality of the benefactor.[235]

1. ART as an onerous contract

In onerous contracts, the cause is understood to be, for each contracting party, the prestation or promise of a thing or service by the other. Because the cause would be the impelling reason for entering into the contract, the cause would necessarily be different for each party.[236]

In AIH, the cause for the intended parents is the undertaking to be performed by the physician, while the cause for the physician is the fee he or she would receive in payment for his or her services. For AID or AIC, the causes for the different parties are the same, except that another contract for the sale or donation of sperm is executed beforehand. If the sperm is sold, the cause for the intended parents is the undertaking of the sperm donor to provide the sperm, while the cause for the sperm donor is the obligation of the intended parents to pay his price.

The basic contract for in vitro fertilization would have for its cause the undertaking to be performed by the physician on the part of the intended parents, and the fee to be received on the part of the physician. These would be the same causes for the essential yet separate contract for the cryopreservation of embryos. A contract for the sale of an ovum or sperm would have as the respective causes for

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[233] JURADO, *supra* note 94, at 461-462.
[234] IV TOLENTINO, *supra* note 91, at 530.
[235] CIVIL CODE, art. 1350.
[236] IV TOLENTINO, *supra* note 91, at 530.

the intended parents and the donors, the undertaking of the donor to provide the egg or sperm and the obligation of the intended parents to pay for them.

A traditional surrogacy contract would have as its causes the obligation of the surrogate mother to allow to be impregnated and to carry the child to term and the corresponding undertaking of the intended parents to pay for her services. For a gestational surrogacy contract, the causes would also be the same. An added contract for the in vitro fertilization and sperm and/egg donation would have to be executed, with the same causes as in ordinary in vitro fertilization contracted by a husband and wife with a physician.

2. ART contract as remuneratory contract

A remuneratory contract is one where a party gives something to another because of some service or benefit given or rendered by the latter to the former, where such service or benefit was not due as a legal obligation.[237] It is in actuality a donation,[238] but governed by the rules on contracts.[239]

AIH, AID and AIC contracts, in vitro contracts, contracts for traditional and gestational surrogacy, as well as their supplementary contracts can be remuneratory if they are done by the physician, surrogate mother or sperm and egg donor in consideration for something previously done for them by the intended parents, which previous act was not a demandable debt.

It should be noted, however, that the acceptability of receiving payment for rendering surrogacy services is by no means a settled matter. Many states have allowed surrogacy, but only if no payment were received. Would a remuneratory contract later executed, in consideration for surrogacy services previously provided for free, be valid? This would appear to be a way for circumventing the prohibition.

3. ART contract as contract for pure beneficence

Gratuitous contracts are essentially agreements to give donations.[240] ART contracts caused by the mere liberality of the benefactor would thus appear to be valid. It should be important to note, however, that before these are to be given

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[237] *Id.*

[238] CIVIL CODE, art. 726: When a person gives to another a thing or account of the latter's merits or of the services rendered by him to the donor, provided they do not constitute a demandable debt,...there is also a donation.

[239] CIVIL CODE, art. 732: Donations which are to take effect inter vivos shall be governed by the general provisions on contracts and obligations in all that is not determined in this title.

[240] IV TOLENTINO, *supra* note 91, at 534.

effect under our laws, the donation must conform to the formalities prescribed by law for a valid donation.

4. Cause should be licit or lawful

Contracts with unlawful cause produce no effect whatever. The cause is unlawful if it is contrary to law, morals, public order or public policy.[241]

AIH, AID and AIC are explicitly allowed by Article 164 of the Family Code. There is no controversy if these services were to be done without monetary compensation. The law is silent, however, as to whether or not physicians and sperm donors can obtain fees for these services. It is widespread practice, however, for physicians and sperm donors to receive fees. Indeed, physicians charge very high fees for each cycle of insemination, and pregnancy is hardly achieved on the first try. It can be further said that these fees are doctor's fees, undoubtedly a lawful cause. It is therefore presumed that such compensation received is valid.

Though IVF is not mandated nor prohibited by any law, fees for the performance of IVF is to be argued along a similar vein. Physicians have been charging their patients for such services.[242] Furthermore, physicians and their fertility clinics are clearly entitled to storage fees for cryopreservation of embryos; the expenses for their storage and at such conditions are not expensive.

There have been no reported cases of surrogacy in the Philippines, but in other jurisdictions, its legality and morality are fiercely debated. Indeed, the idea of "leasing the uterus" or selling a baby for considerable compensation appears to bother not a few. In the United States, six states deny the enforcement of all surrogacy contracts.[243] Some states[244] deny enforcement of the surrogacy contract only if the surrogate is to be compensated, while other states[245] specifically provide that unpaid surrogacy contracts are lawful and enforceable.

Several cases have already reached the courts of other jurisdictions regarding the legality of receiving compensation for services rendered as a surrogate mother.

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[241] CIVIL CODE, art. 1352.

[242] At RM Center, the pregnancy success rate for IVF is at 28%. Thus, spouses who obtain treatment usually contract for successive attempts, until pregnancy is achieved or until they desist voluntarily or upon the recommendation of the physician. Personal interview with Dr. Leonardo Almeda, Reproductive Endocrinologist and Fertility Expert, Reproductive Medicine Center (Feb. 15, 2002).

[243] These states are the District of Columbia, Indiana, Michigan, New York, North Dakota, and Utah. *See* Artificial Reproductive Technology, *supra* note 126.

[244] These states are Kentucky, Louisiana, Nebraska, and Washington. *Id.*

[245] These states are Florida, Nevada, New Hampshire, and Virginia. *Id.*

The first case to reach an American state supreme court was *In re Baby M*,[246] brought before the state supreme court of New Jersey. In this case, a surrogate contract provided for a fee of Ten Thousand Dollars ($10,000.00) for a woman's services as surrogate mother. For this consideration, the woman promised to be inseminated with the contracting husband's sperm and to carry the conceived child to birth. She promised to then deliver the child to the husband-father, and assist with any formalities of adoption by the wife. However, after the child was born, the gestational mother refused to honor the contract and demanded custody of the child. The husband and wife sued for specific enforcement of the contract. The trial court held that the surrogacy contract was valid and ordered specific enforcement of the contract. In reversing the lower court, the New Jersey Supreme Court found that the payment of money to a surrogate mother was illegal, contrary to public policy, and potentially "degrading to women." While the Court granted custody to the father, it voided the surrogate mother's parental rights and the wife's adoption of the child, and declared the surrogate to be the child's natural and legal mother. The Court however stated that where a woman "voluntarily and without payment agrees to act as a surrogate, provided she is not subject to a binding agreement to surrender her child, no New Jersey law is offended."

Another case regarding compensation for surrogacy was brought before the Connecticut Supreme Court. In *Mary Doe v. John Roe*,[246] an after-birth settlement agreement between the intended parents and the traditional surrogate mother included a promise by the surrogate mother to consent to the termination of her parental rights for additional consideration over that provided in the traditional surrogate contract. A probate court accepted the settlement agreement, terminated the surrogate's parental rights, and authorized the beginning of proceedings for step-parent adoption. Because the surrogate refused to sign the adoption papers or relinquish custody of the child, the husband and wife filed a motion in the trial court to cite the surrogate mother in contempt for failing to comply with the terms of the settlement agreement. The surrogate filed a counterclaim, requesting the court to declare the agreement to be a nullity, as it was based on a void surrogacy contract. The issue before the Connecticut Supreme Court was whether or not a trial court had subject matter jurisdiction to render judgment in accordance with a stipulated agreement reached in the probate court. The Court decided that it did.

The result of this case suggested a way of going around the prohibition on traditional surrogacy. Though generally traditional surrogacy contracts would be unenforceable, a judicially accepted settlement by the surrogate after the birth of the child for an added amount, in consideration for the wife's adoption of the child,

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[246] 537 A. 2d 1227 (N.J. 1988).

[247] Conn. 652 (1998).

would, under this case, appear to be legal under Connecticut laws, and states with identical laws. In the Philippines, such a procedure would probably be disallowed, as it is too much in the nature of a sale of a child or adoption for a fee.

In *Johnson v. Calvert*,[248] a gestational surrogacy contract was involved. Here, the wife previously underwent a hysterectomy. Although without a uterus, her ovaries continued to produce healthy eggs. Because she and her husband still wished to have children, they found a young woman who offered to act as surrogate for a fee. The surrogate agreed to have the husband and wife's in vitro-produced-embryo implanted into her uterus, carry the fetus to term, and relinquish all parental rights after the birth of the child.

Before the child was born, a dispute arose over the financial terms of the contract. The surrogate threatened to refuse to give up the baby after it was born. The spouses sued to be declared the child's legal and natural parents. The surrogate sued to have the contract declared to be an unenforceable surrogacy contract.

The California Supreme Court ultimately held in favor of the spouses. The Court declared that its decision was governed by the intent of the efforts of the parents, by which the child would not have otherwise been born. The court said that "the parties' aim was to bring [the spouses] child into the world, not for them to donate a zygote to the surrogate."[249] Despite this, the Court opined that the surrogate, under their laws, always had the right to abort the fetus. Any promise abrogating this right would be unenforceable. "Gestational surrogacy contracts do not exploit women of lower economic status any more than any other poorly paying and undesirable employment."[250]

Indeed, it was important for the court to come up with this statement, in order to address the possible stigma that could arise from the impression of "uterus-leasing." In the Philippines, for example, it is feared that surrogacy might become a profitable source of income for women from the lower income brackets.[251] Unlike the United States, however, the Philippines has never legalized abortion. There is, therefore, no effective way out for a surrogate. Terminating a pregnancy without the consent of the intended parents might constitute a breach of the surrogacy contract by the surrogate, a very expensive act which she could probably not afford.

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[248] 19 Cal. Rptr. 2d 494 (1993).

[249] *Id.* at 519.

[250] *Id.*

[251] The $10,000 fee paid the surrogate in the Johnson case would amount to $1.45 per hour for 24 hours per day for 40 weeks. The implication is that this "low" payment is exploitation. *See* Artificial Reproductive Technology, *supra* note 126.

The difficulty in determining whether or not monetary compensation is to be allowed in surrogacy contracts and the proper amount for such further decreases the likelihood of any law allowing surrogacy contracts any time soon.

VII. LIABILITIES UNDER THE CONTRACT

Every promise made as a result of a contract engenders expectations that the obligor will comply with the terms that have been agreed upon. However, these expectations can be disappointed if the obligor fails to perform entirely, offers to perform belatedly, or performs the obligation in an unsatisfactory manner.[251] If any of these instances arise, there would be non-compliance with the terms of the contract. This is what is known as a breach of contract.[252]

For ART contracts, it is always possible that one party will refuse to perform his or her obligation, or will fail to perform it properly. To rectify such breach, the remedies available in law are specific performance[253] or a suit for damages.[254]

A. Liability of the Physician

A physician performing any of the ART services has the responsibility of exercising ordinary diligence, otherwise he might be subjected to a malpractice action.[256] Thus, any negligence on his part in the performance of the procedures, resulting in either injuries or death, may subject him to a criminal suit for negligence[257] or a civil suit for damages.[258]

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[252] ZIMMERMAN, *supra* note 131, at 783.

[253] "Breach of contract" is a term taken from the English common law. *Id.* at 783. In other civil law countries, non-compliance is known by different names. In the French Civil Code, it is referred to as non-performance ("inexecution"). *Id. See* FRENCH CIVIL CODE, art. 1147, 1184. The German Code, on the other hand, recognizes only two specific grounds for breach: supervening impossibility and delay in the performance. *Id.*

[254] CIVIL CODE, art. 1165. When what is to be delivered is a determinate thing, the creditor, in addition to the right granted him by article 1170, may compel the debtor to make the delivery.

If the thing is indeterminate or generic, he may ask that the obligation be complied with at the expense of the debtor.

If the obligor delays, or has promised to deliver the same thing to two or more persons who do not have the same interest, he shall be responsible for any fortuitous event until he has effected the delivery.

[255] CIVIL CODE, art. 1170. Those who in the performance of their obligations are guilty of fraud, negligence or delay, and those who in any manner contravene the tenor thereof, are liable for damages.

[256] Castillo et. al., *supra* note 3, at 158.

[257] REV. PENAL CODE, art. 365. Imprudence and negligence – Any person who, by simple imprudence or negligence, shall commit an act which would, otherwise, constitute a grave felony, shall suffer the penalty of *arresto mayor* in its medium and maximum periods; if it would have constituted a less serious felony, the penalty of *arresto mayor* in its minimum period shall be imposed.

Despite this, it should be recalled that a basic principle in the recovery of damages is the sustaining of injury. In *John Doe and Jane Doe v. Irvine Scientific Sales Co. and Baxter Healthcare Corp.*,[259] the court absolved the physician and the fertility clinic from liability due to the absence of injury. The embryos of a couple were washed with an albumin solution contaminated with the virus of Creutzfeldt-Jacob disease. Washing the embryos in the contaminated solution rendered the embryos unusable. The couple sued for damages. The court held that because the plaintiffs themselves had not sustained any injury, there was no cause of action. A different ruling may arise if the destruction of such embryos would constitute injury, at least of the economic kind.

Liability on the part of the physician may also arise if the egg is inseminated with the wrong sperm, the sperm is inseminated with the wrong egg, or the wrong embryos are implanted into the intended uterus. Moreover, it is not impossible that a physician might negligently inseminate a woman with the sperm of a man from a different race without her consent. It is undeniable that fault can be attributed to the doctor who performed the process, and redress can be found in a suit for damages.

Today's technology also allows intended parents to choose the gender[260] of the resulting children. Will the wrong gender of the intended child give rise to a cause of action on the parent to sue? This could very well be an issue in countries wherein males are preferred over females. A probable cause of action would be based on the difference in lifetime earnings between a male and female.

Moreover, intended parents can now choose the resulting physical attributes of resulting children, usually through the sperm and egg donor selection. The disappointment in not achieving the desired appearance was in fact the basis for a civil suit in the United States. In that case, a couple who sought sperm donation settled on donor number 183, who, like the husband, had dark curly hair and brown eyes. But when the resulting triplets were born, one of them had red hair. DNA tests later revealed that Donor 83, rather than 183, was the genetic father. The couple sued the physicians who performed the procedure. The wife testified at the trial that she could say "with probability" that children of Donor 183 would have been more attractive than her children, even though she had never seen either

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[258] CIVIL CODE, art. 33. In cases of defamation, fraud and physical injuries, a civil action for damages, entirely separate and distinct from the criminal action, may be brought by the injured party. Such civil action shall proceed independently of the criminal prosecution, and shall require only a preponderance of evidence.

[259] 7 F. Supp.2d 737 (1992).

[260] The Genetic and IVF institute, based in the state of Virginia, U.S.A., reports an 85% success rate in selecting girls (13 of 14 pregnancies) and a slightly lower rate of success in those desiring males. *See* Artificial Reproductive Technology, *supra* note 126.

Donor 83 or Donor 183 and had made the choice on a decision that was just a few lines long. The couple lost, but in a 3-2 appellate decision.[261]

A physician is also directly liable for the intentional destruction of an embryo. In *Del Zio v. Manhattan's Columbia Presbyterian Medical Center*,[262] a physician was ordered to pay Five Hundred Thousand Dollars ($500,000.00) in damages for the intentional destruction of an embryo. Dr. Del Zio, the chief obstetrician-gynecologist of the hospital, decided that the attending physician of the intended parents lacked the skills to properly perform the procedure. He also personally believed that IVF was unethical and immoral. Without the consent of the intended parents and without consulting the other doctors, he ordered the fertilized embryo destroyed before its implantation. He was held liable for the intentional infliction of emotional distress.

It should be noted in the above case that the amount of damages awarded was based on the intentional infliction of emotional distress, and not for the value of the embryo, a potential human life. The person-property dispute would again come to play: treating the embryo as a person would entitle the claimant to damages which could probably include the loss of earning capacity, while treating the embryo as property would entitle the claimant to the amount of money spent to produce the fertilized embryo and maybe, moral damages.

As in any other pregnancy, there is a possibility that children born through ART processes may suffer from physical or mental defects. Wrongful birth actions have thus been known to be brought by parents against alleged offenders or tortfeasors, usually a doctor. These actions need not pinpoint the causal link between the wrongful act and the injury, but will simply establish the negligence of the doctor.[263] To prevent such actions, it would be wise to include in the contract the risks involved in the procedure, as well as those associated with carrying a child to term and eventual childbirth.[264]

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[261] The case name and court was not disclosed. The case facts are as reported by Lori Andrews, *Embryonic Confusion*, *supra* note 229.

[262] No. 74 Civ. 3588 (S.D.N.Y. Nov. 14, 1978).

[263] *See* Bernardo, *supra* note 58, at 44.

[264] An ideal stipulation in all types of ART contracts would read as follows:

"We understand that within the normal human population a certain percentage (approximately 4%) of children are born with physical or mental defects, and that the occurrence of such defects is beyond the control of physicians. We therefore understand and agree that (the doctor and the fertility clinic) do not assume responsibility for the physical and mental characteristic of any child or children born as a result of artificial insemination. We also understand that within the normal population approximately 20% of pregnancies result in miscarriages and that this may occur after insemination as well. Similarly, obstetrical complications may occur in any pregnancy. By our signatures on this document we do hereby absolve, release, indemnify, protect and hold harmless from any and all liability for the mental or physical nature of the child or children so conceived or

Physicians would no doubt attempt to lessen their exposure by contract.[264] Such exculpatory contracts may take the form of a disclaimer, which is a denial of all liability, or a limitation of remedies, which recognizes some liability but limits the plaintiff's remedy.[265]

B. Liability of Donor

A sperm donor for AID, under our laws, is not liable for adultery in the case of successful insemination of the wife.[266] As long as both the husband and the wife give their consent and this agreement is embodied in an instrument, the child produced by artificial insemination will be considered legitimate.[267] Because most standard sperm donation contracts embody a clause expressly stating the donor's disinterest in any rights over the sperm, the possibility of an action by or against a donor for support is unlikely. Moreover, a donor's identity is usually kept confidential.

Though IVF and surrogacy contracts are neither expressly allowed nor expressly prohibited under current laws, future laws may possibly adapt the stance taken for AID as regards sperm donors.

A sperm bank should be liable for negligence made in record keeping when a recipient receives semen other than that chosen. However, in *Hamicker v. University of Utah Medical Center*,[268] a court held that because no physical injury occurred to the wife or child, no cause of action could be sustained. To prevent such non-liability, a contract for the sale of the sperm should expressly include the obligation of the sperm bank to make proper deliveries of the sperm requested. A breach of such obligation would then give rise to a cause of action for damages. In the event that there was no former contractual relation with the sperm bank, the sperm being purchased by the hospital itself, a suit for damages can be based on quasi-delict.[269]

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born, and for the affirmative acts or acts of omission which may arise during the performance of this agreement." *See* Mid-Iowa Fertility, *supra* note 124.

[265] A typical stipulation in ART contracts would contain this stipulation:

"We hereby fully release the physician and any person or corporation acting as agent, employee, or subcontractor of the physician, and hold them harmless from any and all liability, other than that due to negligence, resulting from acts or omissions taken pursuant to this Agreement." *See id.*

[266] Styron, *Artificial Insemination: A New Frontier for Medical Malpractice and Medical Products Liability*, 32 LOYOLA L. REV. 411, 436 (1986).

[267] *See* I TOLENTINO, *supra* note 27, at 522.

[268] FAMILY CODE, art. 521.

[269] 349 Utah Adv. Rep. 3 (1998).

[270] CIVIL CODE, art. 2176. Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict....

Although ova banks are now a technological possibility,[270] there are still no reported cases on the liabilities of a third party egg donor or ova bank. Despite the difficulty of egg retrieval, there should not be any substantial differences with the conditions of the sale of sperm. Egg donation would most likely follow the prescribed guidelines for that of sperm donation, including the waiver of any rights over the eggs, once the retrieval is completed.

C. Liability of Spouses

Spouses may be sued when they fail to pay the fees prescribed by the physician or fertility clinic. In the event that the spouses refuse to pay, it would be rather ludicrous if the physician, as creditor, would have a lien[271] on the child produced. Aside from the fact that the child is not at all property, taking the child from the parents is a heinous crime.[272]

In the case of embryos, however, the issue may be different. Considered neither persons nor property, the retention of embryos pending full satisfaction of payment is probably tenable. It would certainly not qualify as serious illegal detention, as the embryos are not persons. The embryos, moreover, are always in the possession of the physician or fertility clinic anyway, as they can only survive when stored in cryopreservation chambers. Furthermore, the effect of such retention is only the non-implantation of the embryos when sought by the intending parents.

D. Liability of Surrogate

Most of the cases on surrogacy that have reached the courts dealt with the refusal of the surrogate mother to relinquish her claim over the child. In the case of *In re Baby M*,[273] a surrogate mother under a traditional surrogacy contract refused to honor the contract and demanded custody of the child after the child's birth. The husband and the wife sued for specific performance. The New Jersey Supreme Court, finding that the surrogacy contract was illegal, voided both the surrogate's parental rights and the wife's adoption of the child. The surrogate was however declared the child's natural mother.

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[271] *See* Artificial Reproductive Technology, *supra* note 126.

[272] CIVIL CODE, art. 1731 states: He who has executed work upon a movable has a right to retain it by way of pledge until he is paid.

[273] REV. PENAL CODE, art. 267. Kidnapping and serious illegal detention. – Any private individual who shall kidnap or detain another, or in any other manner deprive him of his liberty, shall suffer the penalty of *reclusion perpetua* to death.

[274] 537 A.2d 1227 (N.J. 1988).

Another case of similar import is *Johnson v. Calvert*,[275] a case involving gestational surrogacy. Just before the child was to be born, a dispute arose between the intended parents and the surrogate, with the surrogate refusing to relinquish custody over the child after birth. The husband and wife, in turn, sued to be declared the child's natural and legal parents. The California Supreme Court ruled in favor of the spouses, finding that the intent of the efforts of the parents governed, and that the parties' aim was to bring the husband and wife's child into the world, and not for the spouses to donate a zygote to the surrogate.

It would appear that there is no uniform ruling as to the result of an action for specific performance by the intended parents against a surrogate. The ruling in *Johnson*, however, suggests the development of a new doctrine, that of "intent of efforts of the parents," albeit only for gestational surrogacy cases. The difficulty of applying this same doctrine to traditional surrogacy contracts is manifest; the surrogate is the natural mother, and only a court ruling finding her as an unfit parent or a valid adoption process, could make her relinquish her parental rights over the child.

A surrogacy contract can also contain stipulations about the surrogate's conduct during pregnancy.[276] A perusal of these stipulations would involve a restraint on basic liberties, such as the right to liberty, the right to privacy, and the right to travel. Would a curtailment of these liberties be valid? Would a violation of these conditions constitute a breach of the contract?

A curtailment of basic liberties can only occur pursuant to a legal mandate, in the State's exercise of its police power.[277] When a child is already born, there is no question as to the state's power to exercise its protection over the child, under this police power and the principle of *parens patriae*. This protection can even be

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[275] 5 Cal.4th 84 (1993).

[276] A sample gestational surrogacy contract, obtained from a site devoted to helping surrogate mothers, lists as proper medical instructions:

A. _____ agrees to adhere to all medical instructions given to her, including abstention from sexual intercourse as directed by the IVF Physician.

B. Embryo Carrier will not smoke, drink alcoholic beverages, use illegal drugs, non-prescription medication or prescription medication without approval of the Responsible Physician.

C. Embryo Carrier will undergo prenatal tests, and will take only drugs and vitamins recommended or prescribed by the Responsible Physician.

D. Embryo Carrier will do everything reasonably appropriate for her good health and the good health of the fetus during pregnancy.

E. Embryo Carrier will not engage in any hazardous or inappropriate activity during the pregnancy.

F. Embryo Carrier will not travel outside of _____ after second trimester of pregnancy, except in the event of extreme illness or death in the family (with doctor's approval). *See* http://www.surromomsonline.com/articles/contract.htm (last visited Feb. 3, 2002).

[277] The Police Power is defined as the power of promoting the public welfare by restraining and regulating the use of liberty and property. Freund, as quoted by ISAGANI A. CRUZ, CONSTITUTIONAL LAW 39 (2000).

exercised over and above the basic liberties of a child's parents, under the "best interests of the child" doctrine. Whether or not this protection extends to an unborn child *in utero*, however, is still the subject of debate.

In May 2001, a woman was convicted before a South Carolina court for the death of her stillborn child caused by smoking crack cocaine while she was pregnant with the baby. She was found guilty of murder, and sentenced to 12 years without chance of parole.[277] A similar situation was tried before the Ohio Supreme Court, which ruled that a baby born addicted to cocaine because of his mother's addiction is legally an abused child.[278] Much earlier, a child in Michigan was allowed to sue his mother for tooth damage allegedly caused by his mother's use of tetracycline during pregnancy.[279] All these would suggest that a mother may be held liable for the prenatal injuries of a child.

In the case of surrogate mothers therefore, the probability of their liability for their negligence while pregnant is considerable, despite the contract's curtailment of civil liberties. In the Philippines, the probability is much greater, given the state's vigilance for the rights of the unborn and its unwavering resolve to penalize abortion at all stages.

E. Spouses against each other

Much of the debate concerning the nature of the embryo has been brought about by the greater number of incidents of spouses arguing over the custody of embryos in the event of a marriage's dissolution. The legal wranglings over embryos has ignited not a few questions over the treatment of embryos as property or as persons.

In *Davis v. Davis*,[280] the wife and the husband had the embryos cryogenically preserved, until such time they were ready for them to be implanted into the wife's uterus. Before any successful pregnancy could be achieved, the couple divorced. The wife sued for custody of the embryos, claiming that she had the right to use them and have them implanted into her uterus. The husband disagreed with such plan, refusing to have any parental rights over any resulting children. The Tennessee Supreme Court held that absent any prior agreement of the embryos' disposition, the male gamete provider has equal rights to determine the fate of the couple's frozen embryos. The court reasoned that the female gamete provider had no right to

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[278] *See S.C. Verdict Fuels Debate Over Rights of the Unborn*, *at* http://www.mapinc.org/drugnews/v01/n966/a02.html (May 27, 2001).

[279] *Id.*

[280] *Grodin v. Grodin*, 301 N.W. 2d 869 (Mich. App. 1980).

[281] 842 S.W.2d 588 (Tenn. 1992).

require the male gamete provider to become a father. The court then balanced the interests of the parties, weighing the husband's interest in avoiding parenthood against the wife's interest in using the embryos. Assuming the other party had a reasonable possibility of achieving parenthood by means other than by using the disputed embryos, the party wishing to avoid procreation should prevail. The husband was ultimately granted ownership and control of the embryos.

The New York Supreme Court resolved a similar issue in *Kass v. Kass*.[281] The husband and wife sought to have a child through in-vitro fertilization. Embryos resulting from the wife's egg and the husband's sperm were regularly cryopreserved. After nine unsuccessful attempts, the husband and wife decided to divorce. According to the contract with the fertility clinic, the couple stipulated that in the event that they fail to arrive at a decision as regards the use of the embryos if they divorce, they would donate the embryos to a science research program. The court ruled that the contract should control.

In both cases, the courts stated that a prior agreement controlled the disposition of the embryos. In the *Davis* case, however, because there was no prior agreement between the spouses, the court adopted instead a "balancing of interests" approach to solve the problem.

A standard contract for in vitro fertilization would normally include stipulations on the disposition of the cryogenically preserved embryos in the case of the dissolution of the marriage.[282] Considering the above rulings, it is suggested that

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[282] 91 N.Y.2d 554 (1998).

[283] One sample contract obtained was worded thus:

Initial Disposition Decisions. Should circumstances arise whereby embryos, fresh or frozen, remain which are not used for the purpose of attempting to initiate a pregnancy in the wife, the embryos may be donated to other infertile couples, or otherwise handled in a manner consistent with professional and ethical standards, and applicable legal requirements....We understand that we will retain the right to change our decision in this regard at any future time by notice to the Program. The ultimate disposition of these embryos will be subject, in the event of a change in our marital status or other events interfering with fulfillment of our present intentions, to applicable laws and court decisions affecting the ownership or control of the embryos. *See* Mid-Iowa Fertility, *supra* note 124.

Another contract stated:

We understand that the frozen fertilized eggs are subject to our joint disposition and therefore agree that all decisions about their disposal must be joint decisions, except where such disposal may be affected by applicable laws in the future or by any court decision having jurisdiction over our frozen fertilized eggs.

1. If one partner expires, the disposition of our frozen fertilized eggs will be at the discretion of the remaining partner.

2. If both partners expire, our frozen fertilized eggs will be discarded, subject to existing legal and ethical guidelines.

3. If our marriage is terminated or if we are unable to make a joint decision, the disposition of our frozen fertilized eggs will be determined by the court having jurisdiction over our frozen fertilized eggs. We agree that we will notify (the fertility clinic) upon the possible dissolution of the marriage. *See Nova In Vitro Fertilization, at* http://www.novaivf.com (last visited Feb. 10, 2002).

parties should clearly indicate their intended use of the embryos in the event of the dissolution of the marriage. Furthermore, a separate agreement, embodied in a separate document, would be preferred over the usual practice of inserting such stipulation into the basic contract. This would decrease the risk of its being dismissed as inconsequential by the intended parents.

G. Liability of third parties

The question as to whether or not third parties are also liable for injuries sustained by a child born though ART procedures is another issue. In the 1960's, British courts allowed suits to be brought against a drug company that produced Thalidomide, a drug prescribed to women for morning sickness in the early stages of their pregnancies, after finding proof of its cause for fetal defects. In *Jorgensen v. Meade Johnson Laboratories, Inc.*,[284] the US Court of Appeals for the 10th Circuit found that a cause of action existed against the defendant pharmaceutical company for one of its drug products. An oral contraceptive that they produced was found to have caused chromosomal alternations in the mother resulting in the birth of mongoloid twins. These cases prove that where a direct cause could be established for damage to fetuses, there ought to be a remedy for compensation.[285]

This principle could likely be used for suits against third parties using any of the ART procedures. Admittedly though, proving direct causation is difficult, especially if the third party is a large corporation, such as a pharmaceutical company or a corporation that produces medical equipment.

VIII. CONCLUSION

This paper was an attempt on the part of the authors to challenge the competence of present civil laws to cover instances of rapid technological change. Indeed, the crux of this endeavor was to test the resiliency of the established system of contract law against the most revolutionary of modern developments.

The result was as expected. Current contract laws can ably conform to the new situations created by the ART contracts, and can competently govern the rights and obligations arising from such circumstances. The only hindrance to its proper operation is current law itself or rather, the lack of it – the absence of any state policy as regards the validity of ART procedures itself prevents the efficient working of our established, yet still viable, contract laws.

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[284] 483 F.2d 237 (10th Cir. 1973).

[285] C. SMART, *supra* note 205, at 101.

The ART contract is truly a first of its kind, as it attempts to give to private parties the opportunity to define areas of living previously reserved only to law, with stipulations as to paternity and filiation, parental authority and support, and even the regulation of basic liberties. More importantly, the ART contract becomes a tool by which a possible life is created. It is indeed a mark of changing beliefs and perceptions that such contracts are valid and enforced in other parts of the world.

If ART procedures are ever found to be valid in our jurisdiction, Philippine contract law is established enough and flexible enough to adapt to such conditions. If they are, on the other hand, found to be illegal or immoral, these same laws can clearly prevent any unauthorized enforcement. All that is needed is the proverbial burning bush – an indication of its rightness or wrongness, or an indication of what to do.

In the meantime, those who seek to artificially avail themselves of the privilege of a family will have to wait. Without any declared State policy, ART contracts would likely to be decided by the courts on a case-to-case basis, with the judge sitting as the final arbiter of ART's morality and legality.

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ANNEX A

MID-IOWA FERTILITY, P.C.
THERAPEUTIC INSEMINATION - HUSBAND
MARRIED RECIPIENT CONSENT FORM

We _____ and _____ of _____, Husband and Wife, desire to engage the services of MID-IOWA FERTILITY, P.C. (hereafter referred to as "MIF"), to perform one, or more if necessary, artificial insemination(s) with the sperm of the Husband obtained for the purpose of making the Wife pregnant.

NOW THEREFORE: It is agreed by and between the above-named Husband and Wife that Dr. Donald C. Young of MIF and/or his associates are hereby engaged to perform the procedure of artificial insemination upon the Wife. The procedure has been fully explained to us and in particular, we understand and agree with the following:

1. We agree that even though insemination may be repeated as often as recommended by Dr. Young and/or his associates, there is no guarantee by MIF or assurance that pregnancy or full-term pregnancy will result. We understand that this agreement is not a contract to cure, a warranty of treatment, nor a guaranty of conception.

2. We also understand and accept that the artificial insemination procedure carries with it the risk of sexually transmitted diseases including but not limited to gonorrhea, syphilis, herpes, hepatitis, and acquired immune deficiency syndrome (AIDS).

3. We further understand that within the normal human population a certain percentage (approximately 4%) of children are born with physical or mental defects, and that the occurrence of such defects is beyond the control of physicians. We therefore understand and agree that MIF, Dr. Young, and/or his associates do not assume responsibility for the physical and mental characteristics of any child or children born as a result of artificial insemination. We also understand that within the normal population approximately 20% of pregnancies result in miscarriages and that this may occur after donor insemination as well Similarly, obstetrical complications may occur in any pregnancy. By our signatures on this document we do hereby absolve, release, indemnify, protect and hold harmless from any and all liability for the mental or physical nature of character of any child or children so conceived or born, and for affirmative acts or acts of omission which may arise during the performance of this agreement, MIF, Dr. Young, and/or his associates.

4. We understand that, if a woman is artificially inseminated with the consent of her Husband, the Husband is treated in law as if he were the natural father of a child or children thereby conceived. We further agree that we are assuming entire responsibility for any child or children conceived or born. We agree that we will not seek support for the child or children, or any other payment from the physicians or staff associated with MIF. We further agree that if the child or children should seek support or any other payment from MIF, the physicians or staff, we will indemnify and hold harmless the donor, physicians, staff and MIF.

5. From the moment of conception, I, the undersigned Husband, accept the act of insemination as my own, and agree:

5.1. That such child or children so produced shall be my own l legitimate child or children and are the heirs of my body; and

5.2. That such child or children so produced are, and shall be considered to be, in all respects including descent and distribution of my property, a child or children of my own body.

WHEREFORE, the above-named Husband and Wife have hereto set their hands this ____day of _____ 2000.

IN SIGNING THIS AGREEMENT, WE CERTIFY THAT (1) WE HAVE READ AND FREELY AND KNOWINGLY AGREE TO EVERYTHING STATED IN THIS AGREEMENT, (2) WE UNDERSTAND THE EXPLANATION WE HAVE RECEIVED REGARDING THE PROCEDURES, (3) WE HAVE BEEN GIVEN ALL THE INFORMATION DESIRED BEFORE SIGNING THIS AGREEMENT, AND (4) WE HAVE BEEN GIVEN A COPY OF THIS AGREEMENT.

_____	_____
Husband	Wife
_____	_____
WITNESS	WITNESS

MID-IOWA FERTILITY, P.C. hereby consents to the doctor-patient relationship, based upon the agreements, understandings and consents provided by the Husband and Wife above.

MID-IOWA FERTILITY, P.C.
By:_____
DONALD C. YOUNG, D.O.

ANNEX B

MID-IOWA FERTILITY, P.C.
DIRECTIONS FOR DISPOSITION
OF CRYOPRESERVED SPERM

I/We, _____ and _____ acknowledge that I/we are the sole owner(s) of the cryopreserved semen currently being stored by Mid-Iowa Fertility, P.C. at my/our request under my/our name(s). I/We hereby provide the following directions regarding the disposition of my/our stored semen, and do hereby revoke any previous instructions given to Mid-Iowa Fertility, P.C. which may be different or inconsistent with these directions.

1. Instructions. I/We wish for Mid-Iowa Fertility, P.C. to dispose of the semen in the following manner (one and only one of the options below must be checked):

_____A. Ownership of the semen will be transferred to the following named individual to be used in an effort to achieve a pregnancy. We agree to pay in advance the fees and expenses, if any, incurred to carry out these directions.
Name of Person: _____
Address: _____

_____ B. The semen will be destroyed and not used for any other purpose in accordance with the policies of Mid-Iowa Fertility, P.C.

2. Waiver. I/We understand that if I/We choose to have the semen destroyed, I/we hereby waive my/our right to change these directions at any future time. I/We understand and agree that there will be no refund or credit of any payments made or owed by me/us for the cryopreservation procedure or storage fees to which I previously agreed. I/We, the undersigned, understand the contents of this document and have had any and all questions answered to my/our understanding.

WHEREFORE, the above named owner(s) has/have hereto set their hand(s) this day of _____ 20__.

_____ _____
Owner Spouse (if applicable)

_____ _____
Witness Witness

ANNEX C

MID-IOWA FERTILITY, P.C.
THERAPEUTIC INSEMINATION - DONOR
MARRIED RECIPIENT CONSENT FORM

We _____ and _____of _____ Husband and Wife, desire to engage the services of MID-IOWA FERTILITY, P.C. (hereafter referred to as "MIF"), to perform one, or more if necessary, artificial insemination(s) with sperm from an anonymous donor(s) obtained for the purpose of making the Wife pregnant.

NOW THEREFORE, It is agreed by and between the above-named Husband and Wife that Dr. Donald C. Young of MIF and/or his associates is hereby engaged to perform the procedure of artificial insemination upon the Wife. The procedure has been fully explained to us in particular, we understand and agree with the following:

1. Donor sperm will be used that has been frozen (for storage purposes).

2. We relinquish, waive and disclaim any privilege or right we may have to determine the identity of the donor(s). We further understand that our identities will also not be revealed to the donor.

3. We understand and agree that it cannot be guaranteed that the same donor will be utilized for each successive cycle.

4. We agree that even though insemination may be repeated as often as recommended by Dr. Young and/or his associates, there is no guarantee by MIF or assurance that pregnancy or full-term pregnancy will result. This agreement is not a contract to cure, a warranty of treatment, nor a guaranty of conception.

5. We also understand and accept that though donor sperm will be screened and labeled "disease free", the artificial insemination procedure carries with it the risk of sexually transmitted diseases including but not limited to gonorrhea, syphilis, herpes, hepatitis, and acquired immune deficiency syndrome (AIDS).

6. We further understand that within the normal human population a certain percentage (approximately 4%) of children are born with physical or mental defects, and that the occurrence of such defects is beyond the control of physicians. We therefore understand and agree that MIF, Dr. Young, and/or his associates do not assume responsibility for the physical and mental characteristics of any child or children born as a result of artificial insemination. We also understand that within the normal population approximately 20% of pregnancies result in miscarriages and that this may occur after donor insemination as well. Similarly, obstetrical complications may occur in any pregnancy. By these presents we do hereby absolve, release, indemnify, protect and hold harmless from any and all liability for the mental or physical nature of character of any child or children so conceived or born, and for affirmative acts or acts of omission which

may arise during the performance of this agreement, MIF, Dr. Young, and/or his associates.

7. We understand that, if a woman is artificially inseminated with the consent of her Husband, the Husband is treated in law as if he were the natural father of a child or children thereby conceived. We further agree that we are assuming entire responsibility for any child or children conceived or born. We agree that we will not seek support for the child or children, or any other payment from the donor, physicians or staff associated with MIF. We further agree that if the child or children should seek support or any other payment from MIF, the donor, physicians, or staff, we will indemnify and hold harmless the donor, physicians, staff and MIF.

8. From the moment of conception, the undersigned Husband, accepts the act of insemination as his own, and agrees:

8.1 That such child or children so produced shall be my own legitimate child or children and are the heirs of my body; and

8.2 That such child or children so produced are, and shall be considered to be, in all respects including descent and distribution of my property, a child or children of my own body.

WHEREFORE, the above-named Husband and Wife have hereto set their hands this _____ day of _____, 2000.

IN SIGNING THIS AGREEMENT, WE CERTIFY THAT (1) WE HAVE READ AND FREELY AND KNOWINGLY AGREE TO EVERYTHING STATED IN THIS AGREEMENT, (2) WE UNDERSTAND THE EXPLANATION WE HAVE RECEIVED REGARDING THE PROCEDURES. (3) WE HAVE BEEN GIVEN ALL THE INFORMATION DESIRED BEFORE SIGNING THIS AGREEMENT, AND (4) WE HAVE BEEN GIVEN A COPY OF THIS AGREEMENT.

_____ _____
Husband Wife

_____ _____
WITNESS WITNESS

MID-IOWA FERTILITY, P.C. hereby consents to the doctor-patient relationship, based upon the agreements, understandings and consents provided by the Husband and Wife above.

MID-IOWA FERTILITY, P.C.

By _____
DONALD C. YOUNG, D.O.

ANNEX D

MID-OIWA FERTILITY, P.C.
CONSENT TO IN VITRO FERTILIZATION
AND EMBRYO TRANSFER

1. We, _____ and _____ ("Husband" and "Wife") have been informed that one or both of us is infertile. In Vitro Fertilization ("IVF") and Embryo Transfer ("ET") are the recommended treatments. By signing this consent, we indicate our consent to IVF and ET in the Mid-Iowa Fertility, P.C. Offices and/or in associated hospitals ("the Program") and confirm our understandings, instructions and agreements regarding this process.

2. Dr. Donald C. Young of Mid-Iowa Fertility, P.C., his associates and/or assistants ("the Physician") have explained to us IVF/ET, its risks and benefits, the alternatives and why IVF/ET is the preferred procedure for us. All the questions which we have asked about these matters have been answered in a manner satisfactory to us.

3. We understand that IVF involves stimulation of Wife's ovaries, the retrieval of one or more of Wife's eggs (ova) under general anesthesia [by means of a laparoscope] or under local anesthesia and sedation by means of an ultrasonically guided needle, combining Wife's eggs with Husband's sperm in a growth media vessel, and incubating this fertilized egg(s) for a few days. We understand that ET involves transferring the embryo(s) into Wife's uterus by means of catheter.

4. We understand that success rates vary according to the type of infertility problem. We are aware that the practice of medicine and surgery is not an exact science and We acknowledge that no guarantees have been made to us concerning the results of IVF/ET.

5. It has been explained to us that attempts to induce ovulation by the use of fertility medications for an IVF cycle may have to be abandoned due to poor follicular development, poor hormonal stimulation pattern and/or spontaneous LH (luteinizing hormone) surge.

6. We understand that the principal hazards and risks inherent in IVF/ET are ovarian cysts (large pockets of fluid), hyperstimulation of the ovaries excessive tissue fluid, pain, and enlarged ovaries which may require Hospitalization or surgery for treatment), and multiple pregnancies. We understand that there is also the possibility of an ectopic pregnancy; and that the high estrogen levels resulting from over stimulation may be associated with abnormalities such as heart attack and stroke, abnormalities in pregnancy including molar pregnancy, and estrogen-induced cancers such as those of the breast or uterus.

7. It has been explained "to us that simply having a child as a result of ordinary intercourse carries with it the risk that the child will have one or more congenital

malformations. In the general population, the incidence of congenital malformation is 1 to 6%. Among women who are infertile, that incidence is higher. Although this general background risk always exists, there have as yet been no reports which suggest an increased risk among women undergoing IVF/ET.

8. In addition to these particular risks, we understand that other complications, although rare, can occur during this or any procedure, including but not limited to various problems of the stomach, bowel, bladder, lungs, heart and vessels, and the risks of hemorrhage, of infection, the need for blood transfusion, and the pain and discomfort associated with any surgical procedure. We understand that the explanation that we have received is not exhaustive and that the explanation that other more remote risks and consequences may arise in any procedure.

9. We hereby consent to the administration of any and all tests deemed necessary by the Physician or the Program and any person or corporation acting as an employee, agent or subcontractor of the Physician or the Program, to test for the existence of an antibody to the immunodeficiency virus (HIV), or the presence of HIV itself, which is capable of causing acquired immunodeficiency syndrome, commonly known as AIDS. We understand that the test procedure involves withdrawal by needle of a small amount of blood, and that the blood sample will be subject to laboratory testing. The risks of the procedure, which include but are not limited to bruising, soreness, and a minor risk of infection, have been explained to us. We understand that there are no comparable alternatives to this test at present.

> 9.1. It has been explained to us that our blood may register a "false positive", i.e., the test may indicate that we have an antibody to HIV present in our blood when an antibody is not present. We have been informed that if our test results are positive, it may be necessary to take infectious disease precautions. It has also been explained to us that a negative antibody test result does not guarantee the absence of HIV in our blood, nor does such a test result guarantee that we do not have AIDS. Physician has provided us with information concerning the test for antibodies for HIV and has given us the opportunity to ask questions regarding this information and to have our questions answered.
>
> 9.2. We have been informed that our test results may not be disclosed to anyone other than the persons listed on Attachment A to this Agreement without our written consent. We understand that our test results will be placed in our medical records, and will be available to the persons and entities specified in Attachment A but not otherwise disclosed.
>
> 9.3. We freely consent to the administration of the HIV test, at this time and again on a date not less than one hundred eighty (180) days from the date of the initial testing. If we continue after the second test to provide sperm or ova with the intent of using the IVF process and freezing some of this resulting embryos, we hereby consent to undergo HIV testing every three months from the date of the second test.

10. It has been explained to us that during the course of IVF and ET, unforeseen conditions may be discovered which necessitate the performance of additional and different procedures. We authorize and request that Physician perform such additional procedures as are in his professional judgment necessary and desirable. The authority granted in this paragraph shall extend to treating all conditions which require medical attention and which are not known at the time IVF/ET is undertaken.

11. We hereby certify that we have read and understand the foregoing statements; and we certify that we have received a copy of this form. In light of our condition, our desire to achieve pregnancy and our understandings as set forth herein, and despite the risks and uncertainties outlines above, we hereby consent to and authorize Physician to perform IVF and ET.

12. We also consent to the administration of such anesthetics as may be considered necessary or advisable by Physician with the exception of _____.

13. For the purpose of advancing medical knowledge, we authorize and consent to the admittance of other medical observers, in accordance with Physician's usual procedures, the use of video taping, the taking of photographs and the use of these materials in scientific publications and presentations.

14. We hereby release Physician from any and all liability of any injury or damages to ourselves or any other persons arising out of or related to IVF and ET and cryopreservation (if we have chosen that alternative).

WHEREFORE, the above-named Husband and Wife have hereto set their hands this ___ day of _____, 200_.

_____ _____
Husband Wife

_____
Witness

MID-IOWA FERTILITY, P.C. hereby consents to the doctor-patient relationship, based upon the agreements, understandings and consent provided by the Husband and Wife above.

MID-IOWA FERTILITY, P.C.

By _____
DONALD C. YOUNG, D.O.

ANNEX E

MID-IOWA FERTILITY, P.C.
CONSENT FOR CRYOPRESERVATION OF THE HUMAN EMBRYO AFTER IN VITRO FERTILIZATION

1. Consent. We, _____ and _____ ("Husband" and "Wife"), have been informed that we may elect freezing (cryopreservafion) of the embryos produced through our participation in the Mid-Iowa Fertility, P.C. In Vitro Fertilization program ("the Program"). By signing this consent (the "Agreement"), we indicate our consent to such cryopreservation and confirm our understandings, instructions, and agreements regarding this process.

2. Cryopreservation Explained. Dr. Donald C. Young of Mid-Iowa Fertility, P.C. and/or assistants ("the Physician") have explained the cryopreservation procedure to us. We understand that cryopreservation of embryos means the freezing of embryos under controlled conditions. Cryopreservation begins at the fertilization step of the in vitro fertilization ("IVF") process. Once fertilization has taken place and the embryo has reached the appropriate state of cell development, it is placed in a controlled biologic freezer capable of cooling accurately to subzero temperatures and maintaining the frozen embryos at a constant temperature thereafter.

3. Use of Cryopreservation. We understand that cryopreservation may be utilized if we produce more embryos during our Assisted Reproductive Technology ("ART") treatment cycle than are medically appropriate to accept for embryo transfer in that same cycle. The embryos will be stored in the frozen condition until such time as we request transfer to Wife and Physician determines that appropriate conditions exist for embryo transfer, or until such time as our rights are released under paragraph 6 below. At that time, some or all of the embryos will be thawed. Each embryo will be examined to determine whether it is medically appropriate for transfer to the uterus, and if so, the transfer will take place.

4. Risks and Benefits of and Alternatives to Cryopreservation. The Physician has explained the risks and benefits of cryopreservation and any alternatives to this procedure. All the questions which we have asked about these matters have been answered in a manner which we understand. In this regard, we have been specifically informed of the following:

> 4.1 Risks. We understand that the risks to the embryo associated with human embryo freezing, thawing, and transfer are not well established at present. However, in the limited number of births from frozen human embryos, no increase of developmental defects has been reported. We understand that the Physician's determination that an embryo is medically appropriate for

transfer is not a guarantee of any sort. We understand that as with any technique that requires mechanical support systems, equipment or power failure can occur, and undetectable damage to or loss of embryos may occur due to failure of the mechanical support systems which maintain the frozen embryos at the proper temperature or due to problems arising during transfer to the uterus. We understand that such damage or loss may occur despite all reasonable precautions having been taken. We understand that within the population at large, a certain percentage of children with physical or mental defects are born and that congenital defects to occur even in the absence of cryopreservation. We further understand that the pregnancy rate from transfer of frozen embryos in humans has not yet been determined due to the relatively small number of patients utilizing these procedures worldwide. We understand that there is a risk of multiple gestation if more than one embryo is transferred.

The lack of laws or judicial decisions dealing with the legal status of frozen embryos and participants in cryopreservation programs may also create some risks. We understand that some of the provisions of this Agreement may, at some future time, be held unenforceable in whole or in part. It is our intention that all provisions of this Agreement are severable. In the event that any of them shall be held to invalid by any court, the remaining provisions shall continue to have full force and effect. Developing laws may require changes in some of the Program's policies, procedures and requirements, and we agree to be bound by any such changes. We understand that the legal uncertainties include, but are not limited to, the following:

(a) inheritance rights of embryos;

(b) legality of embryo donation and applicability of laws governing termination of parental rights and adoption;

(c) extent to which one spouse may exercise dominion and control over embryos without the consent of the other spouse;

(d) the extent to which a court, in an action for divorce, might refuse to enforce the provision, in paragraph 6 below, for release upon divorce and might award custody of embryos to one spouse, holding the other spouse liable for child support in the event that the embryos are transferred and pregnancy occurs.

4.2 Benefits. Potential benefits from this procedure may include a chance of pregnancy without the necessity of multiple ovum retrieval procedures, and a possible decreased risk of multiple gestations. Delayed transfer of an embryo also enables the embryo to be transferred under more natural conditions judged to be conducive to implantation.

5. No Guarantee of Success. We understand that cryopreservation has been utilized in a limited number of IVF centers around the world. We also understand that the success rate with frozen embryos transferred in the human has not been determined and no representations guaranteeing creation of an IVF pregnancy through cryopreservation have been made.

6. Ownership of Embryos. The following is our understanding and agreement with respect to ownership, custody and control of stored embryos. As the owners of any and all such embryos, the consent of both of us will be required concerning their use or disposition except as is provided below. Disposition may also be controlled by the final decision of a court or other governmental authority having jurisdiction. Certain use or disposition may also require approval by the Program:

6.1 Initial Disposition Decisions. Should circumstances arise whereby embryos, fresh or frozen, remain which are not used for the purpose of attempting to initiate a pregnancy in the Wife, the embryo(s) may be donated to other infertile couples, or otherwise handled in a manner consistent with professional and ethical standards, and applicable legal requirements. We wish the embryo(s) disposed of in the following fashion (one and only one of the two paragraphs below must be checked "YES"):

(a) The embryo(s) shall be used by infertile persons, if otherwise permitted by applicable law:

YES ____ NO ____

(b) The embryo(s) shall be disposed of and not donated to infertile persons in accordance with the policies of the Program in a manner consistent with professional and ethical standards, and applicable legal requirements:

YES _____ NO _____

We understand that we will retain the right to change our decision in this regard at any future time by notice to the Program. The ultimate disposition of these embryo(s) will be subject, in the event of a change in our marital status or other events interfering with fulfillment of our present intentions, to applicable laws and court decisions (such as a decree of dissolution of marriage) affecting the ownership or control of the embryo(s).

6.2 During the Marriage. During the marriage, we have the right to request transfer by the Program to Wife or to affirmatively release our embryos for possible transfer by the Program to Embryo Donees. An affirmative release

is our written notice to the Physician of our decision not to have the stored embryos transferred to Wife.

(a) Unless Husband or Wife has been rendered incompetent by accident or illness, both of us must join in a request for transfer to Wife or an affirmative release.

(b) The fee for the freezing process includes the storage charges for the first year from the date of fertilization. After that time, a yearly fee will be assessed. If the Husband and Wife decide to donate the embryo(s) at any time after the first year, the Program will discontinue storage charges as soon as the written notice of the decision is received. Husband and Wife will maintain a correct address on file with the Program and will notify the Program of any changes in our marital status, menopausal status, or health condition which would preclude further attempts at achieving pregnancy. Failure to pay for continued storage after the first year or failure to provide current information to the program will result in disposition of the embryo(s) in accordance with the instructions set out in subparagraph 6.1 of this document or such later written instructions which we may provide to the Program.

6.3 In Event of Wife's Death, Incompetence, or Hysterectomy. In the event that Wife dies, becomes incompetent, undergoes hysterectomy or otherwise becomes medically incapable of accepting transfer while our embryo(s) are being stored by the Program, our embryo(s) shall be disposed of in accordance with the instructions set out in subparagraph 6.1 of this document or such later written instructions as we shall provide.

6.4 In Event of Husband's Death or Incompetence. In the event that Husband dies, survived by Wife, or becomes permanently incompetent stored embryo(s) shall be considered the property of the wife, and she has the right to request transfer to herself.

6.5 Termination of the Program. In the event the Program is terminated and embryo(s) which have been cryopreserved remain in storage, we understand that Husband and Wife will be contacted and all reasonable efforts will be made to arrange for disposition of such embryo(s) in accordance with our directions at that time.

7. Disposal of Embryos. We hereby agree and acknowledge that any of our sperm, ova, or embryo(s) which Physician concludes, in the exercise of his professional judgment are non-viable or otherwise not medically suitable for continued use in ART, shall be disposed of.

8. No Sale of Embryos. We, Wife and Husband, Physician and Program understand and agree that buying or selling of embryos shall not occur. Nothing of value shall be given to us in consideration for our release of an embryo. Any Embryo Donee shall be expected to pay all medical expenses incurred in connection with the transfer procedure, the pregnancy and the delivery. No Embryo Donee or anyone else on her behalf may transfer anything of value to us, the Program or the Physician in consideration for the embryo itself or her mere participation in the cryopreservation program as an Embryo Donee. Neither the Physician nor the Program shall receive compensation from persons who wish to be considered as Embryo Donees except compensation to cover the cost of actual medical expenses incurred.

9. Uncertainty Over Inheritance Rights. We understand that one of the legal uncertainties is the inheritance rights of frozen embryos. It is our intent and understanding that if both of us die, our embryos shall be automatically released, and may be transferred to Embryo Donees, but we understand that this release may or may not have an effect on the issue of the embryos' inheritance rights. If we have other children and have wills that make provision of our "children", it is possible that the term could be interpreted to include our embryos'. If we die intestate (without wills), it is possible that our embryos could be held to be our "children" under the intestate succession laws and could therefore be entitled to share our property without other children or to receive all of our property if we have no other children. We recognize that if we wish to avoid these uncertainties or to insure the inheritance rights of our children or other heirs, the safest course of action is for us to execute wills that expressly disinherit our embryos.

10. Release. We hereby fully release the physician and the Program and any person or corporation acting as an agent, employee, or subcontractor of the Physician or the Program, and hold them harmless from any and all liability, other than that due to negligence, resulting from their acts or omissions taken pursuant to this Agreement.

11. Records. We understand that the Program will prepare and maintain written records regarding our participation in the Program. We understand that if an embryo is transferred to an Embryo Donee, some of the medical or genetic information that we have given to Physician may be given to the Embryo Donee. Physician will do this in a manner which protects the confidentiality of our identity. This information may be part of the medical record of any child who results from this donation. We recognize that this information may have to be provided to a governmental agency if laws develop regarding the centralization of such medical/genetic information for children born as a result of embryo donation and that our identities may have to be disclosed as part of the Child's medical/genetic records if the law requires.

IN SIGNING THIS AGREEMENT, WE CERTIFY THAT (1) WE HAVE READ AND FREELY AND KNOWINGLY AGREE TO EVERYTHING STATED IN THIS AGREEMENT, (2) WE UNDERSTAND THE EXPLANATION WE HAVE RECEIVED REGARDING THE USE OF CRYOPRESERVATION, (3) WE HAVE BEEN GIVEN ALL THE INFORMATION DESIRED BEFORE SIGNING THIS AGREEMENT, AND (4) WE HAVE BEEN GIVEN A COPY OF THIS AGREEMENT.

_____
Signature of Wife Date _____

_____
Signature of Husband Date _____

ANNEX F

EGG DONOR OOCYTE DONATION INFORMED CONSENT

Egg donor oocyte donation consists of:

1) Ovarian stimulation to induce growth of multiple eggs on the ovaries.

2) Ultrasound guided retrieval of the eggs.

1) Ovarian stimulation. The following medications are used during Egg Donation treatment: Leuprolide (Lupron), Gonadotropins, Human Chorionic Gonadotropin (hCG, Profasi), Tetracycline (Doxycycline), Demerol, Diazepam (Valium) and Xylocaine with Epinephrine.

Gonadotropins are used to stimulate the development of multiple egg in the ovaries. Mild degrees of ovarian overstimulation are common side effects of these medications. Overstimulation is characterized by abdominal bloating, weight gain (due to body fluid retention) and mild to moderate pelvic and/or abdominal discomfort. This is a self-limiting condition and does not require treatment. Severe ovarian overstimulation is rare. The swollen ovaries can cause moderate to severe pain usually lasting a few days. The patient can have significant body fluid retention, especially within the abdominal cavity. In its most severe forms, ovarian overstimulation could result in ovarian rupture requiring major abdominal surgery, thickening of blood causing shock or formation of a blood clot in a blood vessel, or even death. The number of patients with such severe ovarian overstimulation is very small; a few out of thousands of treated patients. Localized skin reaction at the injection site may occur.

Lupron is used to prevent premature ovulation. It has minimal, if any, side effect, most commonly transient headaches, possible hot flashes and body fluid retention. Localized skin reaction at the injection site may occur.

hCG is necessary for the final stages of egg maturation. In conjunction with Gonadotropins it can contribute to ovarian overstimulation. Localized skin reaction at the injection site may occur.

Doxycycline is a broad spectrum antibiotic used to eliminate possible bacterial contamination of the semen and the uterine cavity. Very few people are allergic to Doxycycline. A common side effect is transient nausea and possibly vomiting, especially if the medication is taken on an empty stomach.

Demerol is a narcotic medication used for pain control during the egg retrieval procedure. The possible side effects include lightheartedness, dizziness, sedation, sweating, nausea and possible vomiting.

Diazepam is used for relaxation and, in conjunction with Demerol, for pain control. Most commonly reported side effects are drowsiness and fatigue.

Xylocaine with Epinephrine is used as a local anesthetic during the egg retrieval procedure. Their side effects are rare and may include lightheadedness, transient rapid heart rate, drowsiness and dizziness.

Allergic Reactions. Possible allergic reactions to all of the aforementioned medications include rash, fever, itching, difficulty in breathing (asthma) or shock. Allergic reactions are quite rare.

Long Term Risks. There may be some long term risks associated with the use of fertility drugs. These risks have not yet been unequivocally defined. In particular there are data to indicate the question of a possible association with an increase in ovarian cancer. Whether or not this risk truly exists, the magnitude of risk, and the definition of which patients may be at risk is still under study.

Ultrasound scanning. Transvaginal ultrasound examinations are used to assess the progress of egg maturation. Ultrasonography is a diagnostic procedure using sound waves to provide an image of the ovaries and growing follicles. So far, there is no reported evidence of side effects to the woman, to the eggs, or to the pregnancy with ultrasound scanning. It is possible, however, that risks may be discovered in the future. Thus the total safety of this procedure is not known at this time.

2) **Risks of ultrasound-guided egg retrieval**. The eggs are removed from the ovaries by passing a long, thin needle through the top of the vagina into the ovarian follicles to aspirate the eggs. This procedure carries a risk of injury to the structures within the pelvis such as the bowel, bladder, blood vessels and nerves, as well as the uterus, tubes and ovaries. Serious damage is rare (less than 1 case in 1,000). Postoperative complications are not common but might include pain or infection inside the abdomen. Some of these complications could possibly require removal of the uterus and/or ovaries, leaving the patient sterile. It is estimated that death as a result of the ultrasound-guided egg retrieval may occur in 1 out of 10,000 procedures. This is less than the risk of dying from an auto accident during one year (1 in 3,000).

Pain. Some women may experience moderate to moderately severe pain when the eggs are aspirated. Most women experience only mild discomfort during the retrieval procedure. There may be some minor pelvic discomfort for about two to three days after the egg retrieval procedure. Tylenol can be used to provide relief.

Financial responsibility for complications. I am financially responsible for possible complications or injuries, which may occur during, or as a result of, the ovarian stimulation and the egg retrieval procedure.

_____
Initial

Responsibility for conception. I understand that it is possible to conceive through intercourse during the ovarian stimulation treatment and that I should not be sexually active during this period of time.

_____
Initial

Informed consent. As a patient, I have the right to receive as much information as I need in order to give informed consent or to refuse the recommended course of treatment. My physicians should describe, in language I can understand, the proposed treatment, the medically significant risks involved, and the alternate course of treatment or non-treatment, including the respective risks of each. If I have questions, I should consult my physicians prior to giving our written consent to the proposed procedure.

MY SIGNATURE INDICATES THAT I HAVE READ AND UNDERSTAND THE ABOVE INFORMATION, AND THAT I AUTHORIZE DR FRANCIS POLANSKY, DR. RICHARD SCHMIDT AND THEIR ASSOCIATES TO PERFORM THE OVARIAN STIMULATION, EGG RETRIEVAL AND ADMINISTRATION OF ANALGESIA AND TO PERFORM ANY ADDITIONAL SERVICES AS MAY BE DEEMED REASONABLE AND NECESSARY.

I, _____ DO HEREBY DONATE ALL MY RETRIEVED EGGS TO MY MATCHED RECIPIENT. ALL OF MY RETRIEVED EGGS WILL BE USED TO CREATE EMBRYOS. THERE WILL BE NO UNUSED EGGS. MY RECIPIENT(S) WILL HAVE SOLE JURISDICTION OVER THE EMBRYOS. SHE (THEY) MAY DECIDE TO DONATE THE EMBRYOS TO ANOTHER PERSON(S) OR FOR RESEARCH. THERE IS A CHANCE THAT MULTIPLE PREGNANCIES MAY BE CONCEIVED FROM THE EMBRYOS.

THIS CONSENT FORM IS AN IMPORTANT DOCUMENT THAT I SHOULD RETAIN WITH MY VITAL RECORDS. BY SIGNING BELOW I ACKNOWLEDGE MY RECEIPT OF A COPY OF THIS CONSENT FORM.

_____ _____
DONOR SIGNATURE DATE

ANNEX G

SAMPLE TRADITIONAL SURROGACY CONTRACT

THIS AGREEMENT is made this _____ day of _____19__ by and between _____ (hereinafter referred to as "Intended Father and Intended Mother" or collectively as "Intended Parents") and _____ hereinafter referred to as "Surrogate").

This agreement is made with reference to the following facts:

A. The Intended Parents are a married couple with each spouse being over eighteen (18) years of age. The Intended Parents desire to enter into this agreement, the sole purpose of 'which is to enable the Intended Parents to have a child who is biologically related to the Intended Father. The Intended Parents are residents of _____.

B. Surrogate is an individual over eighteen (18) years of age. Surrogate affirms that she has had at least one previous pregnancy, and has experienced at least one live birth. Surrogate does not desire to have any other children of her own. Surrogate is a resident of _____.

C. Surrogate affirms that bearing another child does not pose an unreasonable risk to her physical or mental health or to that of any resulting child.

Section One

Surrogate represents that she is capable of conceiving children and that she is not married.

Section Two

Surrogate shall be artificially inseminated with the sperm of the Intended Father. The parties acknowledge that the insemination procedure may have to be repeated until Surrogate become pregnant. Should conception fail to occur after the third attempt of insemination, then this agreement shall become null and void. It is the intention of the parties that the intended Father be the genetic parent of any child conceived as a result of the artificial insemination. The Intended Parents shall be responsible for the medical costs associated with each attempt of artificial insemination. Surrogate, upon becoming pregnant, agrees that she will carry the embryo (or fetus) until delivery. Surrogate agrees that she will cooperate with any background investigation conducted by the Intended Parents into the Surrogate's medical, family and personal history. Surrogate warrants the information to be accurate to the best of her knowledge. The parties agree that the Intended parents shall be entitled to accompany the Surrogate to all pre-natal medical appointments.

Section Three

The Surrogate shall be solely responsible for the clinical management of the pregnancy. Surrogate agrees that she will not abort the child once conceived except if, in the professional medical opinion of her physician, such action is necessary for the physical health of Surrogate or the child has been determined by such physician to be physiologically abnormal. Surrogate agrees to provide the Intended Parents with copies of all medical records pertaining to the pregnancy up to the birth of the child.

The Surrogate shall adhere to all medical instructions given to her by the physicians performing the insemination procedure as well as by her obstetrician. The Surrogate agrees to follow a reasonable prenatal medical examination schedule as prescribed by her obstetrician as well as adhere to all reasonable requirements regarding the taking of medicine and vitamins prescribed by her treating obstetrician, except in a medical emergency. The Surrogate agrees to abstain from the use of alcohol and tobacco products during her pregnancy. The Surrogate further agrees to submit to any reasonable medical test or procedure deemed necessary or advisable by her obstetrician, including but not limited to, amniocentesis.

Section Four

Upon the birth of the child, conceived as a result of the assisted conception described in Section Two of this agreement, Surrogate agrees to immediately surrender physical custody of the child to the Intended Parents. Surrogate agrees to cooperate in the proceedings to terminate her parental rights to such child, and sign any and all affidavits and consent documents in order to further the intended purposes of this agreement. Specifically, Surrogate understands that her parental rights will be terminated in an adoption proceeding in the State of _____. Surrogate agrees to execute consent documents following the birth of the child. The parties agree that the aforesaid relinquishment of parental rights shall occur regardless of the physical or mental condition of the child upon birth.

Section Five

The Intended Parents agree to pay a fee of $ _____ to the Surrogate.

If the Surrogate gives birth to twins, then the fee paid to her shall be $____. If the Surrogate gives birth to triplets, then the fee paid to her shall be $_____. All of the parties acknowledge that the payment of this fee to the Surrogate is a payment of only her services as surrogate. All of the parties acknowledge that the payment of this fee to the Surrogate is in no way a payment to the Surrogate to induce participation in any post-birth adoption proceedings initiated by the Intended Parents. To that effect, the fee to be paid to the Surrogate shall be held in escrow by the attorney for the Intended Parents and released to the Surrogate immediately following the birth of the child or children. The attorney for the Intended Parents shall provide written confirmation to the attorney for the Surrogate that that appropriate funds are being held in escrow. The parties agree that should the Surrogate become pregnant, and a miscarriage occur after 8 weeks of

gestation, then the surrogate shall receive a prorated amount of the fee equivalent to the total amount of the fee divided by 280 for each day of the pregnancy. If a miscarriage occurs before 8 weeks of gestation, then the Surrogate will receive a fee of $250.00. If the Intended Parents choose to either terminate the pregnancy or choose selective reduction, and the event occurs before 8 weeks of gestation, then the Surrogate shall receive a fee of $500.00. If the Surrogate carries the pregnancy to 32 weeks, than she shall receive the total fee.

Section Six

To the extent it is deemed necessary or appropriate at any time, including after the birth of the child, and at the request of the Intended Parents, all of the parties shall undergo any necessary tests to determine the genetic parents of the child, including but not limited to, Blood Group Tests, Serum Proteins Tests, Red Cell Enzyme Tests, and While Cell/H.L.A. Tests. In the event none of these test occur, the absence of these tests will not affect the other provisions of this agreement.

The Surrogate affirms that, at the time of the execution of this agreement, she possesses adequate medical insurance that will cover the cost of all medical treatment related to the Surrogate's intended pregnancy, including prenatal care and delivery. The Intended Parents agree to be financially responsible for all medical costs incurred by the Surrogate which are related to her pregnancy and which are not covered by her insurance. The Intended Parents will be responsible for Surrogate's medical insurance premiums only if the Surrogate must obtain additional medical insurance coverage following the conception of any child.

Should the Surrogate give birth by Cesarean section, then the Intended Parents agree to increase the fee to be paid to the Surrogate by $500.00. In the event that the Surrogate undergoes an elective invasive procedure at the request of the Intended Parents, then the Intended Parents agree to increase the fee to be paid to the Surrogate by $250.00. The Intended Parents agree to provide for a $150,000.00 term life insurance policy on behalf of the Surrogate payable to the beneficiary of her choosing. The policy shall commence from the time of conception and shall expire twelve months following the date of conception.

Additionally, the Intended Parents agree to pay for the reasonable cost of any surrogacy related menu health counseling that the Surrogate incurs within three months following the birth of the child.

Section Seven

The parties recognize that the Surrogate's willingness to become pregnant and deliver a child, for the express purpose of assisting the Intended Parents to build their family, requires a great deal of personal sacrifice on the part of the Surrogate. To that extent, it is the intention of the Intended Parents to assist the Surrogate in easing any burdens she may encounter during the pregnancy. Should the Surrogate be forced to miss any days of

her employment (due to circumstances related to either the insemination or the pregnancy), then the Intended Parents agree to reimburse her for each day of lost wages in the amount of $____ per day. Should the Surrogate receive medical advice from her treatinq physician that she must completely cease working because of the pregnancy, than the Intended Parents agree to reimburse the Surrogate in the amount of $_____ per month, or the appropriate prorated amount. The parties acknowledge that the Surrogate will require a leave of absence from her employment for six weeks following the birth of the child.

Therefore, the Intended Parents agree to reimburse the Surrogate in the amount of $_____ to cover the wages lost by her during that period of time. This amount will be provided to the Surrogate at the time she receives her fee.

Should the surrogate receive medical advice from her treating physician that she be placed on bedrest prior to the delivery of the child or severely restricted in her physical activity then the intended Parents agree to provide her with the amount of $100 per week to be used to help defer the cost of any household helper employed by the Surrogate. The Intended Parents agree to reimburse the Surrogate for her travel expenses incurred in furtherance of this agreement on the amount of $0.32 per mile. The Intended Parents agree to provide the Surrogate with a $500.00 allowance for maternity clothes to be given to the Surrogate at 20 weeks gestation. Should the Surrogate require the services of a child-care provider to take care of her children while she is receiving medical treatment, than the Intended Parents agree to provide a child-care allowance of $____ per day as the need arises.

Section Eight

As stated in Section Two, Surrogate agrees that she will undergo three attempts of insemination. Should conception fail to occur following the third attempt of insemination, then this agreement shall become null and void except for those provisions providing for reimbursement for expenses incurred by the Surrogate during attempts to become pregnant. Should the Intended Parents choose to discontinue working with the Surrogate at any point in time, following the execution of this agreement and prior to her becoming pregnant, then the Surrogate shall receive a fee in the amount of $5,000.00.

Section Nine

Surrogate has consulted with physicians and understands and agrees to assume all medical risks, including death, that may result from the conduct contemplated by this agreement, including, but not limited to, risks involved in medical examinations, insemination procedures, pregnancy and childbirth and post-partum complications. This assumption of risk shall not be interpreted to include the negligence of any person or party providing health care services. Surrogate agrees to release the Intended Parents from any and all liability, that may arise during the fulfillment of this agreement.

Section Ten

"Child' as referred to in this agreement shall include all children born simultaneously pursuant to the inseminations contemplated in this agreement.

Section Eleven

Prior to signing this agreement, each party has been given the opportunity to consult with an attorney of his or her own choice concerning the terms and legal significance of the agreement, and the effect that it has upon any and all interests of the party. The Surrogate has received legal counseling from _____ of _____, _____. The Intended Parents have received legal counseling from _____ of _____, _____.

The Intended Parents agree to reimburse the Surrogate for all reasonable legal expenses incurred by her in her review and fulfillment of this agreement.

The Intended Parents affirm that they have made plans for the guardianship of the child in the event that the Intended Parents should both die prior to the birth of any child.

Section Twelve

Each party acknowledges that he or she has carefully read and understood every word in this agreement and its legal effect, and each party is signing this agreement freely and voluntarily and that neither party has any reason to believe that the other party or parties did not understand fully the terms and effects of this agreement, or that the other party did not freely and voluntarily execute this agreement.

Section Thirteen

In the event any of the provisions of this agreement are deemed to be invalid or unenforceable, such invalid or unenforceable provision shall be deemed severable from the remainder of this agreement and shall not cause the invalidity or unenforceability of the remainder of this agreement. If such provision shall be deemed invalid due to its scope or breadth, then such provision shall be deemed valid to the extend of the scope or breadth permitted by law.

Section Fourteen

This agreement shall be executed in four copies, each of which shall be deemed an original. One copy shall be given to the Intended Parents, one copy to the Surrogate, and one copy each to counsel for the parties.

Section Fifteen

This instrument embodies the entire agreement of the parties with respect to the subject matter of surrogate parenting. There are no promises, terms, conditions, or obligations other than those contained in this agreement, and this agreement shall supersede all previous communications, representations, or agreements, either verbal or written, among the parties. This instrument supersedes any and all previous surrogate parenting

agreements executed by the parties. Any such previously executed agreement shall be null and void as to the parties and not enforceable.

Section Sixteen

This agreement cannot be modified except by a written agreement signed by all the original parties.

Section Seventeen

This agreement shall be governed by, and enforced in accordance with, the laws of the State of _____.

We have read the foregoing agreement and it is our collective intention, by affixing our signatures below, to enter into a binding legal obligation.

SURROGATE: _____[signature]

STATE of _____
COUNTY of _____

ANNEX H

GESTATIONAL SURROGACY CONTRACT

THIS AGREEMENT is made this ___ day of _____, 19__, by and between _____ (hereinafter referred to as "Genetic Father and Genetic Mother" or collectively as "Genetic Parents") and _____ (hereinafter referred to as "Embryo Carrier").

The Parties are aware that surrogate parenting remains a new and unsettled area of law and that this Agreement may be held unenforceable in whole or in part as against public policy.

I. Purpose and Intent

The sole purpose and intent of this Agreement is to provide a means for _____. Genetic Father, to fertilize in vitro an ovum from his wife _____ Genetic Mother, for transfer and implantation into _____, Embryo Carrier, who agrees to carry the ovum/embryo to term and relinquish custody of the child born pursuant to this Agreement to its Genetic Parents, _____.

II. Representations

_____ and _____ represent that they are a married couple, each over the age of eighteen years, who desire to enter into this Agreement. _____ and _____ further represent that to the best of their knowledge they are respectively capable of producing semen and an ovum(s) of sufficient nature for in vitro fertilization and subsequent transfer into _____, Embryo Carrier, but make no representations as to _____'s ability or inability to conceive, carry to term or give birth to a child.

_____ represents that she is a married woman, over the age of eighteen years, and that she desires to enter into this Agreement for the reasons stated above and not for herself to become the parent of any child conceived by _____ and _____ pursuant to this Agreement. _____ further represents that to the best of her knowledge she is capable of carrying an implanted ovum/embryo to term.

III. Selection of Physicians and Counselor

A. Genetic Parents and Embryo Carrier will jointly select physician(s) to examine Embryo Carrier, order and review medical and blood tests for Genetic Parents, Embryo Carrier and Carrier's Husband, and perform IVF procedures (the "Responsible

Physician"). The parties will select a doctor in _____ to do the review and perform the IVF procedures.

B. The delivery doctor will be the Responsible Physician or Embryo Carrier's regular OB-GYN, whichever the parties jointly select.

C. At any time that Genetic Parents are advised it is appropriate, Genetic Parents and Embryo Carrier will jointly select an infertility specialist to become the Responsible Doctor.

D. Genetic Parents and Embryo Carrier will jointly select a psychologist for testing before the IVF procedures and counseling/mediating during pregnancy. The parties have selected _____ (the "Responsible Counselor") in_____ who is affiliated with _____.

IV. Physical Evaluations

A. Embryo Carrier will have a medical examination, blood and other tests and psychological testing as determined by Genetic Parents and their advisors. _____ expressly waives the privilege of confidentiality and permits the release of any reports or information obtained as a result of said examination/testing to _____ and _____.

B. Embryo Carrier's Husband will have blood and sexually transmitted disease ("STD") tests as determined by the Responsible Physician. _____ expressly waives the privilege of confidentiality and permits the release of any reports or information obtained as a result of said examination/testing to _____ and _____.

C. Genetic Parents will have blood and STD tests as determined by the Responsible Physician. _____ expressly waives the privilege of confidentiality and permits the release of any reports or information obtained as a result of said examination/testing to _____ and _____.

V. Conditions

All parties' obligations under this Agreement (other than the obligation of Genetic Parents to reimburse Embryo Carrier for expenses incurred) are conditioned on:

A. The approval or Genetic Parents and their advisors of results of Embryo Carrier's exams and tests.

B. The approval of Embryo carrier and the Responsible Physician of results of Genetic Parents STD tests.

V. Medical Instructions

A. _____ agrees to adhere to all medical instructions given to her, including abstention from sexual intercourse as directed by the IVF Physician. _____agrees to follow a transfer and prenatal medical examination schedule set by the attending physician.

B. Embryo Carrier will not smoke, drink alcoholic beverages, use illegal drugs, non-prescription medication or prescription medication without approval of the Responsible Physician.

C. Embryo Carrier will undergo prenatal medical exams as directed by the Responsible Physician, will submit to other medical tests, and will take only drugs and vitamins recommended or prescribed by the Responsible Physician.

D. Embryo Carrier will do everything reasonably appropriate for her good health and the good health of the fetus during pregnancy.

E. Embryo Carrier will not engage in any hazardous or inappropriate activity during the pregnancy.

F. Embryo Carrier will not travel outside of _____ after second trimester of pregnancy, except in the event of extreme illness or death in the family (with doctors approval).

VII. IVF Procedures

It is the parties' intention to do the following:

A. Try the number of cycles recommended by the Responsible Physician, but stop at any time that the physician recommends stopping

B. Transfer a maximum of _____ embryos per cycle

VIII. Early Termination of Agreement

Before Embryo Carrier becomes pregnant, the agreement may be terminated:

A. By Genetic Parents, if the Responsible Physicians opinion is that Embryo Carrier will not become pregnant within ___ cycles.

B. By Genetic Parents, if the Responsible Physician or counselor determines that Embryo Carrier is not a good candidate for carrying out this agreement.

C. By Genetic Parents or Embryo Carrier, if Embryo Carrier has not become pregnant after _____ cycles.

D. Name

Genetic Parents will name the child.

XI. Relinquishment/Adoption.

Embryo Carrier will relinquish physical custody of the child to Genetic Parents upon birth. Embryo Carrier and Genetic Parents will cooperate in all proceedings for adoption of the child by Genetic Parents.

XII. Paternity test

Embryo Carrier, Embryo Carrier's Husband and Genetic Parents agree that the child will have paternity tests; if Genetic Parents request.

XIII. After Birth Contact.

A. Embryo Carrier can see the child while in the hospital, but the child will be in the care of Genetic Parents from birth forward.

B. After Genetic Parents take the child from the hospital, Embryo Carrier and Embryo Carrier's Husband agree not to try to view or contact the child. Genetic Parents intend to keep Embryo Carrier informed by sending a picture and a letter about the child's progress at least on an annual basis, if Embryo Carrier wishes. Embryo Carrier agrees that she will be reasonably available if child has questions about his/her birth mother.

XIV. Counseling

A. Counseling Sessions

It is the parties' intention that Embryo Carrier will attend at least _____ counselling sessions per month with the Responsible Counselor in _____ during the pregnancy. It is also the parties' intention that Embryo Carrier will attend more counselling sessions if:

(i) Embryo Carrier wants to attend the sessions;

(ii) Genetic Parents want Embryo Carrier to attend the sessions; or

(iii) Embryo Carrier's attendance is strongly recommended by the Responsible Counselor.

Embryo Carrier will use her reasonable efforts to attend the meetings, but will not be penalized for not attending if she does not feel well.

B. Disagreements.

The parties intend that if they have disagreements among them that they are unable to resolve quickly or if there are issues tht they want to bring up before a third party, that they will discuss the disagreements or issues in a conference call or meeting under the direction of the Responsible Counselor. The parties acknowledge that the Responsible Counselor is very experienced in surrogacy matters and agree to be guided by her recommendations.

XV. Fees, Reimbursement, Insurance, and Other Expenses

A. Embryo Carrier's Fee

1. Genetic Parents agree to pay Embryo Carrier as compensation for services provided the sum of $_____. The compensation shall be paid in 10 equal monthly installments, the first being paid after the pregnancy is confirmed.

2. In the case of a multiple pregnancy, Genetic Parents agree to pay Embryo Carrier a bonus fee of $2,000 per additional child. Bonus fee will be added to the original fee of $ _____ and disbursed in equal monthly installments.

3. Escrow Account - Genetic Parents will open an escrow account and will place all fees in the account before IVF procedures begin. Genetic Parents's attorney will be authorized to disburse funds from the account per the payment schedule set out above (Section XV, Part A, Paragraph 1 and 2).

4. Embryo Carrier will receive the total fees set out above (Section XV, Part A, Paragraph 1 and 2), provided she carries the child(ren) at least 32 weeks.

5. In the event that a caesarian is ordered in either a single or multiple birth, Embryo Carrier will be paid an additional $500.

6. Genetic Parents will place $_____ in the aforementioned escrow account (v) to pay for any medical expenses not covered by insurance.

7. For a completed cycle that does not result in a pregnancy, Embryo Carrier will be paid a sum of $500.

B. Termination of Pregnancy

1. Embryo Carrier miscarries (through no fault of her own) or is advised by the Responsible Physician that an abortion is necessary to save her own life, then the payment plan outlined in Section XV, Part A, will cease and all payments to date will belong to Embryo Carrier. Any outstanding uninsured or unreimbursed medical expenses will be the responsibility of the Genetic Parents.

2. If Embryo Carrier aborts the pregnancy when not directed to do so by the Responsible Physician and Genetic Parents, Genetic Parents will have no responsibility for surrogacy fee or expenses other than Embryo Carrier's expenses incurred to that date.

C. Insurance

I. Genetic Parents will be responsible for term life insurance for Embryo Carrier.

2. The policy will be bought before the first IVF cycle and will remain in effect until 2 months after delivery or end of pregnancy. It will cost approximately $_____ premium for $250,000 face amount of insurance. The beneficiaries will be Embryo Carrier's Husband and Embryo Carrier's Children.

D. Counseling

1. Genetic Parents responsible for costs of psychological screening for Embryo Carrier.

2. Genetic Parents responsible for costs of counseling for Embryo Carrier at a monthly rate of $ _____.

3. Genetic Parents responsible for up to 5 counselling sessions for Embryo Carrier with the Responsible Counselor after the birth, if needed.

E. Medical Payments.

1. Genetic Parents responsible for the reasonable costs of medical screening for Embryo Carrier, Embryo Carrier's Husband, Genetic Mother and Genetic Father.

2. Genetic Parents responsible for all medical costs related to conception, pregnancy and birth not covered by medical insurance.

3. Embryo Carrier's medical insurance policy will be the primary insurance coverage for medical costs related to pregnancy and birth.

4. If a medical specialist for high-risk pregnancy is recommended by the Responsible Physician and not covered by insurance, Genetic Parents will be responsible for all related costs.

F. Attorney's Fees.

Genetic Parents responsible for Embryo Carrier's attorney's fees to review contract as well as those related to adoption procedure.

G. Other Payments.

1. Reimbursement for child care expenses related to Embryo Carrier's travels to doctor visits. ($_____/hr or _____/day for overnight care).

2. Reimbursement for gas and travel expenses at $.27 per mile for car, airline tickets and hotel in connection with doctor or counseling visits.

3. Household helper: Genetic Parents will provide $100 per week (paid monthly in advance) in the case of multiple pregnancy or high-risk pregnancy in which the Responsible physician requires Embryo Carrier to be on bedrest or drastically reduce her activity.

4. Maternity clothes: $500.00

5. Stillborn Genetic Parents will be responsible for any funeral or cremation expenses.

6. Genetic Parents are not responsible for any charges or costs unless provided for in this Agreement.

XVI. Other Issues

A. Publicity/Confidentiality.

1. Embryo Carrier will not disclose information about Genetic Parents or about this arrangement to the media unless Genetic Parents approve the disclosure.

B. Death of Genetic Mother or Genetic Father Precedes Birth of Child(ren)

1. If Genetic Father should die before child is born, the child shall be placed with Genetic Mother as the mother, and all terms of this Agreement continue.

2. If Genetic Mother should die before child is born, the child shall be placed with Genetic Father as the father, and all terms of this Agreement continue.

3. If both Genetic Mother and Genetic Father should die before child is born, they have chosen _____ to be child's guardian and take custody at birth.

4. In the event of the death of both Genetic Mother and Genetic Father, _____ will be responsible for all expenses related to the surrogacy.

XVII. Arbitration

Any and all disputes relating to this Agreement or breach thereof shall be settled by arbitration in _____, _____ in accordance with then current rules of the American Arbitration Association, and judgment upon the award entered by the arbitrators may be entered in any Court having jurisdiction hereto. Costs of arbitration, including reasonable attorney's fees to the prevailing party by the Party designated by the Arbitrator or Court. Should one party either dismiss or abandon the claim or counterclaim before hearing thereon, the other Party shall be deemed the "Prevailing Party" pursuant to this Agreement. Should both parties receive judgment or award on their respective claims, the party in whose favor the larger judgment or award is rendered shall be deemed the "Prevailing Party" pursuant to this Agreement.

XVIII. SIGNATURES

Successors &. Assigns:

This agreement shall insure to the benefit of and be binding on the parties, their heirs, personal representatives, successors and assigns. IN WITNESS WHEREOF, the parties have executed this agreement on the date first written above.

Dated this ___ day of _____ 1997 at _____, _____.

_____ Embryo Carrier
By:

_____ Genetic Father
By:

_____Genetic Mother
By:

ANNEX I

Elements To Be Considered In Obtaining Informed Consent For ART

A PRACTICE COMMITTEE REPORT
A Committee Opinion

All informed consents must be in writing, signed by all participating parties, and properly witnessed. In addition to information about chance of success and financial obligations, the following issues should be addressed in the process of obtaining consent. It is also important that couples be provided affairs full information concerning alternative procedures available to manage their specific infertility problems, including procedures that are not performed by the treating center, as well as non-medical options such as adoption and non-treatment. Couples must be informed about the federal reporting requirements and possible contact for follow-up. Couples will be informed through constant forms that this cycle-specific data will be provided to the CDC and that all personal identifiers will be protected under the Privacy Act. If a patient indicates that she does not want this personal identifier reported, the identifier will not be included and this noted in the consent form.

1. IVF, GIFT, and ZIFT

A. Description of procedure including:

1. Use of medications including ovulation induction agents, luteal support, antibiotics, etc.
2. Use of monitoring including laboratory tests and ultrasound
3. Collection of sperm
4. Oocyte retrieval
5. Fertilization in the laboratory (IVF and ZIFT) or in the fallopian tubes (GIFT)
6. Monitoring of early pregnancy

B. Barriers to successful pregnancy including:

1. Poor response to ovulation induction agents
2. Unsuccessful oocyte retrieval
3. Abnormal oocytes
4. Inability to produce semen specimens or acquire sperm of sufficient quality or quantity
5. Failure of fertilization
6. Abnormal embryo development
7. Difficult or failed embryo transfer
8. Failure of implantation
9. Loss or damage to oocytes or embryos

C. Success rates and complications of pregnancy including:
1. Factors which affect pregnancy rates
2. Risks of multiple pregnancies, spontaneous abortion, ectopic pregnancies, stillbirths, and congenital abnormalities

D. Possible risks associated with the following procedures:
1. Blood drawing
2. Ovulation induction agents including allergic reactions, injections, hyperstimulation, multiple births, and association with ovarian cancer
3. Antibiotic administration
4. Oocyte retrieval or tubal transfer
5. Laboratory and clinical handling of gametes and embryos
6. Embryo transfer

E. Disposition of oocytes and embryos including:
1. Option to attempt fertilization and/or freeze unused embryos
2. Discarding of unused oocytes and low quality or abnormal embryos

II. Cryopreservation of Embryos

A. Description of procedures including:
1. Benefits of cryopreservation
2. Freezing of embryos
3. Embryo transfer

B. Potential risks including:
1. Mechanical failure or catastrophic event leading to loss of embryos
2. Theoretic risks of congenital malformations
3. Theoretic risks of long-term storage
4. Monitoring of cycle
5. Failure of embryos to survive freezing and thawing
6. Laboratory and clinical handling of embryos
7. Psychological effects

C. Disposition of frozen embryos including:
1. Program's time limit on storage of frozen embryos
2. Disposition of frozen embryos in the event of:
   a. Death of one or both partners
   b. Divorce or dissolution of partnership
   c. Nonpayment of storage fees
   d. Loss of contact with gamete providers

III. Oocyte Donation

A. Description of procedure including:
1. Medical. and psychological screening including genetic and infectious disease testing as applicable
2. Use of ovulation induction agents
3. Monitoring of cycle
4. Oocyte retrieval
5. Fertilizaton of oocytes
6. Potential cryopreservation of embryos

B. Potential risks and discomforts (donor) including:
1. Blood drawing
2. Ovulation induction agents including allergic reactions, hyperstimulation, and the association with ovarian cancer
3. Antibiotics
4. Oocyte retrieval
5. Laboratory and clinical handling of gametes and embryos
6. Psychological issues

C. Special considerations (recipient) including:
1. Monitoring of cycle
2. Medications
3. Failure to obtain oocytes, sperm, or embryos
4. Laboratory and clinical handling of gametes and embryos
5. Risks of congenital abnormalities
6. Potential Rh incompatibility
7. Transmission of viral infections including HIV
8. Psychological issues

D. Legal Issues

IV. Microoperative Procedures

A. Description of procedures including:
1. Appropriate candidates
2. Rationale for use of these techniques

B. Possible risks of Intracytoplasmic Sperm Injection including:
1. Glucocorticoids and antibiotics if used
2. Arbitrary selection of sperm with theoretical potential for increased risks of birth defects including infertility
3. Trauma or destruction of oocytes
4. Laboratory and clinical handling of gametes and embryos

5. Abnormal embryo morphology
6. Unknown long-term sequelae including those that could occur in subsequent generations

C. Possible risks of Assisted Hatching including:
1. Glococorticoids and antibiotics if used
2. Laboratory and clinical handling of embryos
3. Potential for cells or microorganisms to reach the embryo
4. Potential damage to the embryo including loss of blastomeres
5. Potential increased risk of birth defects
6. Unknown long-term sequelae including those that could occur in subsequent generations

V. Embryo Donation

A. Description of procedure including:
1. Medical and psychological screening including genetic and infectious disease testing as applicable
2. Use of medications as necessary
3. Monitoring of transfer cycle
4. Unknown long-term sequelae including those that could occur in subsequent generations

B. Miscellaneous:
1. Donors relinquish rights to embryos and any offspring that may result from embryo donation
2. Reimbursement of medical costs

Drafted by the Practice Committee of the Society for Assisted Reproductive Technology and approved by the Executive Council of the Society for Assisted Reproductive Technology, November 1996.

Revised and approved by the Practice Committee of the American Society for Reproductive Medicine, April 1997.

Approved by the Board of Directors of the American Society for Reproductive Medicine, June 1997.

Abstract:

EXPANDING THE CLASSIC SELF-DEFENSE DOCTRINE TO ACCOMMODATE THE NOVEL THEORY OF BATTERED WOMAN SYNDROME: PROBLEMS AND ISSUES IN PHILIPPINE CONTEXT

Taking into focus the current widespread abuses inflicted upon married women by their battering husbands, the author, in her paper, defends women who kill their batterers by placing it within the purview of self-defense. Her main theory is that the traditional concept of self-defense fails to absolve women who defend themselves from their husbands when "the violence has stopped". The justifying circumstance must be expanded, by accommodating the Battered Women Syndrome, in order to appreciate this sad reality.

The paper delves into unjust circumstances wherein women who are continually and repeatedly battered by their husbands are left legally unprotected and in fact paradoxically punished. The reason, according to the author, is that when a woman kills an abusive husband when he is no longer inflicting violence, the requirements of imminence and necessity, as traditionally defined, are no longer present.

To defend the woman who kills her battering husband, the author re-defines self-defense, specifically the concepts of imminence and necessity, using the Battered Women Syndrome, in order to correct this perceived legal loophole.