

Cryopreserved Embryos as America's Prospective Adoptees: Are Couples Truly "Adopting" or Merely Transferring Property Rights?

Alexia M. Baiman

Repository Citation

Alexia M. Baiman, *Cryopreserved Embryos as America's Prospective Adoptees: Are Couples Truly "Adopting" or Merely Transferring Property Rights?*, 16 Wm. & Mary J. Women & L. 133 (2009), <https://scholarship.law.wm.edu/wmjow1/vol16/iss1/5>

CRYOPRESERVED EMBRYOS AS AMERICA'S PROSPECTIVE
ADOPTEES: ARE COUPLES TRULY "ADOPTING" OR
MERELY TRANSFERRING PROPERTY RIGHTS?

ALEXIA M. BAIMAN*

INTRODUCTION

- I. ASSISTED REPRODUCTIVE TECHNOLOGY OFTEN CREATES TOO MUCH OF A GOOD THING: EMBRYO DONATION AS AN OPTION FOR A COUPLE'S EXCESS FROZEN EMBRYOS
- II. HUMAN EMBRYOS AS PEOPLE OR PROPERTY: THE JUDICIAL AND LEGISLATIVE EFFORTS IN DETERMINING THE APPROPRIATE STATUS, AND INDIRECTLY, GENETIC PARENTS' DISPOSITIONAL FREEDOM
 - A. *Human Embryos are Simply Early Developed Human Beings: Human Embryos as Legally Recognized "Persons"*
 - B. *Human Embryos are Nothing More Than a Cluster of Cells: Human Embryos as Mere Property of the Egg and Sperm Donors*
 - C. *Neither This Nor That: Human Embryos Occupy a Special "Interim" Status Between Mere Property and a Fully Recognized Human Being*
- III. "CONTRACTING FOR" VERSUS "ADOPTING" A HUMAN EMBRYO: MORE IS AT STAKE THAN CORRECT TERMINOLOGY
 - A. *These Transfers are a Medically Advanced Form of Adoption, Requiring Governing Adoption Doctrine*
 - B. *These Transfers Only Involve Transferring Property Interests in Human Embryos, Requiring Parties to Abide By Contract Law*
 - C. *Embryo Adoptions are Those Transfers to Individuals or Couples With No Research Background and Should Be Governed by Adoption Law*

CONCLUSION

INTRODUCTION

Over the past two decades, the face of adoption in America has drastically changed. Prospective adoptive couples continue to use traditional adoption routes, such as working with adoption agencies, visiting crowded orphanages, and watching television advertisements that broadcast faces of abandoned infants. However, couples have

* Alexia M. Baiman, B.A., University of Pennsylvania, 2004; J.D., University of Pittsburgh, 2009; LL.M. candidate, Georgetown University Law Center, (expected 2010).

recently sought both a new way to adopt and a new type of adoptee: working with fertility clinics to “adopt” frozen clusters of human cells. Although traditional adoption methods remain more popular for infertile couples, Assisted Reproductive Technology has forever changed both the societal and legal concepts of what constitutes “child adoption.”

Twelve percent of all American women battle infertility.¹ With an increasing number of couples desperate for pregnancy assistance, the 1970s witnessed the development of a type of Assisted Reproductive Technology known as in vitro fertilization (IVF).² In an IVF “cycle,” a fertility doctor maximizes the patient’s chance of pregnancy by surgically extracting the woman’s eggs, fertilizing them outside of her womb, and implanting the resulting embryos directly into her uterus.³ With each cycle costing an average of \$12,400,⁴ many couples wishing to experience pregnancy themselves quickly found IVF financially out of reach.⁵ Rather than turn to traditional adoption agencies and forgo the hope of pregnancy, many of these couples have recently opted for the more affordable method of receiving and implanting another couple’s already fertilized embryos.⁶

Although the popularity of transferring embryos left over from IVF treatments has increased, the majority of American state legislatures and courts have remained silent, reluctant to definitively resolve the question of whether the transfer is an adoption, thus governed by adoption law, or whether it is merely a transfer of property interests in the embryos, thus subject to contract law.⁷ Genetic parents and

1. American Society for Reproductive Medicine, Frequently Asked Questions About Infertility, <http://www.asrm.org/Patients/faqs.html> (last visited Oct. 11, 2009) [hereinafter Reproductive Medicine FAQs] (referring to the percentage of reproductive-age women affected by infertility).

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id.* (stating that IVF comprises “less than [three percent] of infertility services,” in spite of the fact that it may be the only way for some people to conceive).

6. Olga Batsedis, Note, *Embryo Adoption: A Science Fiction or an Alternative to Traditional Adoption?*, 41 FAM. CT. REV. 565, 570 (2003).

7. In order for genetic parents to lawfully contract away their ownership rights to their embryos, the excess cryopreserved embryos must first be deemed to be their property. If embryos are deemed to be property rather than legally recognized “persons,” either contract or property law could govern the transfer. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001). Contract rights bind only the parties to the contract and describe each party’s right to use the object at issue. *Id.* at 776-77. Property rights, however, “specif[y] which person (the ‘owner’) is to act as the gatekeeper or regulator of the thing. Then this owner determines . . . which individuals can engage in which uses of the resource.” *Id.* at 790. Property rights, therefore, focus on restricting the right to use the object rather than describe each party’s right to use the object. *Id.* at 791. Although recognizing property law as a possible governing

prospective adoptive parents across the country are thus left uncertain over both the finality and scope of their transfer agreements.⁸

This paper argues that state legislatures must enact laws regulating embryo donation and that such laws should declare contract law as the governing doctrine; however, when genetic donors transfer their excess embryos to a recipient with no clinical research experience, the transfer should be governed by adoption law and be called an “embryo adoption.” The nature of the transfer, rather than the implantation in the recipient woman herself, triggers the legal application. The protections afforded by adoption law are furthered only if the genetic parents donate their embryos to a recipient who lacks research experience, because such a recipient is more likely to implant the embryos in hopes of giving birth to a child.⁹ These protections, such as concern for the resulting child’s well-being, slip away when genetic parents instead wish to destroy or donate their embryos to research and thus choose a clinical research recipient. Thus, a transfer to a recipient with a research background should be viewed as a typical transfer of property rights, governed by contract law.

In order to prevent parties from potentially structuring embryo agreements in such a way as to frustrate the law, legislatures must clearly define the scope of its newly enacted embryo adoption and donation statutes. Without a clear statutory scope, parties and courts will remain in the dark as to which state law applies in a dispute. For example, is the applicable state law the law of the home state of the genetic parents, the law of the state in which the embryos were created, or the law of the state where the recipient party lives? State legislatures must determine whose interests its donation and adoption statutes are meant to protect and codify this interest in the statutory scope in order to clearly guide genetic parents, prospective adoptive parents, and fertility clinics through the embryo donation and adoption process.

Part I of this paper describes Assisted Reproductive Technology, focusing particularly on in vitro fertilization, and the alternatives that couples face when IVF treatments result in excess embryos. This Part also describes one of the alternatives, embryo donation, and why this option is quickly growing in popularity. Part II discusses the three dominant views as to an embryo’s legal status and the current judicial and legislative split over this controversial issue. This Part

doctrine, this paper focuses on contract law as the alternative governing body of law to adoption law in transferring excess cryopreserved embryos.

8. Paula J. Manning, *Baby Needs a New Set of Rules: Using Adoption Doctrine to Regulate Embryo Donation*, 5 GEO. J. GENDER & L. 677, 679.

9. *Id.* at 678-79.

also explores the importance that such a legal status categorization has on genetic parents' decision-making authority concerning an embryo's future use, including embryo adoption. Finally, Part III examines the benefits and implications of applying adoption law and contract law to embryo transfers, concluding that the goals of adoption law are best furthered when governing only those transfers to individuals or couples with no clinical research experience, those transfers therefore legally considered to be "embryo adoptions."

I. ASSISTED REPRODUCTIVE TECHNOLOGY OFTEN CREATES TOO MUCH OF A GOOD THING: EMBRYO DONATION AS AN OPTION FOR A COUPLE'S EXCESS FROZEN EMBRYOS

Infertility currently afflicts over seven million women in America.¹⁰ The Centers for Disease Control and Prevention define "infertility" as an attempt to become pregnant for one year and a failure to do so.¹¹ Since introduced in the United States in 1981, Assisted Reproductive Technology (ART) has provided infertile couples with newfound hope by increasing a woman's chance of pregnancy by fertilizing her surgically removed eggs with sperm and implanting them directly into her uterus.¹² ART procedures have resulted in almost 500,000 healthy births in the United States between 1985 and 2006.¹³

As one of three types of ART treatments,¹⁴ IVF is the most common ART procedure performed in the United States and is the chosen fertility treatment for men with low sperm counts and for women who either lack or have blocked fallopian tubes.¹⁵ In a typical IVF cycle, fertility doctors surgically remove between five and seventeen eggs from a woman's ovaries.¹⁶ Once mixed with sperm, the fertility clinic waits approximately forty hours before determining whether the eggs have indeed been fertilized.¹⁷ These fertilized eggs, also known as embryos, are then directly implanted into the woman's

10. Reproductive Medicine FAQs, *supra* note 1.

11. Centers for Disease Control and Prevention, Assisted Reproductive Technology, <http://www.cdc.gov/art/> (last visited Oct. 11, 2009).

12. *Id.*

13. Reproductive Medicine FAQs, *supra* note 1.

14. The other types of ART treatments are Gamete Intrafallopian Transfer (GIFT), and Zygote Intrafallopian Transfer (ZIFT). Centers for Disease Control and Prevention, 2006 Assisted Reproductive Technology (ART) Report: Commonly Asked Questions, <http://www.cdc.gov/art/ART2006/faq.htm#2> (last visited Oct. 11, 2009).

15. Reproductive Medicine FAQs, *supra* note 1.

16. Batsedis, *supra* note 6, at 566.

17. Reproductive Medicine FAQs, *supra* note 1.

uterus, maximizing pregnancy success by avoiding the woman's troubled fallopian tubes.¹⁸

Of the seventeen eggs extracted and fertilized, fertility clinics generally only implant between four and eight embryos in order to minimize the number of simultaneous pregnancies.¹⁹ Couples freeze the remaining embryos to preserve their viability in case implantation fails to result in a pregnancy.²⁰ This "cryopreservation" process allows couples to implant embryos on several occasions without having to endure the high cost and burden of extracting and fertilizing additional eggs.²¹ To cryopreserve embryos, fertility clinics apply the embryos with a cryoprotectant treatment and then freeze them in liquid nitrogen.²² Fertility clinics generally store cryopreserved embryos for five years.²³ If a woman later wishes to implant her frozen embryos, the embryos are thawed and rinsed of the cryoprotectant before implantation.²⁴

If the couple does not wish to implant the cryopreserved embryos, they have four alternatives: donate the excess embryos to research, destroy the embryos, indefinitely store the frozen embryos at a fertility clinic, or donate the embryos to be implanted in another woman.²⁵ Embryo donation is a welcome option for those who resist destroying or donating their embryos to research because of personal beliefs.²⁶ For example, many donating couples choose embryo donation because they believe more should result from the ordeal of IVF treatments than mere research.²⁷ As one woman explained, "[t]o donate to research seemed kind of depressing. The financial and emotional effort that went into this made them seem so valuable."²⁸

18. *Id.*

19. Karin A. Moore, *Embryo Adoption: The Legal and Moral Challenges*, 1 U. ST. THOMAS J. L. & PUB. POL'Y 100, 102 (2007).

20. Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169, 171 (2004).

21. *Id.*

22. Robyn L. Ikehara, Note, *Is Adoption the "New" Solution for Couples in Dispute Over Their Frozen Embryos?*, 15 S. CAL. REV. L. & SOC. JUST. 301, 304 (2006).

23. Batsedis, *supra* note 6, at 566. After the five-year period, many fertility clinics offer genetic parents the opportunity to extend the cryopreservation period for a yearly fee. *Id.*

24. Moore, *supra* note 19, at 104.

25. Manning, *supra* note 8, at 683-84.

26. *Id.* at 684.

27. Shari Roan, *She Can Donate; Who Will Adopt?*, L.A. TIMES, Oct. 6, 2008, at F7 [hereinafter Roan, *She Can Donate*].

28. *Id.*

Currently, most embryo donations are anonymous and are arranged through fertility clinics.²⁹ Federal health and safety laws require strict medical and genetic screenings of the donating couple to determine the embryos' viability and whether the couple is "free of any genetic and communicable diseases."³⁰ Other than this federal constraint, clinical screenings and disclosure policies are within the individual fertility clinic's discretion.³¹ Thus, clinics are not legally obligated to maintain family history records or donor identities, and may resist releasing such identifying information to the resulting child.³² However, general clinic policies often do require that the donating couple relinquish their legal rights to the embryos prior to the transfer.³³ The donee couple must then agree to assume all responsibilities for any resulting children.³⁴ Unlike in a traditional adoption,³⁵ a genetic parent usually may revoke his or her consent to the donation only prior to implantation, providing the donee couple with substantial reassurance as to the donation's finality.³⁶

Many legal questions remain unanswered surrounding this popular new fertility option.³⁷ For example, is embryo donation truly a new type of "adoption" or is the transfer of these cell clusters merely a transfer of property interests? The answer not only determines the applicable law, but also may force state legislatures to modify traditional laws so as to fit this medical fertility advancement. Few states currently have statutes specifically addressing embryo donation or adoption, leaving legislative silence to guide American couples in structuring their embryo transfers.

29. 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, 553 (2008).

30. Roan, *She Can Donate*, *supra* note 27.

31. See Richard F. Storrow, *The Bioethics of Prospective Parenthood: In Pursuit of the Proper Standard for Gatekeeping in Infertility Clinics*, 28:5 CARDOZO L. REV. 2283, 2286 (discussing the lack of government regulation and willingness of infertility clinics to regulate themselves).

32. Manning, *supra* note 8, at 684.

33. Lambert, *supra* note 29, at 552.

34. *Id.*

35. In traditional voluntary adoptions, birth parents are granted a period of time after the child's birth during which to revoke their consent. However, the length of such revocation periods often varies by state. For example, Pennsylvania allows a birth mother to revoke her consent within thirty days of the child's birth. 23 PA. CONS. STAT. § 2711(c)(1)(ii) (2009). A birth father may revoke his consent within thirty days of either the child's birth or the date on which he gave consent, whichever is later. *Id.* § 2711(c)(i). In contrast, Florida allows a revocation period of three business days in all adoptions of children older than six months. FLA. STAT. § 63.082(4)(c) (2009). However, where the adopted child is less than six months old, birth parents may not revoke their consent unless "the court finds that it was obtained by fraud or duress." *Id.* § 63.082(4)(b).

36. Batsedis, *supra* note 6, at 570.

37. *Id.*

II. HUMAN EMBRYOS AS PEOPLE OR PROPERTY: THE JUDICIAL AND LEGISLATIVE EFFORTS IN DETERMINING THE APPROPRIATE STATUS, AND INDIRECTLY, GENETIC PARENTS' DISPOSITIONAL FREEDOM

Although embryo donation has become an increasingly preferred disposition choice, the critical time lapse between embryo storage and implantation in the donee's womb has caused legal disputes surrounding the fate of these frozen embryos by allowing time for parties to change their minds as to their disposition wishes.³⁸ The absence of a clear federal directive regarding a human embryo's legal status has forced state legislatures and courts to resolve these contentious disputes as matters of first impression.³⁹ The importance of these judicial and statutory declarations cannot be overstated: they determine genetic donors' freedom in making decisions affecting their embryos, such as donation and adoption, because an embryo's legal status not only dictates the applicable governing law but also establishes the limits of the genetic parents' decision-making authority.⁴⁰

The handful of existing case law does not originate from contested embryo adoptions.⁴¹ Rather, these cases primarily focus on the question of a divorced party's right to determine the disposition of his or her embryos.⁴² If the reasoning is applied beyond the divorce context, however, these courts erected dispositional boundaries on genetic parents in embryo donations and adoptions by classifying an embryo as a person, property, or as deserving special respect.

A. Human Embryos are Simply Early Developed Human Beings: Human Embryos as Legally Recognized "Persons"

Some state legislatures⁴³ declare a human embryo a "juridical person," thus granting an embryo the same legal rights as are granted

38. David L. Theyssen, Note, *Balancing Interests in Frozen Embryo Disputes: Is Adoption Really a Reasonable Alternative?*, 74 IND. L.J. 711, 714 (1999).

39. Naomi D. Johnson, Note, *Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?*, 68 BROOK. L. REV. 853, 875 (2003); Diane K. Yang, Note, *What's Mine Is Mine, But What's Yours Should Also Be Mine: An Analysis of State Statutes That Mandate the Implantation of Frozen Preembryos*, 10 J.L. & POL'Y 587, 588, 616 (2002).

40. Ikehara, *supra* note 22, at 308.

41. Kindregan, Jr. & McBrien, *supra* note 20, at 174.

42. For cases discussing the issue of embryo ownership in a divorce context, see *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *J.B. v. M.B.* 783 A.2d 707 (N.J. 2001); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992). For cases in which a married couple and a fertility clinic disputed embryo ownership, see *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989); *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256 (Ariz. Ct. App. 2005).

43. Only a few state legislatures have codified this viewpoint. In contrast, no state court has held that embryos are legal "persons." See discussion *infra* Part II.A.

to a newborn infant, including the safeguard of applying the best interests of the child standard when its courts determine the embryo's future.⁴⁴ These select state legislatures declare a legitimate interest in protecting an embryo's potential for life because a human's genetic makeup is formed upon conception.⁴⁵ Therefore, once an embryo is formed, the state has the same concern for the embryo's safety as it does for a human's well-being, entitling embryos to the same legal protections.⁴⁶ Under these protections, embryos cannot be intentionally destroyed, a prohibition that includes donating to research.⁴⁷ This legitimate state interest thus severely limits genetic parents' dispositional choices to either implantation in the genetic parent or the donee, or indefinite cryopreservation.⁴⁸

The Louisiana and New Mexico legislatures are two such legislatures that ascribe to this controversial viewpoint.⁴⁹ New Mexico declares its firm protection of a fetus's future safety and well-being, although the legislature falls short of an absolute grant of "judicial person" status.⁵⁰ The legislature defines "fetus" as "the product of conception from the time of conception until the expulsion or extraction of the fetus or the opening of the uterine cavity," encompassing embryos within the expansive definition.⁵¹ In ensuring fetal safety, the state prohibits procedures on fetuses unless the purpose is "to meet the health needs of the particular fetus and the fetus will be placed at risk only to the minimum extent necessary to meet such needs."⁵² For those undergoing IVF treatments, New Mexico thus mandates either implantation of all excess embryos or indefinite cryopreservation.⁵³

Taking the most protective legislative approach of any American state, Louisiana expressly declares a human embryo to be "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."⁵⁴ The legislature defines "human embryo" as "composed of one or more living cells and human genetic material so unified and organized that it will develop in utero into

44. Lambert, *supra* note 29, at 536.

45. Batsedis, *supra* note 6, at 566-67.

46. *See id.* at 567 (discussing state statutes criminalizing embryo experimentation).

47. *See id.* (stating that several states have outlawed embryo experimentation, no matter how the research is funded).

48. Katheryn D. Katz, *The Legal Status of the Ex Utero Embryo: Implications for Adoption Law*, 35 CAP. U. L. REV. 303, 334 (2006) [hereinafter Katz, *Ex Utero Embryo*].

49. Yang, *supra* note 39, at 593.

50. N.M. STAT. § 24-9A-3 (2008).

51. *Id.* § 24-9A-1(G).

52. *Id.* § 24-9A-3(A).

53. *Id.*; Yang, *supra* note 39, at 593.

54. LA. REV. STAT. ANN. § 9:126 (2008).

an unborn child.”⁵⁵ Under the statute, a human embryo may not be intentionally destroyed or created solely for research purposes.⁵⁶ In addition, the best interests of the embryo standard governs custody disputes between genetic parents to best protect the embryo’s future.⁵⁷ As the only state legislature to currently acknowledge embryo adoption,⁵⁸ Louisiana allows IVF patients to relinquish their parental rights to the embryo as long as another married couple implants the embryos.⁵⁹

Despite these state legislatures’ proclaimed legitimate state interest, these clusters of cells carry merely the *potential* for human life and thus do not deserve similar legal protections as held by humans.⁶⁰ Until successfully implanted in a woman’s uterus, embryos cannot develop beyond a cluster of cells and thus ever possess anything but mere potential.⁶¹ Therefore, the state has only a slight interest in limiting genetic parents’ dispositional authority prior to implantation. Even once implanted, the state’s interest in an embryo’s well-being remains slight because an implanted embryo only has a small chance of successfully developing into an infant.⁶² A final problem with categorizing embryos as legal “persons” is that the United States Supreme Court has continuously rejected fetuses, which occupy a later state of human development, as judicial “persons.”⁶³ The Court’s refusal to extend constitutional protections to a fetus indicates that the Court would likely refuse to further stretch the definition to encompass an embryo, a less developed *potential* human.⁶⁴

The majority of state legislatures have in fact rejected New Mexico and Louisiana’s approaches, refusing to afford full legal rights to human embryos.⁶⁵ In addition, Colorado voters rejected Amendment 48 on Election Day 2008, which called for declaring “a fertilized egg a person with legal rights.”⁶⁶ Montana voters also went to the ballot boxes in 2008, rejecting a petition to amend the state constitution to “define human life as beginning at the moment of conception.”⁶⁷

55. *Id.* § 9:121.

56. *Id.* §§ 9:122, :129.

57. *Id.* § 9:131.

58. Moore, *supra* note 19, at 115.

59. LA. REV. STAT. ANN. § 9:130 (2008).

60. Katz, *Ex Utero Embryo*, *supra* note 48, at 306; Yang, *supra* note 39, at 595.

61. Batsedis, *supra* note 6, at 567.

62. Yang, *supra* note 39, at 595 (“[E]mbryos are lost naturally each day. Such occurrences are not contemplated as a loss of life, but rather a loss of genetic cells.”).

63. *Id.* at 618-19.

64. Lambert, *supra* note 29, at 537.

65. Batsedis, *supra* note 6, at 567.

66. Shari Roan, L.A. TIMES Blog, *Obama Victory Delights Stem-Cell Researchers*, Nov. 6, 2008, http://latimesblogs.latimes.com/booster_shots/2008/11/obama-victory-d.html [hereinafter Roan, *Obama Victory Delights*].

67. Shari Roan, *On the Cusp of Life, and of Law*, L.A. TIMES, Oct. 6, 2008, at A1.

*B. Human Embryos Are Nothing More Than A Cluster of Cells:
Human Embryos as Mere Property of The Egg and Sperm Donors*

In perceiving embryos as the personal property of the egg and sperm donor rather than as an independent potential life form,⁶⁸ some states elevate the interests of the genetic donors above that of the embryo itself and bestow the donors with full decision-making authority regarding whether to own, donate, or destroy their embryos.⁶⁹ Supporters applaud this grant of decisional freedom, because a fertilized egg cannot further develop by itself without implantation, thus resembling a property interest rather than a human life.⁷⁰ Opponents vociferously counter, arguing that this property categorization drastically minimizes an embryo's real potential for life.⁷¹

In 1989, the United States District Court for the Eastern District of Virginia was one of the first courts to find the at-issue embryos the property of its genetic donors.⁷² In *York v. Jones*,⁷³ the court considered a dispositional dispute between a fertility clinic and a married couple who previously underwent IVF treatment.⁷⁴ When the couple decided to change fertility clinics, the original clinic refused to transfer the couple's remaining frozen embryos to the chosen clinic.⁷⁵ The court concluded that the dispositional agreement signed between the Yorks and the fertility clinic prior to undergoing IVF created a relationship such that the clinic was obligated to return the subject matter of the relationship — the frozen embryos — to the couple when the relationship's purpose ended.⁷⁶ Assuming, rather than finding, the embryos to be personal property, the court stated that "[t]he obligation to return the property is implied from the fact of lawful possession of the *personal property* of another."⁷⁷ In support of its property ruling, the court relied on the cryopreservation agreement between the Yorks and the fertility clinic in which the parties themselves had viewed any remaining embryos as the genetic donors' personal property.⁷⁸ Based on the unambiguous agreement, the court mandated

68. Batsedis, *supra* note 6, at 567.

69. Lambert, *supra* note 29, at 538; Yang, *supra* note 39, at 599.

70. Katz, *Ex Utero Embryo*, *supra* note 48, at 306.

71. Ikehara, *supra* note 22, at 309.

72. *Id.*

73. 717 F. Supp. 421 (E.D. Va. 1989).

74. *Id.* at 422.

75. *Id.*

76. *Id.* at 425.

77. *Id.* (emphasis added).

78. *Id.* at 426. The agreement stated "that in the event of [the parties'] divorce, the legal ownership of the [embryos] 'must be determined in a property settlement.'" *Id.*

that the fertility clinic fully recognize the Yorks' property rights in the excess frozen embryos by immediately returning them to the couple.⁷⁹

Following the Virginia federal court's lead, Florida codified a genetic donor's property interest in his or her embryos, granting the sperm and egg donor joint decision-making authority regarding their embryos' disposition.⁸⁰ The Florida legislature bolstered its property position by declaring that "control" and decisional authority always remains with the genetic donors — if one donor dies, the living donor immediately assumes full decisional authority.⁸¹

In November 2008, Michigan joined Florida as its voters passed Proposition 2, categorizing embryos as "property" by allowing Michigan researchers to create new embryonic stem-cell lines from embryos created solely for fertility treatment purposes.⁸² Affected by the amendment are only those embryos that would otherwise be destroyed unless donated.⁸³ By allowing researchers to lawfully create embryos solely for research purposes, Michigan voters authorized genetic donors full decision-making authority over their embryos, refusing to place constraining limits on that personal decision.⁸⁴

C. Neither This Nor That: Human Embryos Occupy a Special "Interim" Status Between Mere Property and a Fully Recognized Human Being

Under the most widely adhered to categorization, human embryos occupy a special "interim" legal status, deserving more recognition than mere "property" because of their potential for life but less than the full legal protections enjoyed by humans.⁸⁵ While egg and sperm donors maintain a property interest, their decision-making authority regarding the embryo's future use is not absolute and can be superseded by state legislation.⁸⁶ The American Society for Reproductive Medicine, a staunch supporter of the "interim status" classification, articulates that embryos should be afforded "profound respect," but

79. *Id.* at 427.

80. FLA. STAT. § 742.17(2) (2009). A "preembryo" is "the product of fertilization of an egg by a sperm until the appearance of the embryonic axis." *Id.* § 742.13(12).

81. *Id.* § 742.17(3). The statute does not directly address who assumes authority if both genetic parents die without leaving a signed written agreement dictating their disposition wishes. *Id.* § 742.17.

82. Roan, *Obama Victory Delights*, *supra* note 66.

83. *Id.*

84. *See id.* (stating that Proposition 2 gives genetic donors a wider range of options for unused embryos than was previously available).

85. Yang, *supra* note 39, at 596.

86. Paul C. Redman II & Lauren Fielder Redman, *Seeking a Better Solution for the Disposition of Frozen Embryos: Is Embryo Adoption the Answer?*, 35 TULSA L.J. 583, 590 (2000); Ikehara, *supra* note 22, at 310.

not the same moral and legal rights that are afforded human beings.”⁸⁷ However, despite overwhelming support for this middle approach, most states have failed to specifically enumerate and define the accompanying protections.⁸⁸

In the seminal case of *Davis v. Davis*,⁸⁹ the Tennessee Supreme Court declared that embryos are neither persons nor property, but “occupy an interim category that entitles them to special respect because of their potential for human life.”⁹⁰ In the midst of their divorce, Mr. and Mrs. Davis disagreed as to “‘custody’ of the seven ‘frozen embryos’” remaining from their IVF treatment.⁹¹ Explicitly disagreeing with *York*,⁹² the Tennessee court held that the couple does not hold an absolute property interest in the embryos.⁹³ As mere clusters of cells, the state lacks a legitimate interest in the embryos’ small potential for human life, and therefore treating embryos as “people” would constrain the parties’ decision-making rights.⁹⁴ However, the state must grant embryos sufficient protections to allow them to develop and reach their potential for human life.⁹⁵ Therefore, the court mandated that its state courts bestow “special respect” upon human embryos.⁹⁶

Similarly, the Arizona Court of Appeals in *Jeter v. Mayo Clinic Arizona*⁹⁷ held that human embryos “occupy an interim category between mere human tissue and persons because of their potential to become persons.”⁹⁸ The Jetters sued the Mayo Clinic under the state’s wrongful death statute for the loss of their frozen embryos, which the clinic had previously agreed to cryopreserve.⁹⁹ In dismissing the claim, the court stated that the legislature, not the courts, should determine if “a three-day-old, eight-cell cryopreserved pre-embryo [falls] within the statutory definition of ‘person’ under the [State’s] wrongful death statutes.”¹⁰⁰ As the state legislature had

87. Manning, *supra* note 8, at 692.

88. See Lambert, *supra* note 29, at 539-40 (stating that this approach, though popular, is criticized for inadequately defining the specific protections due to embryos).

89. 842 S.W.2d 588 (Tenn. 1992).

90. *Id.* at 597.

91. *Id.* at 589.

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

93. *Davis*, 842 S.W.2d at 597.

94. *Id.* at 602.

95. See *id.* at 596 (discussing recommendation of the Ethics Committee of the American Fertility Society that “special respect [of embryos] is necessary to protect the welfare of potential offspring”).

96. *Id.* at 597.

97. 121 P.3d 1256 (Ariz. Ct. App. 2005).

98. *Id.* at 1271.

99. *Id.* at 1258.

100. *Id.* at 1261.

yet to define “person,” the court refused to hold that an embryo is a legal “person” for purposes of the statute.¹⁰¹

Despite expressly deferring to the state legislature, the court commented that it did not view an embryo as a legal “person” under the wrongful death statute, emphasizing that many variables affect the development from a mere embryo to a human infant.¹⁰² Therefore, although deserving special respect, the court emphasized the unlikelihood that a defendant could be found guilty of the wrongful death of a human embryo, because it would be too speculative for a jury to ever find that “‘but for the injury’ to the fertilized egg,” the embryo would reach its human potential and “a child would have been born.”¹⁰³

Pennsylvania adheres to this majority middle approach, protecting a woman’s constitutional right to reproductive freedom, but superseding a genetic parent’s full decisional authority by criminalizing the creation of embryos solely for research purposes.¹⁰⁴ Joining Pennsylvania’s statutory balance are Maine, Massachusetts, Michigan, and North Dakota, which all accord embryos special respect and refuse to treat embryos as mere property by “prohibit[ing] the sale of embryos for research purposes.”¹⁰⁵

III. “CONTRACTING FOR” VERSUS “ADOPTING” A HUMAN EMBRYO: MORE IS AT STAKE THAN CORRECT TERMINOLOGY

While many genetic parents are able to exercise their decisional autonomy and donate embryos to another couple for implantation, no majority view exists as to what law governs this type of transfer.¹⁰⁶ Although existing case law focuses primarily on embryo ownership in the divorce context, the nation’s state court dockets are slowly filling up with embryo donation disputes, the divisive issues being the appropriate governing law and whether these transfers should indeed be considered embryo “adoptions.”

A. These Transfers Are a Medically Advanced Form of Adoption, Requiring Governing Adoption Doctrine

Those advocating that human embryos are the new “adoptees” urge courts and legislatures across the country to recognize and offer

101. *Id.* at 1271.

102. *Id.* at 1262, 1271.

103. *Id.* at 1262.

104. 18 PA. CONS. STAT. § 3216(a) (2009).

105. Batsedis, *supra* note 6, at 567.

106. *See id.* (noting that “embryos are afforded a different status in different states” and that “no federal law exists that clearly addresses disputes over embryo ownership”).

“embryo adoption” — that is, embryo donation governed by adoption law based on the overall goal of protecting the best interests of the embryo.¹⁰⁷ Under these touted legal safeguards, all fertility clinics offering embryo adoption would execute a home study prior to implantation to ensure the prospective adoptive parents’ fitness and the safety of their home.¹⁰⁸ As in a traditional adoption, a licensed social worker would evaluate the prospective adoptive parents’ fitness by inquiring into their relationship, criminal record, and physical health.¹⁰⁹

Once the home study is complete, the biological parents would be required to terminate their parental rights to any resulting child, and the adoptive parents would immediately assume all rights.¹¹⁰ Rather than allow a post-implantation period during which time the genetic parents could revoke consent to the embryo adoption, revocation would be prohibited after implantation.¹¹¹ However, many advocates argue that adoptive parents should be required to return all *un*-implanted embryos to the genetic parents even after the adoption’s finalization.¹¹²

Wishing to push the country towards implementing these safeguards for embryo adoptions, the Bush administration established the Embryo Adoption Public Awareness Campaign through the Office of Population Affairs in the Department of Health and Human Services.¹¹³ Section 301 of the Public Health Services Act¹¹⁴ authorizes the Embryo Adoption Program, designed to promote embryo adoption as a fertility option.¹¹⁵ Pushing this issue into the national spotlight, Congress earmarked over \$3.9 million in the Health and Human Services appropriations act for the public awareness campaign in fiscal year 2008 alone.¹¹⁶ Five organizations shared the grant

107. See Manning, *supra* note 8, at 712 (stating that adoption law focuses on “protecting the best interests of the child”).

108. See *id.* (discussing the home study process in adoption law that would presumably extend to fertility clinics if embryo adoption became the norm).

109. See *id.* at 712-13 (describing the home study process in adoption law).

110. *Id.* at 712.

111. See, e.g., NIGHTLIGHT CHRISTIAN ADOPTIONS, SNOWFLAKES EMBRYO ADOPTION PROGRAM: INFORMATION FOR ADOPTING PARENTS (last visited Nov. 1, 2009), <http://www.nightlight.org/downloads/nightlight-embryo-overview.pdf> (describing relinquishment of embryos in the Snowflakes program).

112. For a description of how one organization addresses this situation in practice, see NIGHTLIGHT CHRISTIAN ADOPTIONS, SNOWFLAKES EMBRYO ADOPTION PROGRAM: FREQUENTLY ASKED QUESTIONS BY GENETIC FAMILIES (last visited Nov. 1, 2009), <http://www.nightlight.org/downloads/FAQs%20from%20GPs%205%2029%2009.pdf>.

113. Office of Population Affairs, U.S. Dep’t of Health & Human Servs., Embryo Adoption, <http://www.hhs.gov/opa/embryooption/index.html> (last visited Aug. 24, 2009).

114. 42 U.S.C. § 241 (2006).

115. Office of Population Affairs, U.S. Dep’t of Health & Human Servs., Embryo Adoption: Funding, <http://www.hhs.gov/opa/embryooption/funding/index.html> (last visited Aug. 24, 2009).

116. *Id.*

awards for 2008; Nightlight Christian Services received the largest grant at \$500,000.¹¹⁷

As the sole organization in the United States to currently offer embryo donation with “the same legal and emotional safeguards offered in traditional adoptions,”¹¹⁸ Nightlight Christian Adoptions provides state legislatures and courts with a glimpse of how embryo adoptions governed by adoption law would operate in practice.¹¹⁹ Licensed by the State of California, Nightlight Christian Adoptions offers the Snowflakes Frozen Embryo Adoption Program.¹²⁰ The program recognizes embryos as “persons” and advertises its program as facilitating embryo “adoptions” rather than mere donations.¹²¹ Through the Snowflakes Program, genetic parents may choose the adopting family, although the program has strict criteria regarding who may adopt.¹²² After the adoptive couple completes the Adoptive Parent Application and signs the Agreement for Adoption Services, the organization prepares a home study to screen and educate the couple on adopting a human embryo.¹²³

Once properly screened, the parties execute the organization’s Embryo Adoption Agreement and relinquishment forms prior to transferring the embryos to the adoptive couple’s fertility clinic.¹²⁴ Because California disagrees with the premise underlying the Snowflakes Program and has not granted full “person” status to embryos, Snowflakes’ agreement follows the interim status approach, viewing embryos as property but including traditional adoption language to protect the embryo’s well-being.¹²⁵ For example, the Snowflakes

117. Office of Population Affairs, U.S. Dep’t of Health & Human Servs., Embryo Adoption: Grantees, <http://www.hhs.gov/opa/embryooption/grantees/index.html> (last visited Oct. 12, 2009).

118. Katheryn D. Katz, *Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation*, 18 WIS. WOMEN’S L.J. 179, 191 (2003) [hereinafter Katz, *Snowflake Adoptions*] (quoting Nightlight Christian Adoptions, About Us, <http://www.toadoptkids.org/nlca.htm> (last visited Dec. 13, 2003)).

119. *Id.* at 191, 193.

120. Nightlight Christian Adoptions, Embryo Adoption Programs, <http://www.nightlight.org/adoption-services/snowflakes-embryo/default.aspx> (last visited Oct. 12, 2009).

121. NIGHTLIGHT CHRISTIAN ADOPTIONS, SNOWFLAKES EMBRYO ADOPTION PROGRAM: INFORMATION FOR ADOPTING PARENTS, *supra* note 111.

122. These criteria include: the adoptive mother is able to carry a child to term, the couple is under forty-five years old (those over forty-five may adopt, but face a longer waiting period), and married couples are preferred over single women. NIGHTLIGHT CHRISTIAN ADOPTIONS, SNOWFLAKES EMBRYO ADOPTION PROGRAM: FREQUENTLY ASKED QUESTIONS BY ADOPTING FAMILIES (June 30, 2009), <http://www.nightlight.org/downloads/FAQs%20from%20APs%2006%2030%2009.pdf>.

123. *Id.*

124. *Id.*

125. NIGHTLIGHT CHRISTIAN ADOPTIONS, SNOWFLAKES EMBRYO ADOPTION PROGRAM AGREEMENT FOR ADOPTION SERVICES, <http://www.nightlight.org/downloads/Agreement%20for%20Snowflakes%20on%20letterhead%2010.08.pdf> (last visited Oct. 12, 2009).

agreement expressly states that any child resulting from an embryo adoption has inheritance rights solely through the adoptive parents.¹²⁶

Approving of the Snowflakes Program's application of legal protections to embryo adoptions, and with the full support of the organization's executive director,¹²⁷ the Georgia House of Representatives passed the Option of Adoption Act on March 12, 2009.¹²⁸ The Act calls for embryo adoptions to be governed by adoption law and recognizes the adopting couple as the legal parents of the resulting child.¹²⁹ In addition, the Act promotes embryo adoptions by making them as financially desirable as traditional adoptions.¹³⁰ For example, embryo adoptive parents residing in Georgia would be eligible for the federal adoption tax credit, a tax credit for which traditional adoptive parents are already eligible.¹³¹

B. These Transfers Only Involve Transferring Property Interests in Human Embryos, Requiring Parties To Abide By Contract Law

At the opposite end of the debate are those who support contract law as the governing doctrine for all embryo transfers.¹³² However, even if contract law does govern embryo donations, will courts enforce the donation contract if the donors subsequently change their minds? Proponents argue that enforcing dispositional agreements, even those signed prior to IVF treatments, is critical in providing certainty to the transfer.¹³³ Critics argue, however, that contract law has no place in embryo custody disputes because couples undergoing IVF treatments may have been so eager to start treatment that they may not have thoroughly considered the consequences.¹³⁴ While the debate has thus far centered on the enforceability of agreements in divorce actions, these cases emphasize courts' hesitancy to enforce contracts in all family law disputes, including disputes involving embryo donation contracts.¹³⁵

126. Katz, *Snowflake Adoptions*, *supra* note 118, at 192.

127. Michael Foust, *Georgia May See United States' First Embryo Adoption Law*, BAPTIST PRESS, Mar. 17, 2009, <http://www.bpnews.net/bpnews.asp?id=30084>.

128. Option of Adoption Act, 2009 Ga. Laws 171, § 2 (codified as amended at GA. CODE ANN. § 19-8-41 (2009)).

129. GA. CODE ANN. § 19-8-41(d) (2009).

130. Stephen Gurr, *Georgia's Newest Laws Now in Effect*, GAINESVILLETIMES, July 1, 2009, at 1A, available at <http://www.gainesvilletimes.com/news/archive/20665> (noting statement of Georgia Right to Life president that persons who adopt embryos under the new Georgia law will be eligible for a federal tax credit).

131. *Id.*

132. Katz, *Ex Utero Embryo*, *supra* note 48, at 327.

133. Lambert, *supra* note 29, at 544.

134. *Id.* at 544-45.

135. See, e.g., *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000) (indicating that public policy is against enforcing agreements "bind[ing] individuals to future familial relationships").

The influential *Davis v. Davis*¹³⁶ case established the judicial framework for determining contract enforcement in embryo disposition disputes.¹³⁷ In *Davis*, the parties underwent IVF treatment, never signing a written agreement articulating their disposition wishes as to any excess embryos.¹³⁸ After their divorce, the parties vehemently disagreed as to the embryos' future use: the plaintiff requested that she donate the embryos to an infertile couple, while the defendant demanded that they be discarded.¹³⁹ The Tennessee Supreme Court held that the sperm and egg donors' current preferences can overcome a prior agreement in a custody dispute over frozen embryos.¹⁴⁰ If their wishes conflict, "an agreement regarding disposition of any untransferred preembryos in the event of contingencies . . . should be presumed valid and should be enforced as between the progenitors."¹⁴¹ As the parties' wishes conflicted, and in the absence of a written agreement, the court balanced the rights of both parties, concluding that the husband's right to avoid parenthood outweighed the wife's desire to donate.¹⁴²

Six years later, the Court of Appeals of New York echoed the *Davis* decision in *Kass v. Kass*,¹⁴³ treating dispositional agreements as presumptively valid and thus binding upon the parties.¹⁴⁴ The parties underwent IVF treatment while married, signing a consent agreement dictating the disposition of excess embryos.¹⁴⁵ After separating, the parties disagreed as to disposition: the plaintiff requested implantation, while the defendant resisted becoming a father.¹⁴⁶ The court emphasized that "parties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing."¹⁴⁷ Genetic parents should make this personal choice rather than the legislature or the judiciary.¹⁴⁸ Thus, the court enforced the contract

136. 842 S.W.2d 588 (Tenn. 1992).

137. *Id.* at 604.

138. *Id.* at 590.

139. *Id.*

140. *Id.* at 597.

141. *Id.*

142. *Id.* at 604.

143. 696 N.E.2d 174 (N.Y. 1998).

144. *Id.* at 180.

145. *Id.* at 176. The contract stated that "[i]n the event that [the parties] no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of [the] stored, frozen pre-zygotes," the embryos would be donated by "consent of both [parties]" to the clinic's IVF program. *Id.* at 176, 181.

146. *Id.* at 177.

147. *Id.* at 180.

148. *Id.*

as the signed consent agreement clearly reflected the parties' intent to donate all remaining embryos to research.¹⁴⁹

At the turn of the twenty-first century courts began to emphasize an individual's right to determine family matters rather than contractual enforceability, a policy that had been quietly underlying previous decisions.¹⁵⁰ In *A.Z. v. B.Z.*,¹⁵¹ the Supreme Judicial Court of Massachusetts refused to enforce contracts in embryo disposition disputes where enforcement would compel a party to enter into an undesired family relationship.¹⁵² The issue before the court was whether the wife's ownership rights over frozen embryos remaining from an IVF treatment allowed her to implant them over her husband's objection.¹⁵³ Before each IVF treatment, the parties signed the fertility clinic's consent form, indicating that "should [the parties] become separated," the wife would receive the embryos so that she could implant them.¹⁵⁴ The court emphasized that even though this agreement unambiguously expressed the parties' wishes, "the [Massachusetts] Legislature has already determined by statute that individuals should not be bound by certain agreements binding them to enter or not enter into familial relationships."¹⁵⁵ Enforcing the contract would thus violate public policy by intruding into an individual's freedom of personal choice in family life matters.¹⁵⁶ The court held contracts to enter into such relationships, including parenthood, unenforceable "against individuals who subsequently reconsider their [dispositional] decisions."¹⁵⁷

One year later, in *J.B. v. M.B.*,¹⁵⁸ the Supreme Court of New Jersey rendered void those dispositional agreements where a genetic parent changes his or her mind about disposition before implantation.¹⁵⁹ Prior to undergoing an IVF cycle, the parties executed the fertility clinic's consent form, relinquishing all ownership and control of their "tissues" to the clinic upon "dissolution of [the] marriage by court order, unless the court specifies who takes control and direction of the tissues."¹⁶⁰ After separating, the wife desired to destroy the

149. *Id.* at 181.

150. Moore, *supra* note 19, at 113-14; Yang, *supra* note 39, at 604-05.

151. 725 N.E.2d 1051 (Mass. 2000).

152. *Id.* at 1058.

153. *Id.* at 1053.

154. *Id.* at 1054. The court noted that "[e]ach time after signing the first consent form . . . the husband always signed a blank consent form [after which] the wife filled in the disposition and other information." *Id.*

155. *Id.* at 1058.

156. *Id.* at 1059.

157. *Id.*

158. 783 A.2d 707 (N.J. 2001).

159. *Id.* at 719.

160. *Id.* at 710.

remaining embryos.¹⁶¹ The husband, however, demanded that the wife either implant the embryos or donate them to another infertile couple.¹⁶² The court stressed that forcing an individual to have children violated the state's public policy.¹⁶³ The court, therefore, held that contracts were unenforceable where the parties later disagree with the contract's terms such that one genetic parent's wishes "compel procreation over the subsequent objection of one of the parties."¹⁶⁴

The common thread between these landmark cases is the courts' refusal to enforce a contract that forces a party into an unwanted family relationship.¹⁶⁵ If following the disposition contract's terms would not place a genetic party in such an unwanted position, as was the situation in *Kass*,¹⁶⁶ courts are more likely to demand contractual adherence.¹⁶⁷ Therefore, in embryo donation disputes between genetic parents and prospective adoptive parents *prior to* implantation, it seems unlikely that courts will enforce donation contracts that force genetic parents, who have subsequently changed their mind, to continue with the donation. In situations where one genetic parent wishes to continue with the embryo donation and the other refuses, precedent indicates that requiring donation where there is not already a voluntary relinquishment of parental rights violates public policy, because it forces procreation, thus rendering the embryo donation contract void.¹⁶⁸

C. Embryo Adoptions Are Those Transfers to Individuals or Couples With No Research Background and Should Be Governed by Adoption Law

Stuck in the storm created by this judicial and statutory uncertainty are those genetic and prospective adoptive parents who fear that their embryo donation agreements may be deemed unenforceable and that fertility clinics will not implement protective measures to ensure the health and safety of the resulting children. Remaining at the legal outskirts of this medical fertility advancement for too long, state legislatures throughout the country must convene and enact laws regulating embryo donation and codify adoption law as

161. *Id.*

162. *Id.*

163. *Id.* at 717-18.

164. *Id.* at 719.

165. Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1038-39 (2004).

166. *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).

167. *See id.* at 179-80 (presuming contract validity in an embryo disposition case).

168. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058-59 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001).

the applicable doctrine when genetic parents transfer their embryos to an individual or couple with no research background. These state statutes also must clearly indicate the scope of their declarations, providing clarity as to which state's law applies in disputes. While a unified congressional enactment would provide great uniformity, family law has historically been left to state regulation, and should continue to be so. Resolving this debate is imperative not only to provide legal clarity to directly affected parties, but also because the statutory outcome will naturally affect other areas of the law, including criminal and wrongful death claims.¹⁶⁹

If statutorily accepted as an embryo adoption, the adopted embryo would retain all accompanying rights and safeguards that attach to a biological embryo.¹⁷⁰ For example, the adoptive mother of an embryo would retain the constitutional liberty of reproductive choice.¹⁷¹ In addition, a state legislature's declaration that human embryos are "persons" under its wrongful death statute would include both biological and adopted embryos, thereby allowing a family member to bring suit on the adopted embryo's behalf.¹⁷²

Abiding by adoption laws only in the instances where the recipient individual or couple is not trained in research preserves genetic parents' decisional authority as to disposition by permitting donation or destruction in certain circumstances, and furthers the purpose of adoption law by protecting the health and safety of any resulting children.¹⁷³ For example, the Snowflakes Program expressly stipulates in its agreements that any frozen embryos unused by the adoptive couple be returned to the donors if "they are no longer to be used for implantation."¹⁷⁴

Whereas the finalization of a traditional adoption involves issuing the child a new birth certificate with the names of the adoptive parents listed as the child's parents,¹⁷⁵ few states currently address the parental status of adoptive parents of embryos.¹⁷⁶ The nation's

169. See *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256 (Ariz. Ct. App. 2005) (describing cause of action wherein a married couple sued under Arizona's wrongful death statute for the loss of the couple's frozen embryos).

170. Manning, *supra* note 8, at 679.

171. Ikehara, *supra* note 22, at 306-07.

172. See *Jeter*, 121 P.3d at 1261-62 (holding that without further legislative action, the current definition of "persons" under the Arizona wrongful death statute does not include cryopreserved embryos).

173. See Manning, *supra* note 8, at 678-79 (stating that adoption law and embryo donation for implantation implicate similar policy concerns).

174. Lambert, *supra* note 29, at 560; NIGHTLIFE CHRISTIAN ADOPTIONS, SNOWFLAKES EMBRYO ADOPTION PROGRAM: FREQUENTLY ASKED QUESTIONS BY GENETIC FAMILIES, *supra* note 112.

175. Manning, *supra* note 8, at 714.

176. The jurisdictions that have addressed this issue are Delaware, Florida, Louisiana, New Hampshire, North Dakota, Ohio, Oklahoma, Texas, Utah, Virginia, Washington,

state legislatures must pass legislation to affirmatively designate a legal mother and father for an adopted embryo because parental status affects a host of legal issues, including intestate claims and claims for medical benefits.¹⁷⁷ If embryo adoption is truly the newest form of adoption, then state legislatures should follow the parental status designations in traditional adoptions and declare the adoptive parents as the resulting child's legal parents.¹⁷⁸

Although the majority of states have recently granted traditionally adopted children certain rights, including access to complete medical history and genetic origin information,¹⁷⁹ these rights have not yet been granted to embryo adoptees.¹⁸⁰ State legislatures declaring adoption law as the governing doctrine must codify these same rights for all adoptees, including embryo adoptees. The result of an embryo adoption and a traditional adoption is the same: an adopted child who is entitled to the same rights and privileges as biological children.¹⁸¹ If not addressed by state legislatures, state courts will soon be inundated with lawsuits demanding equal entitlements for embryo adoptees. Without specifically addressing whether the developing embryo retains these protective rights, courts will receive no statutory guidance on how to resolve such disputes.

For those instances where both genetic parents initially wish to destroy or donate their embryos to research, state legislatures must anticipate future litigation and establish express policies regarding contractual enforceability in this legal area. Since these agreed-upon dispositional choices — destruction and donation solely for research purposes — neither infringe on a genetic parent's disposition decision-making authority nor force him or her into an unwanted family role, the small amount of precedent indicates that state courts would likely enforce these contracts.¹⁸² Even if one party later wishes to implant despite the contractual provision directing for destruction or donation to research, it is likely that courts will enforce the provision, as implantation would interfere with the other party's procreational freedom.¹⁸³ However, each state legislature should eradicate any

and Wyoming. Jonathan Penn, Note, *A Different Kind of Life Estate: The Laws, Rights, and Liabilities Associated With Donated Embryos*, 21 REGENT U. L. REV. 207, 209 n.8 (2008). For example, the Florida legislature grants married recipients of donated eggs or preembryos parental status of the resulting child. FLA. STAT. § 742.11(2) (2009).

177. Alexa E. King, Note, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 378 (1995).

178. Manning, *supra* note 8, at 712.

179. *Id.*

180. *Id.* at 679.

181. *Id.* at 718.

182. *Id.* at 696.

183. *Id.*

potential uncertainty and statutorily express its policy regarding contractual enforceability in such situations.

Finally, if state legislatures in fact legislate that contract law governs all embryo donations, embryo donation contracts ought to clearly define the scope of the donee couple's rights over any remaining embryos in order to ensure enforceability.¹⁸⁴ If the contract is silent regarding either couple's future rights of any remaining embryos, ambiguity as to the scope of the donors' consent to the original donation may potentially invalidate the contract.¹⁸⁵ For example, may the donee couple re-donate the embryos to another couple? Is the donee couple required to implant all of the transferred embryos or may they donate some to research? Answers to these questions should be expressly included in contracts so as to maximize clarity and enforceability.

CONCLUSION

Throughout the decades, popular American adoption methods have shifted from adopting abandoned American children, to adopting international newborn infants, to adopting unborn human embryos. With the popularity of Assisted Reproductive Technology procedures generally, and IVF treatments in particular, infertile American couples are increasingly seeking to implant another couple's embryo in hopes of giving birth to a child. However, although science has advanced enough to offer desperate couples this fertility option, the nation's state legislatures have remained silent. As the majority of states lack guiding case law on issues occurring in embryo donations and adoptions, silence will continue to govern without intervention by each state's legislature. Not only is the well-being of all resulting children implicated in such legislative silence, but genetic parents' right to dispositional freedom remains in limbo. It is time for state legislatures around the nation to enter the debate. The legislatures should balance genetic parents' decisional autonomy with human embryos' safety by codifying that embryo adoptions by individuals or couples without a research background be governed by adoption law, while donations to those with clinical research experience be governed by contract law. This statutory codification both allows genetic parents to retain full dispositional decision-making authority and protects the embryos' safety and well-being. In addition, the state legislatures should explicitly state the scope of such statutes, so as to avoid conflicts as to who is bound by the statute and which state's law governs in an embryo adoption or donation dispute.

184. Lambert, *supra* note 29, at 560-61.

185. *Id.* at 560.