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Embryo “Adoption”? The Rhetoric, the Law, and the Legal Consequences

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Embryo “Adoption”? The Rhetoric, the Law, and the Legal Consequences

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I. INTRODUCTION

Reproductive technology is at a cusp between science and intimacy. One of the most intimate and momentous decisions a person will make in her lifetime is the decision to become a parent. Many couples set out to accomplish this objective the "old-fashioned way," through sexual intercourse. However, this method may not work for everyone. In fact, approximately 6.5 to 10 million couples in the United States suffer from infertility.¹ Since the first "test tube" baby was born in 1978,² various assisted reproductive technologies (ART) have become available to help couples achieve parenthood.³ That birth, the first to result from the use of in vitro fertilization (IVF),⁴ ushered in an era of new reproductive choices for infertile couples. Since then, the use of ART has grown dramatically. In 2007, fertility clinics registered with the Centers for Disease Control and Prevention (CDC) performed 142,435 ART cycles,⁵ resulting in 43,412 live births and 57,569 infants.⁶ ART and fertility drugs provide something remarkable: an ability to manipulate nature. For infertile couples, having a child is now within reach.

Embryo transfer, in which embryos are generally transferred to a woman's uterus at the two–eight cell stage, is one way in which infertile couples are able to have children. Physicians have been performing embryo transfers for years, yet the concept of the recipient "adopting" the embryo transferred to her is a recent development.⁷

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1. *Embryonic Stem Cell Research: Hearing Before the Subcomm. on Criminal Justice, Drug Policy and Human Res. of the H. Comm. on Gov't Reform*, 107th Cong. (2001) (statement of Marlene Strege, Resident, Falbrook, CA); see also Michelle Andrews, *5 Things You May Not Know About Infertility*, U.S. NEWS & WORLD REPORT, Mar. 17, 2009, <http://health.usnews.com/articles/health/sexual-reproductive/2009/03/17/5-things-you-may-not-know-about-infertility.html>. Infertility is defined as a lack of success after trying to conceive a child for one year. This condition affects about 10% of the population. See *Frequently Asked Questions About Infertility*, RESOLVE: THE NAT'L INFERTILITY ASS'N, <http://www.resolve.org/infertility-overview/what-is-infertility/frequently-asked-questions-about-infertility.html> (last visited Jan. 20, 2011). The Center for Disease Control estimates that "about 12% of women of childbearing age in the United States have used an infertility service." CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2007 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 1 (2009) [hereinafter CDC 2007 ART REPORT], available at <http://www.cdc.gov/art/ARTReports.htm>. (last visited Jan. 20, 2011).
 2. Louise Brown, born July 25, 1978. See generally ROBIN MARANTZ HENIG, *PANDORA'S BABY: HOW THE FIRST TEST TUBE BABIES SPARKED THE REPRODUCTIVE REVOLUTION* (Cold Spring Harbor Lab. Press 2006) (2004).
 3. Assisted reproductive technologies include in vitro fertilization and artificial insemination, among others. See Andrews, *supra* note 1.
 4. *The First Test-Tube Baby*, TIME MAG., July 31, 1978, <http://www.time.com/time/magazine/article/0,9171,946934-1,00.html>.
 5. CDC 2007 ART REPORT, *supra* note 1, at 13.
 6. *Id.*
 7. See Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169, 176 (2004); Michelle L. Anderson, Comment, *Are You My Mommy? A Call for Regulation of Embryo Donation*, 35 CAP. U. L. REV. 589, 604–05 (2006) ("[President Bush had] advocated the position that all of the current frozen embryos

But the term “adoption” does not accurately describe what actually happens when embryos are transferred.⁸ While helping people have babies is commendable, there is something very strange about extending the use of the term “adoption” to embryos. Children are adopted, but . . . embryos?

The biggest problem with embryo adoption laws is the lack of them.⁹ Because only a few states have statutes that address embryo adoption, when issues arise parties are forced to rely on the language of private contracts and bring their challenges before a court, hoping for the best. Currently, the only legal precedents available to guide the courts are those that have decided embryo disposition at death or divorce,¹⁰ parental rights of donors,¹¹ or the enforceability of contracts in surrogacy agreements.¹² As a result, many courts have called for a uniform law.¹³ In February 2008 the American Bar Association promulgated the Model Act Governing Assisted Reproductive Technology (“Model Act”).¹⁴ And, although the Model Act acknowledges the possibility of embryo donations to third parties, it does not set forth any guidelines for how embryo donations should occur in practice.¹⁵

The use of the term “adoption” to describe this transaction is itself problematic. Calling the transaction embryo “adoption” encourages the parties involved to treat it

should be implanted or donated to research rather than destroyed . . . [and] . . . supported Congress’s designation of \$1 million annually to a campaign to raise public awareness of embryo adoption.”).

8. See *infra* Part V. In fact, Black’s Law Dictionary defines “embryo adoption” as “*slang*.” BLACK’S LAW DICTIONARY 53 (8th ed. 2004). The definition goes on to describe embryo adoption as “[t]he receipt of a frozen embryo that is implanted into a recipient’s womb. Donors must waive all parental rights before the recipients of the embryo assume legal ownership or custody. The process is not considered to be a legal adoption because American law does not treat embryos as children.” *Id.*
9. Only four states have laws that provide any guidance for embryo transfers. They are Florida, Louisiana, Oklahoma, and Georgia. See FLA. STAT. § 742.11 (2010) (“[A]ny child born within wedlock who has been conceived by means of donated eggs or preembryos shall be irrefutably presumed to be the child of the recipient gestating woman and her husband, provided that both parties have consented in writing to the use of donated eggs or preembryos.”); LA. REV. STAT. ANN. §§ 9:130–131 (2010) (unequivocally providing that an embryo is a “juridical person” and any disputes concerning the embryo must be resolved in the embryo’s best interest); OKLA. STAT. tit. 63 § 1-730 (2010) (defining “unborn child” as “the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth,” and specifically includes “embryo”); GA. CODE ANN. §§ 19-8-40 to -43 (2010) (setting out a two-step process: first, the embryo donors relinquish all rights relating to the embryo via written contract; and second, the donees petition the court for an order of adoption, which terminates all rights and responsibilities of the donors and vests all of these rights and responsibilities with the donees).
10. See, e.g., *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *Kass v. Kass*, 91 N.Y.2d 554 (1998).
11. See, e.g., *Lamarita v. Lucas*, 823 So. 2d 316 (Fla. Dist. Ct. App. 2002) (holding sperm donor was not a parent and has no parental rights).
12. See, e.g., *In re Baby M*, 537 A.2d 1227 (N.J. 1988).
13. See generally, e.g., *Kass*, 91 N.Y.2d at 562.
14. ABA MODEL ACT GOVERNING ASSISTED REPROD. TECH. (2008), available at http://www.americanbar.org/content/dam/aba/publishing/family_law_quarterly/family_flq_artmodelact.pdf.
15. *Id.* § 502(1) (“Intended parents may choose to donate their unused embryos . . . for the purpose of the recipient attempting to create a child and become that child’s parent.”).

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like traditional adoption.¹⁶ In fact, many legal scholars are calling for this process to be treated like traditional adoption, governed by adoption law and the best interests of the child standard.¹⁷ The Nightlight Christian Adoptions Agency in California, for example, “would like for embryos to be recognized as human life and therefore to be adopted as opposed to treated as property.”¹⁸ That agency has been offering embryo adoptions since the late 1990s.¹⁹ Because embryo adoption has remained completely unregulated, private agencies have developed their own rules. Clinics and agencies, such as the Nightlight Christian Adoptions Agency, have relied on the best interests standard, used in traditional adoption proceedings, to bar prospective parents whose adoption of an embryo, in the agency’s opinion, would not be in the best interests of the yet-to-be conceived offspring.²⁰ Following either contract law or adoption law, private agencies may reject those applicants they deem to be “undesirable” candidates, such as non-Christian or homosexual couples.²¹ Couples

16. Traditional adoption can either be private or created by judicial order. Private adoption “occurs independently between the biological mother (and sometimes the biological father) and the adoptive parents without the involvement of an agency.” BLACK’S LAW DICTIONARY 53 (8th ed. 2004). On the other hand, court ordered adoption is “[t]he creation of a parent-child relationship by judicial order between two parties who usu[ally] are unrelated This relationship is brought about only after a determination that the child is an orphan or has been abandoned, or that the parents’ parental rights have been terminated by court order.” *Id.* at 52.

17. See Olga Batsedis, Note, *Embryo Adoption: A Science Fiction or an Alternative to Traditional Adoption?*, 41 FAM. CT. REV. 565 (2003) (arguing that adoption law should be applied to embryo donation). The best interests of the child standard is “[a] standard by which a court determines what arrangements would be to a child’s greatest benefit, often used . . . in deciding whether to approve an adoption.” BLACK’S LAW DICTIONARY 170 (8th ed. 2004).

A court may use many factors, including the emotional tie between the child and the parent or guardian, the ability of the parent or guardian to give the child love and guidance, the ability of the parent or guardian to provide necessities, the established living arrangement between a parent or guardian and the child, the child’s preference if the child is old enough that the court will consider that preference in making a custody award, and a parent’s ability to foster a healthy relationship between the child and the other parent.

Id.

18. Sarah Blustain, *Embryo Adoption*, N.Y. TIMES, Dec. 11, 2005, § 6 (Magazine), at 67, available at http://www.nytimes.com/2005/12/11/magazine/11ideas1-16.html?_r=1&scp=1&sq=embryo%20adoption%20december%202011%202005&st=cse.

19. *Snowflakes Frozen Embryo Adoption & Donation Program*, NIGHTLIGHT CHRISTIAN ADOPTIONS AGENCY, <http://www.nightlight.org/adoption-services/snowflakes-embryo/default.aspx> (last visited Jan. 11, 2011).

20. One of the first agencies to apply traditional adoption to embryo donation is Nightlight Christian Adoptions. Its adoption program, the Snowflakes Embryo Adoption Program, offers adoption of what it calls “pre-born children.” Naomi D. Johnson, Note, *Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?*, 68 BROOK. L. REV. 853, 859–69 (2003). Other agencies include Miracles in Waiting and Bethany Christian Services Adoption Agency, to name a few. See MIRACLES WAITING, <http://www.miracleswaiting.org> (last visited Jan. 20, 2011); BETHANY CHRISTIAN SERVS., <http://www.bethany.org/> (last visited Jan. 20, 2011).

21. *Snowflakes Embryo Adoption Program Frequently Asked Questions by Adopting Families*, NIGHTLIGHT CHRISTIAN ADOPTIONS AGENCY (Oct. 18, 2010), <http://www.nightlight.org/downloads/nightlight-embryo-overview.pdf> [hereinafter *Snowflakes Embryo Adoption Program FAQ*].

participating in this process have no legal protections beyond their contracts, which might not be enforceable depending on the state.²² Although some might argue that embryo adoption is not very different from the traditional adoption of a child, a closer analysis reveals many differences.

Embryo donation in ART and its classification will have a tremendous impact on family law. Designating the embryo donation procedure as embryo adoption could have far-reaching effects.²³ Part II of this note discusses ART generally, and what is known as embryo “adoption” specifically. It also includes a discussion of the uncertain legal status of embryos. Part III discusses the legal status of embryos in New York. Part IV analyzes inadequacies in current contract law, with a specific focus on surrogacy contracts. It also describes the inapplicability of traditional adoption law and the potential effects of characterizing embryo donations as embryo adoptions. Part V analyzes adoption law in New York and describes the possible conundrum caused by applying traditional adoption law to embryo “adoption.” This analysis suggests a need for legislative action rather than judicial rulemaking in this area. Finally, Part VI analyzes current statutes from Louisiana, Oklahoma, and Georgia regarding embryo adoption, and presents a model law governing embryo transfers to resolve some of the problems addressed throughout this note.

II. ORIGIN AND LEGAL DEFINITIONS OF “ADOPTABLE” EMBRYOS

A. *The Definition and Scope of Infertility and Assisted Reproductive Technologies*

ART is an umbrella term that refers to fertility treatments involving both eggs and sperm,²⁴ and includes several types of treatments such as IVF, gamete intrafallopian transfers (GIFT), and zygote intrafallopian transfers (ZIFT).²⁵ ART began in 1978 when the first “test-tube” baby, Louise Brown, was born in England.²⁶ Ms. Brown was the first child conceived through IVF, a procedure developed by

22. See, e.g., *In re Baby M*, 537 A.2d 1227, 1240–41 (N.J. 1988); *J.B. v. M.B.*, 751 A.2d 613, 619 (N.J. Super. Ct. App. Div. 2000), *aff’d as modified*, 783 A.2d 707 (N.J. 2001) (concluding that a contract to procreate is contrary to New Jersey public policy and is unenforceable); *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000) (holding that a consent form signed by a couple and a fertilization clinic, providing in pertinent part that on the parties’ separation the embryos were to be given to the wife for implantation, was unenforceable).

23. For example, a woman’s right to an abortion in the United States has been firmly established by the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). This right implies that, at least up to a certain point, a fetus/embryo is not a legally recognized person. By calling this ART process adoption, it implies that there is a human life/child involved. Thus, every abortion could be considered murder. Calling this procedure adoption sets up a slippery slope.

24. CDC 2007 ART REPORT, *supra* note 1, at 3.

25. *Id.* IVF is a procedure in which a woman’s eggs are removed and fertilized in a lab with sperm, and the resulting embryo is transferred to the woman’s uterus through the cervix; GIFT is the process in which an instrument guides unfertilized eggs and sperm into the woman’s fallopian tubes; ZIFT is a process in which the woman’s eggs are fertilized in a lab with sperm, and the fertilized eggs (not yet an embryo, but rather a “zygote”) are then guided with an instrument into the fallopian tubes of the woman. *Id.*

26. See generally HENIG, *supra* note 2.

Drs. Robert Edwards and Patrick Steptoe.²⁷ The first IVF program in the United States began in the late 1970s at the Eastern Virginia Medical School in Norfolk, Virginia.²⁸ Today, there are approximately 400 clinics in the United States assisting infertile couples to become parents.²⁹

In the United States, it is estimated that sixty-two million women are of reproductive age.³⁰ Of those sixty-two million women, “about 1.2 million, or 2%, [have] had an infertility related medical appointment within the previous year and an additional 10% [have] received infertility services at some time in their lives.”³¹ As of 2006, approximately 300,000 babies have been born using ART procedures in the United States.³² The most commonly used and the most effective form of ART is IVF.³³

1. *Defining Embryo Donation and Adoption*

Embryo donation is a process by which couples who have cryogenically preserved embryos relinquish any and all legal rights to those embryos and give them to another couple with no genetic ties to the embryos.³⁴ Experts believe there are as many as 400,000 embryos frozen in storage in the United States.³⁵ These so-called “excess” embryos exist in storage because more eggs are extracted from an IVF patient than

27. See *The First Test-Tube Baby*, *supra* note 4.

28. GEOFFREY SHER ET AL., *IN VITRO FERTILIZATION: THE A.R.T. OF MAKING BABIES* xvii (3d ed. 2005).

29. *Id.*

30. CDC 2007 ART REPORT, *supra* note 1, at 3.

31. *Id.* (“Infertility services include medical tests to diagnose infertility, medical advice and treatments to help a woman become pregnant, and services other than routine prenatal care to prevent miscarriage.”). “Infertility means not being able to get pregnant after one year of trying. Or, six months, if a woman is thirty five or older. Women who can get pregnant but are unable to stay pregnant may also be infertile.” *Infertility, Frequently Asked Questions*, U.S. DEP’T OF HEALTH & HUMAN SERVS. OFFICE ON WOMEN’S HEALTH, <http://www.womenshealth.gov/faq/infertility.cfm#a> (last visited Jan. 20, 2011).

32. SHER ET AL., *supra* note 28, at 5. The most recent CDC National Summary and Fertility Clinic Report explains that:

73.5% of ART cycles involved the use of nonfrozen, nondonor eggs or embryos. Another 14.5% involved frozen, nondonor eggs or embryos. In only 11.8% of ART cycles, the eggs or embryos were received from a donor. Though success, as defined by “live birth rates,” varies depending on the procedure performed, success rates have been increasing for all ART procedures since 1996. In addition, ART has become a more widely used technique. According to the CDC report, 127,977 ART cycles were performed in 2004, resulting in the birth of 49,458 babies, which is approximately double the number of cycles performed and babies born in 1996.

Jessica L. Lambert, Note, *Developing a Legal Framework for Resolving Disputes Between “Adoptive Parents” of Frozen Embryos: A Comparison to Resolutions of Divorce Disputes Between Progenitors*, 49 B.C. L. REV. 529, 534–35 (2008) (citations omitted).

33. Lambert, *supra* note 32, at 533.

34. See SHER ET AL., *supra* note 28, at 239.

35. See Lambert, *supra* note 32, at 534; see also *Snowflakes Embryo Adoption Program FAQ*, *supra* note 21.

can be used for one implantation.³⁶ Most IVF clinics require IVF patients to state in writing, prior to the extraction of eggs and collection of sperm, their wishes pertaining to the disposition of the unused embryos from the initial treatment.³⁷ Many fertility clinics give their patients the option of donating their excess embryos anonymously to another couple when the patients no longer need or want them for their own use.³⁸ To date, the Nightlight Christian Adoptions Agency “has matched 480 genetic families . . . with 328 adopting families.”³⁹ “There are 242 Snowflakes children and 19 adopting families are currently expecting 24 babies.”⁴⁰

Embryo donation, however, is different in many respects from embryo adoption. Whereas anonymous embryo donation has been treated like a gift,⁴¹ embryo adoption has been treated like traditional adoption. Nightlight Christian Adoptions Agency describes the difference between embryo donation and embryo adoption as this: With embryo donation, the adopting family does not have a home study prepared, the families are usually unknown to one another and have no participation in the selection process, and there is typically no contact between the families, “even through an intermediary.” Embryo adoption, as provided by adoption agencies and/or attorneys, “goes beyond the typical donation” program by offering the same “safeguards and education available” as that in a traditional adoption. A home study is conducted for the adopting family and includes screening and education. Both the donating and adopting families participate in the selection of each other, as compared to embryo donation, where most often, a doctor in a clinic decides to whom embryos are given. An embryo adoption program further recognizes the importance of counseling for all parties involved.⁴²

36. See Ann Bindu Thomas, Note, *Avoiding Embryos “R” Us: Toward a Regulated Fertility Industry*, 27 WASH. U. J.L. & POL’Y 247, 248 (2008).

37. Erin P. George, Comment, *The Stem Cell Debate: The Legal, Political and Ethical Issues Surrounding Federal Funding of Scientific Research on Human Embryos*, 12 ALB. L.J. SCI. & TECH. 747, 751 (2002) (discussing options for discarding unused embryos).

38. See Heidi Forster, *Recent Development: The Legal and Ethical Debate Surrounding the Storage and Destruction of Frozen Human Embryos: A Reaction to the Mass Disposal in Britain and the Lack of Law in the United States*, 76 WASH U. L.Q. 759, 760 (1998). Other options include discarding the embryos by thawing them, or donating the embryos for research. See *id.*

39. *Snowflakes Embryo Adoption Program FAQ*, *supra* note 21.

40. *Id.*

41. See generally *Embryo Donation FAQ*, MIRACLES WAITING, <http://www.miracleswaiting.org/understanding.html#q3> (last visited Jan. 20, 2011) (“An anonymous embryo donation occurs when donors and recipients do not know each other’s identities. With an anonymous donation, no contact can be made between donor and recipient, either now or in the future.”). Donors are not involved in the process of selecting recipients, and the embryo is treated as property that is being voluntarily transferred to another person or couple without compensation. See also *Frequent Questions: Adopting Parents*, EMBRYO ADOPTION AWARENESS CTR., <http://www.embryoadoption.org/faqs/index.cfm> (last visited Jan. 20, 2011) [hereinafter *Frequent Questions: Adopting Parents*] (access by clicking on “Choosing Embryo Adoption – Is it right for me?” and then clicking “5. How is embryo adoption different from embryo donation?” hyperlink).

42. *Snowflakes Embryo Adoption Program FAQ*, *supra* note 21.

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The home study required for prospective adoptive parents offers genetic parents entering an embryo adoption program the benefit of selecting the adoptive parents from the agency’s pool of prescreened applicants,⁴³ and in some cases the opportunity to maintain a relationship with the adoptive family once the child is born.⁴⁴ Embryo ownership is transferred directly from the genetic parents to the adoptive parents,⁴⁵ who may negotiate the terms for future contact between the families.⁴⁶

Prospective adoptive parents entering an embryo adoption program must complete an application, traditional adoption home study, adoption education program, undergo health checks, and pay a fee.⁴⁷ The placement agency then reviews their file and matches the prospective adoptive parents to genetic parents with similar adoption preferences, such as the desired level of openness post-adoption.⁴⁸ The genetic and prospective couples are each given the chance to approve or disapprove of the match.⁴⁹ Once all parties agree, the frozen embryo is delivered to the adoptive mother’s clinic for the frozen embryo transfer.⁵⁰ None of these procedures are legal requirements of embryo transfer.⁵¹

From the perspective of adopting parents, embryo adoption affords many benefits. The greatest of these is the ability to carry one’s adopted embryo, or child, to term—a benefit traditional adoption cannot provide. Another benefit is cost. Adopting an embryo is not expensive. The average cost of adopting an embryo, not including fertility clinic charges and medical fees for implantation, is approximately \$4500.⁵² It is less expensive than both IVF and traditional adoption, which can cost as much as \$15,000⁵³ and \$30,000,⁵⁴ respectively.

43. *Frequent Questions: Adopting Parents*, *supra* note 41 (access by clicking on “Practicalities of Donating Your Embryos” and then clicking “1. Can the donating family have input regarding who receives their embryos?” hyperlink).

44. *Id.*

45. *Id.* (access by clicking on “Expenses and Legal Requirements,” and then clicking “7. What are the most significant legal issues associated with embryo adoption?” hyperlink).

46. *Id.* (access by clicking on “Practicalities of Donating Your Embryos” and then clicking “1. Can the donating family have input regarding who receives their embryos?” hyperlink).

47. *Id.* (access by clicking on “The Embryo Adoption Process” and then clicking on various tabs).

48. *Id.* (access by clicking on “The Embryo Adoption Process” and then clicking “13. How are placing and adopting families matched?” hyperlink).

49. *Id.*

50. *Id.* (access by clicking on “The Embryo Adoption Process” and then clicking “16. What happens after a match is made?” hyperlink).

51. *See infra* Part III.

52. *See Cost of IVF*, MALPANI INFERTILITY CLINIC, <http://www.drmlpani.com/cost-of-ivf.htm> (last visited Jan. 20, 2011).

53. *How Much Does IVF Cost?*, ABOUT.COM, http://infertility.about.com/od/ivf/f/ivf_cost.htm (last visited Jan. 20, 2011).

54. *Adoption Costs*, ADOPTION.COM, <http://costs.adoption.com> (last visited Jan. 20, 2011).

Furthermore, unlike traditional child adoption, genetic parents cannot readily change their minds. With embryo adoption, the genetic family must transfer a signed relinquishment terminating their ownership rights before the embryos are shipped to the adoptive mother for implantation.⁵⁵ The Nightlight Christian Adoptions Agency stipulates that the “genetic family has three business days from the date they sign the relinquishment in which to change their minds.”⁵⁶ Therefore, the only time genetic parents can change their minds is prior to implantation of the embryo into the adoptive mother.

B. The Uncertain Legal Status and Classification of Frozen Embryos

The current legal status of embryos is unclear: they are considered either property, human beings, or an intermediate category of potential life.⁵⁷ Whether these embryos can or should be donated to or adopted by the prospective parents involves overarching notions of when life begins.⁵⁸ If life begins at fertilization, some commentators argue that an adoption model must be utilized for disposition of these embryos in order to create a new family.⁵⁹ However, significant practical roadblocks exist if the adoption model is applied to embryos because the vast majority of states do not permit the pre-birth termination of parental rights.⁶⁰ If, instead, frozen embryos are not protected as either “potential life”⁶¹ or “juridical persons,”⁶² other commentators argue the donation model becomes more persuasive and practical, enabling the donation of frozen embryos to third parties without concerns regarding the pre-birth termination of

55. See *Snowflakes Embryo Adoption Program FAQ*, *supra* note 21.

56. *Id.*

57. See Paige C. Cunningham, *Embryo Adoption or Embryo Donation?: The Distinction and Its Implications*, *CTR. FOR BIOETHICS & HUMAN DIGNITY* (Apr. 16, 2003), <http://cbhd.org/content/embryo-adoption-or-embryo-donation-distinction-and-its-implications>.

58. See, e.g., Susan L. Crockin, “*What is an Embryo?*”: *A Legal Perspective*, 36 *CONN. L. REV.* 1177 (2004); Kelly J. Hollowell, *Defining a Person Under the Fourteenth Amendment: A Constitutionally and Scientifically Based Analysis*, 14 *REGENT U. L. REV.* 67 (2002); Ann A. Kiessling, *Commentary, What is an Embryo?*, 36 *CONN. L. REV.* 1051 (2004).

59. See, e.g., Brandon S. Mercer, *Comment, Embryo Adoption: Where are the Laws?*, 26 *J. JUV. L.* 73, 74 (2006).

60. See *infra* Part V.

61. E.g., *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (discussing the treatment and status of embryos under the law and holding that cryopreserved embryos occupy an “interim category” between that of persons and property and thus should be afforded “special respect” due to their “potential for human life”).

62. *LA. REV. STAT. ANN.* §§ 9:123--133 (2010) (stating that an in vitro fertilized human ovum is a juridical and biological person under Louisiana law). “As a juridical person, the in vitro fertilized human ovum shall be given an identification by the medical facility for use within the medical facility which entitles such ovum to sue or be sued. The confidentiality of the in vitro fertilization patient shall be maintained.” *Id.* § 9:124.

parental rights.⁶³ Thus, a critical question presented is: What legal status can or should be attributed to a cryogenically preserved fertilized human embryo?

1. *The Embryo as a Person*

Although no court has held an embryo to be a person, two states have enacted statutes that define the legal status of an embryo as equal to a person. Louisiana has directly addressed the status of an embryo, and defines an embryo as “an in vitro fertilized human ovum, with certain rights granted by law.”⁶⁴ Moreover, the statute states that “[a]n in vitro fertilized human ovum exists as a *juridical person* until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law”⁶⁵ and that “[a]n in vitro fertilized human ovum as a juridical person is recognized as a separate entity apart from the medical facility or clinic where it is housed or stored.”⁶⁶ The Louisiana statute emphasizes that an embryo is “a biological *human being* which is not the property of the physician which acts as an agent of fertilization, or the facility which employs him or the donors of the sperm and ovum.”⁶⁷ Missouri law similarly defines life as “begin[ning] at conception.”⁶⁸ Although not explicitly stated, it is likely that an embryo would be considered life under Missouri law.

2. *The Embryo as “Potential Life” Deserving Special Respect and Protection*

In the seminal case of *Davis v. Davis*,⁶⁹ the Tennessee Supreme Court identified the embryo as something in between “life” and “property.” The *Davis* court held that embryos should be afforded a special or interim status under the law due to their potential to give rise to human life.⁷⁰ *Davis* began as a divorce case in which the wife was seeking custody of the couple’s cryogenically preserved embryos so that she could use them to become pregnant post-divorce.⁷¹ Mr. Davis, on the other hand, wanted the embryos to remain frozen.⁷² “Based on its determination that the embryos were

63. See Batsedis, *supra* note 17, at 566, 569, 574. Pre-birth termination of parental rights is the “legal severing of a parent’s rights, privileges, and responsibilities regarding his or her child” prior to the birth of the child. BLACK’S LAW DICTIONARY 1511 (8th ed. 2004).

64. See LA. REV. STAT. ANN. § 9:121.

65. *Id.* § 9:123 (emphasis added). A juridical person is one that is “created by law and given certain legal rights and duties of a human being.” BLACK’S LAW DICTIONARY 1178 (8th ed. 2004).

66. LA. REV. STAT. ANN. § 9:125.

67. *Id.* § 9:126 (emphasis added).

68. MO. REV. STAT. § 1.205 (2010).

69. 842 S.W.2d 588, 594–98 (Tenn. 1992).

70. *Id.* at 597.

71. *Id.* at 598.

72. *Id.* However, the positions of Mr. and Ms. Davis later shifted:

[B]oth have remarried and Mary Sue Davis (now Mary Sue Stowe) has moved out of state. She no longer wishes to utilize the “frozen embryos” herself, but wants authority

‘human beings’ from the moment of fertilization, the trial court awarded ‘custody’ to Mary Sue Davis and directed that she ‘be permitted the opportunity to bring these children to term through implantation.’”⁷³ The Tennessee Court of Appeals, however, held that “there is no compelling state interest to justify . . . ordering implantation against the will of either party,” and denied Ms. Davis custody of the embryos.⁷⁴ Ms. Davis then appealed to the Supreme Court of Tennessee.⁷⁵ After an extensive analysis, that court concluded that “preembryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”⁷⁶

3. *The Embryo as Property*

On the other end of the spectrum is the view that embryos should be deemed the legal property of the genetic parents and may be disposed of just like any other property under the law—by contract.⁷⁷ Although no statutes define embryos as property, several courts have taken this view. In *In re Marriage of Dahl and Angle*, the Oregon Court of Appeals explicitly held that frozen embryos are “personal property.”⁷⁸ Specifically, the court held that the “[contractual] right to possess or dispose of the frozen embryos [created during marriage] is personal property that is subject to a ‘just and proper’ [disposition in a dissolution proceeding].”⁷⁹

In *York v. Jones*, the Eastern District of Virginia implicitly held that embryos are the property of their donors.⁸⁰ There, Mr. and Mrs. York brought an action against a reproductive medical facility to obtain possession of their frozen embryos after the facility refused to transfer the couple’s frozen embryos to a different medical facility.⁸¹ The court held that the “Cryopreservation Agreement created a bailor-bailee

to donate them to a childless couple. Junior Davis is adamantly opposed to such donation and would prefer to see the “frozen embryos” discarded.

Id. at 590.

73. *Id.* at 589 (citation omitted).

74. *Id.*

75. *Id.* at 590. Notably, the court stated:

We granted review, not because we disagree with the basic legal analysis utilized by the intermediate court, but because of the obvious importance of the case in terms of the development of law regarding the new reproductive technologies, and because the decision of the Court of Appeals does not give adequate guidance to the trial court in the event the parties cannot agree.

Id.

76. *Id.* at 597.

77. See, e.g., Batsedis, *supra* note 17, at 567.

78. *In re Marriage of Dahl & Angle*, 194 P.3d 834 (Or. Ct. App. 2008).

79. *Id.* at 839.

80. *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989).

81. *Id.* at 424.

relationship between the plaintiffs and defendants.”⁸² Thus, the nature of this relationship “imposes on the bailee [i.e., the medical facility], when the purpose of the bailment has terminated, an absolute obligation to return the subject matter of the bailment [i.e., the frozen embryos] to the bailor [i.e., the genetic donors]. The obligation to return the property is implied from the fact of lawful possession of the personal property of another.”⁸³ By recognizing the relationship between the Yorks and the clinic as a traditional bailor-bailee relationship, the court implicitly viewed the embryos as property of the donors and, as such, held that the Yorks had the right to determine the disposition of their embryos.

Similarly, in *Kass v. Kass*, the New York Court of Appeals was asked to determine the disposition of frozen embryos in a divorce proceeding.⁸⁴ Addressing an issue of first impression, the court held that the five frozen embryos produced during the Kasses’ participation in IVF would not be recognized as “persons,”⁸⁵ and that contract law would determine the disposition of these embryos.⁸⁶ By applying contract law to determine the disposition of the embryos, the court implicitly held that embryos are property.

How an embryo is defined under the law dictates the legal rights of the parties involved in an embryo transfer. If an embryo is a person, then arguably a traditional adoption model and the best interests standard should apply. In contrast, if the embryo is property, then the contractual donation of the embryo to a third party is permissible and should be binding. Although the majority of the states that have addressed the issue would define an embryo as property, the law is far from uniform and far from clear.

III. NEW YORK AND THE LEGAL STATUS OF AN EMBRYO

Under New York law, an embryo is not a person but instead is treated as property to be disposed of pursuant to contract law;⁸⁷ traditional adoption law, including the best interest of the child standard, applies only to children.

The first case to address the status of an embryo in New York was *Del Zio v. Presbyterian Hospital*.⁸⁸ In that case, a hospital employee destroyed a test tube containing the Del Zios’ sperm and egg.⁸⁹ As a result of the hospital’s actions, the Del Zios’ lost the opportunity to become pregnant and suffered severe emotional

82. *Id.* at 425.

83. *Id.* (citation omitted).

84. *See* *Kass v. Kass*, 91 N.Y.2d 554 (1998).

85. *Id.* at 564.

86. *Id.* at 565. *But see* *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000) (holding that a consent form signed by a couple and a fertilization clinic, providing in pertinent part that on the event of the parties’ separation the embryos were to be given to the wife for implantation, was unenforceable).

87. *Kass*, 91 N.Y.2d at 564–66.

88. No. 74 Civ. 3588, 1978 U.S. Dist. LEXIS 14450 (S.D.N.Y. Nov. 9, 1978).

89. *Id.* at *3.

distress.⁹⁰ They brought a claim for wrongful conversion and a tort action for intentional infliction of emotional distress against the hospital and the employee.⁹¹ Although the jury found for the Del Zios' on the intentional infliction of emotional distress claim, they found for the defendants on the wrongful conversion claim.⁹²

Twenty years later, the New York Court of Appeals in *Kass v. Kass* held that five cryogenically preserved pre-zygotes produced during a married couple's participation in an IVF program would not be recognized as "persons" for constitutional purposes in a matrimonial action in which the wife was seeking sole custody of the pre-zygotes.⁹³ Instead of determining the disposition of embryos based on a family law analysis using the best interests of the child analysis, the court applied contract law.⁹⁴

The Kassses were married in 1988.⁹⁵ Beginning in 1990, Mrs. Kass underwent multiple egg retrieval processes and fertilized eggs were transferred to her nine times. But the two resulting pregnancies were unsuccessful.⁹⁶ In 1993, the couple signed numerous consent forms provided by the IVF program regarding the cryopreservation.⁹⁷ The forms stated, in pertinent part, that the Kassses "have the principal responsibility to decide the disposition of our frozen pre-zygotes . . . [which] . . . will not be released from storage for any purpose without [our] written consent In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction."⁹⁸ Additionally, an addendum to the consent forms provided that "[i]n the event that we . . . are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, . . . [o]ur frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program."⁹⁹

Later that year, the couple decided to dissolve their marriage.¹⁰⁰ Only three weeks after signing the consent forms, the couple drew up and signed an uncontested divorce agreement stating, "[T]he frozen pre-zygotes . . . should be disposed of [in] the manner outlined in our consent form and . . . neither Maureen Kass[,] Steve Kass or anyone else will lay claim to custody of these pre-zygotes."¹⁰¹ One month later,

90. *Id.* at *4–5.

91. *Id.* at *5.

92. *Id.* at *11.

93. *Kass v. Kass*, 91 N.Y.2d 554, 564 (1998).

94. *Id.* at 565.

95. *Id.* at 557.

96. *Id.* at 558.

97. *Id.*

98. *Id.* at 559.

99. *Id.* at 559–60.

100. *Id.* at 560.

101. *Id.* (alterations in original).

the wife commenced a matrimonial action requesting sole custody of the pre-zygotes so that she could undergo another implantation procedure. The husband opposed the removal of the pre-zygotes from storage.¹⁰²

The trial judge granted the wife custody of the pre-zygotes and directed her to exercise her right to implant them within a medically reasonable time.¹⁰³ The judge reasoned that the "female participant in the IVF procedure has exclusive decisional authority over the fertilized eggs created through that process, just as a pregnant woman has exclusive decisional authority over a nonviable fetus."¹⁰⁴ A divided Appellate Division reversed.¹⁰⁵ All five justices, however, unanimously agreed on two fundamental issues: first, "a woman's right to privacy and bodily integrity are not implicated before implantation occurs"; and second, "when parties to an IVF procedure have themselves determined the disposition of any unused fertilized eggs, their agreement should control."¹⁰⁶

The Court of Appeals affirmed, finding that the parties clearly expressed their intent that, in the circumstances presented, the pre-zygotes would be donated to the IVF program for research purposes.¹⁰⁷ The Court of Appeals first agreed with the Appellate Division that the disposition of pre-zygotes does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice, and that pre-zygotes are not "persons" for constitutional purposes.¹⁰⁸ The court then held that "[a]greements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them"¹⁰⁹ and, to the extent possible, it should be the progenitors or donors, rather than the state or the courts, who by their prior directive make this deeply personal life choice.¹¹⁰ Under common law principles governing contract interpretation, the informed consents signed by the Kassess unequivocally manifested their mutual intention that implantation of the pre-zygotes could be made only by a joint decision of the parties; otherwise, by mutual consent they would be donated to the IVF program for research.¹¹¹ Following *Kass*, under New York law an embryo is treated as property to be disposed of pursuant to principles of contract law.

102. *Id.*

103. *Id.* at 561.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 556–57.

108. *Id.* at 564.

109. *Id.* at 565 ("Explicit agreements avoid costly litigation in *business transactions*." (emphasis added).

110. *Id.*

111. *Id.* at 567–68.

IV. LEGAL APPROACHES TO RESOLVING DISPUTES BETWEEN DONORS REGARDING THE DISPOSITION OF FROZEN EMBRYOS

A. *Problems with Contract Law*

Advancements in assisted reproductive technology in recent years may help childless couples achieve their dreams of parenthood, but state legislatures, which lag behind technology,¹¹² have created nightmares for some couples simply by their inaction. Due to this inaction, interested parties have turned to contract law. But without guidance from the legislature on what provisions must be included to form an enforceable embryo donation contract, the parties may believe that their contract is valid and enforceable—and when a dispute arises they may learn the hard way that it is not. Courts may find that parties have overstepped moral boundaries with their agreement and invalidate the contract because it violates a public policy against trafficking or selling children, or exploiting financially needy women. For example, in New York, “surrogate parenting contracts are . . . contrary to the public policy . . . and are void and unenforceable.”¹¹³ Although no such dispute has arisen in the context of embryo adoption, surrogacy agreements, which are analogous to those used in embryo adoptions, illustrate the inadequacies of contract law when dealing with these issues.¹¹⁴

In *Baby M*, William Stern and his wife, Elizabeth, were unable to have children.¹¹⁵ Mr. Stern entered into a surrogacy contract with Mary Beth Whitehead, who agreed to be artificially inseminated with Mr. Stern’s sperm, carry and deliver the child, and, after the birth, take the necessary steps to relinquish her parental rights.¹¹⁶ In exchange for performance of the agreement, Mr. Stern agreed to pay Mary Beth \$10,000.¹¹⁷ Immediately following the birth of the baby girl, Mary Beth expressed great reluctance to relinquish custody. Although she turned the baby over to the Sterns a few days following the birth, Mary Beth soon after asked to “borrow” the baby for a week and the Sterns, fearing that Mary Beth would harm herself, acceded.¹¹⁸

When Mr. Stern realized Mary Beth was not going to return the baby on her own free will, he filed a complaint seeking enforcement of the surrogacy contract.¹¹⁹ The trial court validated the surrogacy contract and awarded custody to Mr. Stern, relying

112. See *The First Test-Tube Baby*, *supra* note 4.

113. N.Y. DOM. REL. LAW § 122 (McKinney 2010).

114. *In re Baby M*, 537 A.2d 1227, 1240–41 (N.J. 1988); see also *J.B. v. M.B.*, 751 A.2d 613, 619 (N.J. Super. Ct. App. Div. 2000), *aff’d as modified*, 783 A.2d 707 (N.J. 2001) (concluding that a contract to procreate is contrary to New Jersey public policy and is unenforceable).

115. See *Baby M*, 537 A.2d at 1235.

116. *Id.* at 1235. Mary Beth’s husband at the time agreed to do whatever is “necessary to rebut the presumption of paternity under the [New Jersey] Parentage Act.” *Id.*

117. *Id.*

118. *Id.* at 1236–37.

119. *Id.* at 1237.

heavily on the best interests of the child standard. Further, the trial court terminated Mary Beth's parental rights and allowed Mrs. Stern to adopt the child.¹²⁰

But the Supreme Court of New Jersey reached a different conclusion and held the surrogacy contract invalid because it directly conflicted with New Jersey public policy expressed in statutes prohibiting the use of money in connection with adoptions, requiring proof of parental unfitness or abandonment prior to the termination of parental rights, and affording a parent the right to revoke a prior consent to adoption.¹²¹ The court held that the surrogacy contract also violated public policy preferences for retaining children with their natural parents, the equal status of mothers and fathers in custody determinations, the right of a parent to be fully informed prior to consenting to the relinquishment of a child, and the preeminence of the child's best interests in any custodial placement.¹²²

Similarly, in *R.R. v. M.H.*, the Supreme Judicial Court of Massachusetts held that a surrogacy contract between the surrogate mother and biological father was unenforceable.¹²³ The contract required the surrogate mother to cede custody to the biological father, and for the father to pay her \$10,000 for her "services rendered in conceiving, carrying and giving birth to the Child."¹²⁴ But the surrogate mother renounced the contract by announcing, in the sixth month of pregnancy, that she intended to keep the baby.¹²⁵ The court concluded that the "mother should have time after a child's birth to reflect on her wishes concerning the child"¹²⁶ and that the surrogate mother's consent to relinquish custody could not be recognized until the fourth day following the child's birth. Further, because "[n]o private agreement concerning adoption or custody can be conclusive in any event because a judge, passing on custody of a child, must decide what is in the best interests of the child," the court held that the contract was unenforceable.¹²⁷

In New York, surrogacy contracts received a mixed reception prior to the enactment of Article 8 of the New York Domestic Relations Law. In *In re Adoption of Baby Girl L.J.*, decided before *Baby M*, the court expressed concern over the moral and ethical issues presented by such agreements, but held that a commercial surrogacy contract was not prohibited by existing law.¹²⁸ In *In re Adoption of Paul*, the court, following *Baby M*, invalidated a surrogacy contract on the ground that remuneration

120. *Id.* at 1237–39.

121. *Id.* at 1240–46.

122. *Id.* at 1246–50.

123. *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998).

124. *Id.* at 792.

125. *Id.* at 791.

126. *Id.* at 796.

127. *Id.*

128. *In re Adoption of Baby Girl L.J.*, 505 N.Y.S.2d 813, 817 (Sup. Ct. Nassau County 1986).

to the surrogate mother violated New York's well-established public policy against trafficking in children.¹²⁹

Some scholars argue that embryo adoption and surrogacy are basically the same thing, and thus should be treated the same, independent from traditional adoption concepts.¹³⁰

The theory of treating gestational surrogacy and embryo adoption as legally analogous is consistent with the holdings in noteworthy decisions of the courts in California and Massachusetts. In *Johnson v. Calvert* and *Culliton v. Beth Israel Deaconess Medical Center*, the courts determined that adoption law is inapplicable to gestational surrogacy arrangements. In *Johnson*, the California court ruled that "gestational surrogacy differs in crucial respects from adoption." The Massachusetts court in *Culliton* ruled that adoption law applies only when the birth mother has a genetic relationship to the child. These cases suggest that in the reproductive technology arena, adoption law only applies to traditional surrogates who have a genetic relationship to the child. It does not apply in cases of gestational surrogacy, where the birth mother is genetically unrelated to the child. Because a woman gestating an "adopted" embryo also bears no genetic relationship to the resulting child, the situation should be treated like gestational surrogacy arrangements instead of like traditional adoption arrangements.¹³¹

They conclude that if embryo adoption is treated like surrogacy, "then embryo adoption arrangements should also be governed by the terms of the contract that the parties execute."¹³² Thus, without guidance from the legislature on whether embryo donation contracts are enforceable and, if they are enforceable, which provisions must be included in such contracts, parties may find themselves without an enforceable contract and in a legal battle to establish parentage or custody.

B. Traditional Adoption

Dissatisfied with the protections of contract law, agencies offering embryo "adoption" services have turned to traditional adoption law. Adoption law is a creature of state statutory law. For example, in New York, "[t]he family court has original jurisdiction concurrent with the surrogate's courts over adoption proceedings under article seven [adoption section] of the domestic relations law."¹³³ Traditional adoption is the process of legally taking another's child as one's own, thereby terminating the biological parents' rights and responsibilities.¹³⁴ In an adoption accomplished by parental consent, the child is placed directly with prospective adoptive parents. However, the consent transfers only physical custody of the child to the adoptive

129. *In re Adoption of Paul*, 550 N.Y.S.2d 815, 817 (Fam. Ct. Kings County 1990).

130. Kindregan & McBrien, *supra* note 7, at 179.

131. *Id.* at 178–79 (citations omitted).

132. *Id.* at 179.

133. N.Y. FAM. CT. ACT § 641 (McKinney 2009).

134. N.Y. DOM. REL. LAW § 110 (McKinney 2010).

parents; legal custody remains with the natural parents until a petition for adoption is granted.¹³⁵ In determining whether to grant an order for adoption of a minor child, the welfare or "best interests" of the child are of paramount consideration.¹³⁶ If satisfied that the adoption promotes the best interests of the adoptive child, the judge or surrogate must issue an order approving the adoption and directing that the adoptive child shall thereafter be regarded and treated in all respects as a child of the adoptive parents or parent.¹³⁷

In determining what is in the best interests of the adoptive child, the judge or surrogate is guided by such considerations as the suitability of the adoptive parents.¹³⁸ In *In re Adoption of Baby Girl R*, an order of adoption was found to be in the best interests of the child and valid where a preponderance of the evidence demonstrated that the adoptive parents "were mature, intelligent, caring, loving, disciplined and responsible parents with above average means of support," and the biological father, who was challenging the order of adoption, was an unmarried teenager working as a store clerk and living with his disabled father.¹³⁹ On the other hand, in *In re Jaclyn L.F.*, the court found that it was not in the child's best interests to allow an adoption in which prospective adoptive parents had a history of drug use.¹⁴⁰

The best interests of the child is also the criterion which a court must employ in determining whether to permit a consenting party to revoke his or her consent to the adoption.¹⁴¹ Whether a party may successfully withdraw or revoke consent will depend on the requirements for withdrawal or revocation as established by the applicable law (typically by statute) in the jurisdiction in which adoption is sought. For example, New York Domestic Relations Law section 115-b states that a natural parent may revoke extrajudicially executed consent to adoption within forty-five days after its execution.¹⁴² However, revocation will not be given effect in the face of opposition from prospective adoptive parents unless the court determines that the

135. *Id.* § 115(1)(b) ("A person or persons seeking to commence a private-placement adoption shall, prior to the submission of a petition for such adoption and prior to any transfer of physical custody of an adoptive child, be certified as a qualified adoptive parent or parents by a court . . ."); *id.* § 115-d(5) ("Such investigation shall include, but not be limited to, a personal interview and visit at the applicant's or applicants' home and an investigation of any other facts relating to the familial, social, religious, emotional and financial circumstances of the adoptive parent or parents which may be relevant to certification as a qualified adoptive parent or parents.").

136. *See In re Pierre*, 784 N.Y.S.2d 650 (2d Dep't 2004).

137. DOM. REL. § 116.

138. It is important to note that a biological parent can veto an adoption if he has the right to do so, such as under New York Domestic Relations Law section 111, which specifically sets out whose consent is required for adoption, or the New York State Constitution. *See* DOM. REL. § 111; *Troxel v. Granville*, 530 U.S. 57 (2000). The Constitution affords natural or biological parents a protected interest in the care, custody, and management of their children. *Id.* at 66.

139. *In re Adoption of Baby Girl R*, 481 N.Y.S.2d 516, 517 (3d Dep't 1984).

140. *In re Jaclyn L.F.*, 697 N.Y.S.2d 158, 158-59 (2d Dep't 1999).

141. *See* DOM. REL. § 115-b(3)(b).

142. *Id.* § 115-b(3)(a).

best interests of the child will be served by granting the revocation.¹⁴³ The statute states that “[i]n such proceeding the parent or parents who consented to such adoption shall have no right to the custody of the child superior to that of the adoptive parents.”¹⁴⁴ For example, in *In re Daniel C.*, the court held that it would not be in the best interests of the child to revoke the mother’s surrender of him where the child had lived and bonded with his adoptive parents for three years, since he was six months old, and considered his adoptive parents’ children to be his siblings.¹⁴⁵

Adoption is a complicated and lengthy court process. More importantly, adoption involves constitutionally protected parental rights that can be superseded only by a determination of what is in the best interests of the child. Embryo adoption resembles traditional adoption only if a legally recognized child is involved. If embryos are classified as property, with applicable legislative standards, this complicated court process will be rendered unnecessary.

V. THE LEGAL CONUNDRUM IN NEW YORK: TRADITIONAL ADOPTION LAW AS APPLIED TO EMBRYO DONATION

The word “adoption” leads donating couples to believe they are terminating their parental rights by donating their embryos to another couple. But

[n]o court has to date resolved a contested embryo adoption dispute. The parties involved, therefore, should not simply assume that any embryo can be legally adopted, thus terminating the donor’s legal rights and interests. The legal risk of unintentionally maintaining parental interests and rights may complicate the process of donating embryos.¹⁴⁶

The best interests of the child standard is inappropriate in states such as New York that do not recognize an embryo as a person.

The primary concern of adoption laws is to ensure that the particular adoptive parents are suitable for the child. In every adoption proceeding, the judge must make a finding that the adoption is in the best interests of the child. At the core of this concept is the idea that a child already exists. Yet, in embryo donation, no child exists whose best interests can be considered. For example, in *In re Marriage of Witten*, the Iowa Supreme Court held that embryos are not children and, therefore, the best interests of the child standard did not apply.¹⁴⁷

Moreover, no parental rights can be terminated for a child that does not exist. In most states it is illegal to consent to adoption before the child is born, and all states recognize a period after a child is born during which the birth mother can rescind

143. *Id.* § 115-b(3)(b).

144. *Id.* § 115-b(6)(d)(v).

145. *In re Daniel C.*, 453 N.Y.S.2d 572, 573 (Sup. Ct. Westchester County 1982).

146. Kindregan & McBrien, *supra* note 7, at 174.

147. *In re Marriage of Witten*, 672 N.W.2d 768, 775 (Iowa 2003).

her consent to the adoption.¹⁴⁸ In New York, for example, a natural parent may revoke an extrajudicially executed consent to adoption within forty-five days after its execution.¹⁴⁹ Applying existing adoption laws to embryo adoption allows the donor couple to rescind their consent to the adoption up until the time that the child is born, more than nine months after consent was given, and, more importantly, after the adopting mother has gestated the child. Furthermore, because New York statutes dictate pre-placement requirements,¹⁵⁰ coupled with the fact that less than one-third of embryo implantations actually result in the birth of a child,¹⁵¹ applying adoption statutes to embryo donation would result in unnecessary legal procedures in a majority of the cases.

Finally, using the best interests of the child standard for embryo donation is a legal fiction. In New York, “[a]ny child born to a married woman by means of artificial insemination . . . shall be deemed the legitimate, birth child of the husband and his wife for all purposes.”¹⁵² Because of the common legal presumption that the woman who gave birth to the child and her husband are the legal parents of that child, in embryo donation, the donors of the genetic material do not need their parental rights terminated if the gestating mother is the intended mother of the child. This negates the entire purpose of adoption statutes, which is the termination of birth parents’ rights and responsibilities. Further, the purpose of the court-issued adoption decree is to state that the adoptive parents are now the legal parents of the child. This process is simply not necessary with embryo adoption because the adoptive or gestational parents’ names would already be on the child’s birth certificate.

Taking these two statutes together—that a woman cannot terminate her parental rights pre-birth and that a woman who gives birth to the child is presumed, with her husband, to be the legal parents of the child—could lead to a legal nightmare. Applying New York adoption law, a child born as a result of embryo donation could possibly have four legally recognized parents: both the intended parents, who will likely be the gestational mother and her husband if married at the time, will be presumed the legal parents of the resulting child *and* the genetic parents, who have not been able to terminate their parental rights until post-birth and who have a “common-law presumption favoring the biological parents’ right to custody.”¹⁵³ The combination of these laws in its application to embryo donation has the potential of

148. See *Consent to Adoption*, ADOPTION & CHILD WELFARE LAWSITE, http://www.adoptionchildwelfarelaw.org/faq_detail.php?id=85 (last visited Feb. 17, 2011); *25 Factors to Consider When Adopting From the United States*, CREATING A FAMILY, <http://www.creatingafamily.org/adoption/charts/adopting-from-united-states-birth-mother-relinquishment.html> (last visited Feb. 17, 2011).

149. DOM. REL. § 115-b(3).

150. See generally *id.* § 115.

151. CDC 2007 ART REPORT, *supra* note 1, at 56.

152. DOM. REL. § 73(1). *But see In re Roberto d.B.*, 923 A.2d 115 (Md. 2007) (reversing the lower court in a 6-3 decision, and holding that a woman serving as a gestational surrogate has a constitutional right to deny maternity of the child to whom she gave birth).

153. *People ex rel. Anonymous v. Anonymous*, 530 N.Y.S.2d 613, 615 (3d Dep’t 1988).

creating a legal dilemma of immense proportion should this foreseeable situation wind up before a court.

The New York Appellate Division had to confront a similar legal mess in *Perry-Rogers v. Fasano*.¹⁵⁴ There, the court addressed competing claims for parentage that resulted from the wrongful implantation of embryos.¹⁵⁵ *Fasano* arose in an unusual context. Two separate couples, one Caucasian and one African American, utilized the IVF and embryo transfer services of the same facility.¹⁵⁶ By mistake, both sets of fertilized ova were implanted into the uterus of the white woman.¹⁵⁷ Although the facility notified both couples of the error about one month after implantation, the white couple resisted the efforts of the black couple to contact them.¹⁵⁸ The white woman subsequently gave birth to two children: one who was the biological child of the white woman and her husband, and the other who was the biological child of the black couple.¹⁵⁹ After the birth of the children, the white couple did nothing to address the situation until the black couple tracked them down and sued.¹⁶⁰ Approximately four months after the births, the white couple agreed to relinquish custody of the black child to his biological parents, conditioned upon visitation.¹⁶¹

The Appellate Division, First Department, ruled that even if the white couple had attempted to contest custody of the black child, they would have lacked standing to do so.¹⁶² The court declined to dispose of the claim solely based on the fact that the Fasanos (the white couple), were “genetic strangers” to the child.¹⁶³ While gestational mothers with no biological connection to the child may have enforceable rights, the resolution of the parties’ rights turned on their intent when entering the IVF process.¹⁶⁴ The court emphasized that “[i]n recognition of current reproductive technology, the term ‘genetic stranger’ alone can no longer be enough to end a discussion.”¹⁶⁵ Here, the black couple purposefully arranged for their genetic material to be taken in order to attempt to create a biological child, whom they intended to rear.¹⁶⁶ Accordingly, the court held that the child would be recognized as the black couple’s child, even though another woman had mistakenly acted as the gestational

154. 715 N.Y.S.2d 19 (1st Dep’t 2000).

155. *Id.* at 21.

156. *Id.* at 21–22.

157. *Id.* at 21.

158. *Id.* at 21–22.

159. *Id.* at 22.

160. *Id.*

161. *Id.*

162. *Id.* at 24.

163. *Id.* at 23.

164. *Id.* at 24.

165. *Id.* at 23.

166. *Id.* at 24.

mother.¹⁶⁷ In dicta, however, the court noted that there might be circumstances in which both a genetic mother and a gestational mother would have competing interests in being declared the parent, and the court would have to treat both the genetic and gestational mother as parents.¹⁶⁸ Thus, it is evident that there is no clear answer to the question of what will happen in the event an embryo donation is contested.

VI. EMBRYO DONATION BY CONTRACT AND STATUTE

A. Current Statutes

Only a few states address embryo adoption statutorily. Louisiana recognizes embryos as a “juridical person”:

An in vitro fertilized human ovum is a juridical person which cannot be owned by the in vitro fertilization patients who owe it a high duty of care and prudent administration. If the in vitro fertilization patients renounce, by notarial act, their parental rights for in utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation in accordance with written procedures of the facility where it is housed or stored. The in vitro fertilization patients may renounce their parental rights in favor of another married couple, but only if the other couple is willing and able to receive the in vitro fertilized ovum. No compensation shall be paid or received by either couple to renounce parental rights. Constructive fulfillment of the statutory provisions for adoption in this state shall occur when a married couple executes a notarial act of adoption of the in vitro fertilized ovum and birth occurs.¹⁶⁹

Further, the Louisiana statute states that the best interests of the “ovum” standard shall be used to resolve any arising disputes: “In disputes arising between any parties regarding the in vitro fertilized ovum, the judicial standard for resolving such disputes is to be in the best interest of the in vitro fertilized ovum.”¹⁷⁰

According to the statute, patients do not own their embryos. As a result, embryos cannot be intentionally destroyed. Moreover, IVF patients have very limited options in regard to their frozen embryos. The statute states that embryos are to be used solely for the “support . . . of the complete development of the human in utero implantation.”¹⁷¹ Thus, IVF patients can decide to either use the frozen embryos for themselves or donate them to a third party.

Section 1-730 of title 63 of the Oklahoma Statutes defines “unborn child” to mean the unborn offspring of human beings from the moment of conception through

167. *Id.* at 24–25.

168. *Id.* at 25 n.1.

169. LA. REV. STAT. ANN. § 9:130 (2010).

170. *Id.* § 9:131.

171. *Id.* § 9:122.

pregnancy and until live birth, and specifically includes “embryo.”¹⁷² Under section 556 of title 10 of the Oklahoma Statutes, written consent of both donating and recipient couples is required for embryo donation.¹⁷³ The doctor who is to perform the transfer must file those consents with a court having adoption jurisdiction in the state.¹⁷⁴ By giving their consent to the transfer of embryos, the genetic parents also relinquish their parental rights to any child born from those embryos.¹⁷⁵ The statute thus concludes that “[a]ny child or children born as a result of a human embryo transfer donation shall be considered for all legal intents and purposes, the same as a naturally conceived legitimate child of the husband and wife that consent to and receive a human embryo transfer.”¹⁷⁶

On March 12, 2009, Georgia passed the Option of Adoption Act (OAA), which some are considering one of the nation’s first embryo adoption bills.¹⁷⁷ The OAA “is viewed as a victory for anti-abortion groups who want the law to recognize embryos in their earliest stages of development as people.”¹⁷⁸ However, unlike the Louisiana statute, the Georgia statute does not explicitly define an embryo as a person.¹⁷⁹

The statute sets out a two-step process for embryo adoption: First, the embryo donors relinquish all rights relating to the embryo to the donee parents via written contract.¹⁸⁰ Second, the donees petition the court for an order of adoption, which terminates all rights and responsibilities of the donors and vests all of these rights and responsibilities with the donees.¹⁸¹

172. OKLA. STAT. tit. 63, § 1-730 (2010) (“Unborn child’ means the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo and fetus.”).

173. OKLA. STAT. tit. 10, § 556(A)(1) (2010).

174. *Id.* § 556(A)(3).

175. *Id.* § 556(B)(2).

176. *Id.* § 556(B)(1).

177. Steven Ertelt, *Georgia State House Passes Embryo Adoption Bill to Protect Unborn Children*, LIFE NEWS.COM (Mar. 13, 2009, 9:00 AM), <http://www.lifenews.com/2009/03/13/bio-2793/>.

178. *Georgia Passes First Embryo Adoption Act*, EMBRYO ADOPTION AWARENESS CTR., <http://www.embryooption.org/news/27.cfm> (last visited Jan. 20, 2011).

179. GA. CODE ANN. § 19-8-40 (2010).

180. *Id.* § 19-8-41.

181. *Id.* §§ 19-8-41 to -42. Specifically, the statute states:

A legal embryo custodian may relinquish all rights and responsibilities for an embryo to a recipient intended parent prior to embryo transfer. A written contract shall be entered into between each legal embryo custodian and each recipient intended parent prior to embryo transfer for the legal transfer of rights to an embryo and to any child that may result from the embryo transfer. The contract shall be signed by each legal embryo custodian for such embryo and by each recipient intended parent in the presence of a notary public and a witness. Initials or other designations may be used if the parties desire anonymity. The contract may include a written waiver by the legal embryo custodian of notice and service in any legal adoption or other parentage proceeding which may follow.

Id. § 19-8-41(a).

Once this two-step process is complete, the court will issue a final order of adoption, which terminates “future parental rights and responsibilities of any past or present legal embryo custodian or gamete donor in a child which results from the embryo transfer and shall vest such rights and responsibilities in the recipient intended parent.”¹⁸² Once the order of adoption becomes final, the child becomes the legal child of the intended recipient parents.¹⁸³

All three of these statutes, however, suffer from shortcomings. For example, the Louisiana statute discriminates against non-married or homosexual individuals by referring only to either “married couples” or “husband and wife.”¹⁸⁴ Moreover, both the Louisiana and Georgia statutes do not include a provision regarding the possible termination of the agreement, and only Louisiana addresses what happens in the event of a dispute. In traditional private adoptions, where a living child is the adoptee, parties commonly use contracts to effectuate their intent. If a traditional adoption contract fails to address a relevant issue over which a dispute subsequently arises, the parties can seek to litigate the matter guided by state statutes and common law. Donor couples and the intended parents of the embryo do not have such guidance. Thus, it is important for any state statute governing embryo donation to explicitly address what happens in the event of a dispute.

B. Proposed Model Law: Amendments to the ABA Model Act Governing Assisted Reproductive Technology

The Model Act provides a framework for addressing issues such as parentage, informed consent, donor identity, control of cryopreserved gametes, mental health consultation, privacy, gamete and embryo donation, insurance, and quality assurance.¹⁸⁵ Although the Model Act serves as a mechanism to assist in resolving contemporary family controversies that now reach the courts with little legislative guidance or regulation, it does not go far enough in addressing all of the issues that arise in regard to embryo donation.

Prior to the birth of a child or following the birth of a child, a recipient intended parent may petition the superior court for an expedited order of adoption or parentage. In such cases, the written contract between each legal embryo custodian and each recipient intended parent shall be acceptable in lieu of a surrender of rights.

Id. § 19-8-42(a).

182. *Id.* § 19-8-43.

183. *Id.* § 19-8-41.

184. See LA. REV. STAT. ANN. § 9:130 (2010).

185. ABA MODEL ACT GOVERNING ASSISTED REPROD. TECH. (2008), available at http://www.americanbar.org/content/dam/aba/publishing/family_law_quarterly/family_flq_artmodelact.pdf. “[T]he purpose of the Model Act is to provide a flexible framework of legal rights, obligations, and protections to the stakeholders in ART, as well as to promote the interests of society generally. Those stakeholders include ‘patients, participants, parents, providers and the resulting children and their siblings.’” Charles P. Kindregan, Jr. & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 203, 209 (2008) (footnote omitted).

The Model Act defines an embryo as “a cell or group of cells containing a diploid complement of chromosomes or group of such cells . . . that has the potential to develop into a live born human being if transferred into the body of a woman under conditions in which gestation may be reasonably expected to occur.”¹⁸⁶ From this definition, it is uncertain which legal status is appropriate. It is clear that under the Model Act an embryo is not a “juridical person.” However, it is not clear whether the Model Act defines the embryo as property or as potential life deserving of special respect. Knowing that the legal status of the embryo is at the heart of this issue, the ABA must draft a definition that explicitly defines the embryo as either property or as potential life.

Moreover, unlike the Louisiana, Oklahoma, and Georgia statutes, which discriminate against unmarried or homosexual individuals, the Model Act defines “spouse” broadly and acknowledges that unmarried persons frequently use ART. But there are instances when the legal marital status of a person is in fact relevant. Thus, the Model Act defines “legal spouse” as “an individual married to another, or who has a legal relationship to another that this state accords rights and responsibilities equal to, or substantially equivalent to, those of marriage.”¹⁸⁷ This definition clearly embraces civil unions or domestic partnerships recognized in states such as New Jersey and California.¹⁸⁸

Most importantly, the Model Act clearly states a preference for the use of binding agreements prior to the creation of embryos as the best means of clarifying the rights and obligations of the participants.¹⁸⁹ The Model Act provides that participants should execute an agreement spelling out the intended use and disposition of embryos in the event of divorce, illness, death, or other changed circumstances.¹⁹⁰ However, although the Model Act also permits the intended parents to agree to donate any unused embryos to other patients,¹⁹¹ it fails to set out any guidelines regulating this procedure.

186. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(10).

187. *Id.* § 102(21).

188. *See, e.g., Lewis v. Harris*, 908 A.2d 196, 223–24 (N.J. 2006).

We have decided that our State Constitution guarantees that every statutory right and benefit conferred to heterosexual couples through civil marriage must be made available to committed same-sex couples. . . . To comply with the equal protection guarantee of *Article I, Paragraph 1 of the New Jersey Constitution*, the State must provide to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples To bring the State into compliance with *Article I, Paragraph 1* so that plaintiffs can exercise their full constitutional rights, the Legislature must either amend the marriage statutes or enact an appropriate statutory structure within 180 days of the date of this decision.

Id.

189. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 501.

190. *Id.* §§ 501(1), (3)(a)–(b) (requiring parties to agree on how the embryos are used in the event of divorce, illness, incapacity, or death, and to clarify which intended parent may control the embryos).

191. *Id.* § 502(1) (other patients can be known or anonymous).

The Model Act should contain language mandating certain pre-donation procedures that must be provided by all fertility centers to couples donating their frozen embryos to another couple or individual. These pre-donation procedures should include: medical and genetic history, testing for genetic and infectious diseases, psychological screening and counseling,¹⁹² legal counseling, and informed consent by both parties to the procedure. For example, legal counseling should include information about the specific rights being transferred and received, and information about the possibility of an open or closed donation. It is crucial that the donor couple understands the consequences of donation, including the forfeiture of any right to seek legal parentage to any children born of the procedure.

Moreover, the Model Act must outline the process to legally recognize embryo donor agreements. The Model Act does not have to look very far for guidance. The drafters of the Model Act proposed two alternative laws recognizing surrogacy agreements as a foundation for recognizing embryo donation agreements.¹⁹³ "Alternative A requires a judicially authorized gestational agreement for the determination of ART parentage, whereas Alternative B provides an administrative model that does not require a judicial proceeding for parentage determination if all parties are in compliance."¹⁹⁴ Although both alternatives are viable options upon which to design the embryo donation procedure, Alternative B offers a more streamlined approach for potential parents. This model protects parties from the whim of the courts, and is faster and less expensive. Furthermore, it results in greater judicial economy and consistency.

There are several points from Alternative B that can be applied directly to a proposed law governing embryo donations. For example, like Alternative B, the intended parent or parents in an embryo donation agreement must show a medical need for the arrangement evidenced by a qualified physician's affidavit.¹⁹⁵ The receiving individual or couple must complete a mental health evaluation and undergo legal consultation.¹⁹⁶ The agreement must state that the donating couple relinquishes all rights, obligations, and interests with respect to the donated embryos, and that the individual donee or couple accepts all rights, obligations, and interests with respect to the embryos. The agreement must be in writing, executed prior to any medical procedure, witnessed by two disinterested parties,¹⁹⁷ and no money may be

192. Currently, the Model Act provides for mandatory mental health consultation of all participants in an assisted reproduction procedure, which includes embryo donation. *Id.* § 301(1). "Consultation" is "an initial in-person meeting with a licensed mental health professional for the purpose of educating the participants about the effects and potential consequences of their participation in any ART procedure." *Id.* § 102(7). The provider is also required to offer additional voluntary counseling to every participant in addition to mandatory counseling. *Id.* § 301(2). The Model Act states that the results of the mental health consultation may not be used to arbitrarily deny any interested parent the right to procreate. *Id.* § 301(1).

193. *Id.* art. 7.

194. Kindregan & Snyder, *supra* note 185, at 220.

195. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 702(2)(b).

196. *Id.* § 702(2)(c)–(d).

197. *Id.* § 703(2)(b)–(c), (f).

exchanged in consideration for the transfer of the embryos. This proposed statute should also include a provision stating that each of the parties to the agreement may terminate the agreement within three days of its execution so long as notice is given and the embryos have not yet been implanted, and a copy of the agreement must be kept by each party's attorney, the donors, the donees, and the physician performing the embryo transfer.

Next, like Alternative B, once all of these requirements have been met each party's attorney must certify, prior to the birth of the child or within twenty-four hours of the birth, on forms provided by the state, that the embryo donation agreement complies with all statutory requirements.¹⁹⁸ Once the child is born, hospital and state employees will complete birth records indicating that the birth mother, or the intended parents, are the legal parents of the child.¹⁹⁹ No judicial proceedings will be necessary because the parent-child relationship will be established, unless a dispute arises, at which time the court would have to look to the four corners of the contract to resolve the dispute. Alternative B provides that if a dispute arises alleging noncompliance with the agreement, the court shall determine the rights and liabilities of the parties based on evidence of their original intent.²⁰⁰ Finally, like Alternative B, an action to invalidate the agreement for failure to comply with the statute or to challenge the parentage of the donee must be commenced within twelve months following the birth of the child.²⁰¹ By basing embryo donation in contract law, as long as all eligibility requirements are met and all procedural safeguards are implemented, the donee individual or couple become the legal parents of the resulting child.

VII. CONCLUSION

In our modern world, sex is no longer the exclusive method of human reproduction. Science is progressing faster and faster every day, but the law is not keeping up. Embryo donation will have a tremendous impact on family law. Embryo donation affords parents opportunities that are unavailable to individuals who choose to go through the channels of ART or traditional adoption. Embryo donation affords parents benefits that some might argue are better than the benefits of traditional adoption. This area is completely unregulated and can very likely run rampant if it remains that way. Trying to fit new technology into old law is simply not good enough; some new standard is necessary. The words of former Chief Justice Kaye, spoken more than ten years ago, still ring true today: "As science races ahead, it leaves in its trail mind-numbing ethical and legal questions."²⁰²

198. *Id.* § 705(1)–(2).

199. *Id.* § 705(4).

200. *Id.* § 709(1).

201. *Id.* § 712.

202. *Kass v. Kass*, 91 N.Y.2d 554, 562 (1998).