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The Disposition of Cryopreserved Embryos: Why Embryo Adoption Is an Inapposite Model for Application to Third-Party Assisted Reproduction

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**THE DISPOSITION OF CRYOPRESERVED EMBRYOS:
WHY EMBRYO ADOPTION IS AN INAPPOSITE MODEL
FOR APPLICATION TO THIRD-PARTY ASSISTED
REPRODUCTION**

Elizabeth E. Swire Falker, Esq.[†]

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The issues involved in embryo donation/adoption are vast and complex on scientific, ethical, and political levels. What an embryo¹ is and how it should be treated are hotly debated issues at the forefront of reproductive science and the law. The opinions are varied and diametric, from those who believe embryos are solely cellular matter and should be treated as such, making them eligible for “donation” such as one would donate a kidney or a

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1. Notwithstanding later discussion in this article regarding applicable terminology and discussion regarding the definition of an embryo, for purposes of clarity and ease of reference, the term embryo will be used herein to refer to any fertilized human ova that has not been transferred to the uterus of a woman and/or that has not obtained a level of cellular differentiation presented by evidence of a primitive streak. See *infra* Part III for a discussion of stages of embryonic development.

liver, to those who believe each and every embryo is a living, sentient being, and should therefore only be eligible for “adoption.” Indeed, the debate is inflammatory and extremist; for example, one religious authority, the *Donum Vitae*, has pronounced that, notwithstanding the fact that it considers frozen embryos to be human beings that should be afforded all rights and protections accordant therewith, frozen embryos must be thawed and allowed to die because they were created in an unnatural manner through in vitro fertilization (IVF).² Indeed, arguments such as the one set forth by the *Donum Vitae* perhaps best encapsulate how divisive the nature of the debate surrounding the disposition of frozen embryos can get.

This article will analyze the legal and statutory models for the disposition of cryopreserved embryos to a third party for purposes of family building. Part I will present an overview of the debate and its importance in the current legal, bioethical, and political climate.³ Part II will present an overview of the “two” models for disposition, donation and adoption, and will demonstrate that other than through the different use of terminology, there is no meaningful difference in the current methodology for disposing of frozen embryos to third parties for purposes of family building.⁴ Notwithstanding the fact, however, that from a practical standpoint there may be no “real” distinction between embryo donation and adoption, these contradictory paradigms and the concomitant misapplication of terminology must be addressed and resolved if the disposition of frozen embryos is going to provide a real and substantial means for building new families in the future.

Thus, Part III will seek to define the term “embryo” by analyzing the legal and scientific definitions afforded embryos to date, and will discuss how state and federal law impact the

2. E.g., Karin A. Moore, *Embryo Adoption: The Legal and Moral Challenges*, 1 U. ST. THOMAS J. L. & PUB. POL’Y 100, 117–19 (discussing the *Donum Vitae*’s position on frozen embryos and in vitro fertilization, noting that “[w]hen the act of embryo adoption is characterized as a wonderful gift to an infertile couple instead of making the best possible situation out of an irresponsible moral choice, it undermines the goal of stopping frozen embryos from being created in the first place” and that “[t]hose opposing embryo adoption [in the right-to-life Catholic community] believe the problem must be attacked going forward, and that those lives already hanging in the frozen abyss must be allowed to die for the greater good of an unequivocal stand against the practice of IVF.”).

3. See *infra* Part I.

4. See *infra* Part II.

definition of an embryo.⁵ It will then propose a definition for the term “embryo” that is consistent with existing jurisprudence and science and will also provide ongoing stability for the disposition of cryopreserved embryos for purposes of conception given the current legal and constitutional environment.⁶ Part III will further discuss how the definition of an embryo has the potential to undermine existing procreative freedoms; and how the definition of an embryo has been used intentionally in an effort to create a backdoor approach to weaken procreative freedoms recognized in *Roe v. Wade*⁷ and its progeny.⁸

Part IV of this article will examine existing jurisprudential theories regarding the termination of parental rights and how state adoption laws and public policies impact an embryo adoption.⁹ Finally, Part V will propose a model for the disposition of cryopreserved embryos which is consistent both with existing legal precedent as well as medical, ethical and normative ideas regarding the disposition and donation of cellular matter and gametes.¹⁰ This article argues that any application of the traditional adoption model to the disposition of cryopreserved embryos is not only inconsistent with the overwhelming body of U.S. legal jurisprudence, but also that, from a normative and ethical standpoint, such a paradigm also undermines and confuses the well established protected interests of genetic/gestating birth parents. In addition, such a paradigm propounds the fears and vulnerabilities of the infertile population, whether due to medical or social factors.

I. THE DEBATE OVER THE DISPOSITION OF CRYOPRESERVED EMBRYOS FOR FAMILY BUILDING

It is incongruous and iconoclastic that, as science hurdles humanity forward into uncharted and once incomprehensible

5. *See infra* Part III.

6. It is the intent of this article to better define an embryo solely in the context of the disposition of frozen embryos to third parties to create new family units and to analyze the conflicting approaches taken by courts, legislatures, and practitioners. This article does not attempt to address substantial moral questions surrounding whether embryos are human beings or when life begins.

7. 410 U.S. 113 (1973).

8. *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309 (1994); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

9. *See infra* Part IV.

10. *See infra* Part V.

technologies involving the ability to create life and families, the law, legal scholars, and bioethicists struggle to keep pace and to define that life and those families.¹¹ Reproductive technologies have served not only to offer new and faster means of creating families for those who not twenty-five years ago might have remained childless but have also simultaneously created one of the most divisive and misunderstood discussions regarding the implications and implementation of that technology. Had political invective not taken such a large and overwhelming role in the early discussions regarding the application of these new technologies, reasoned minds and appropriate debate might have avoided much of the current controversy regarding the disposition of cryopreserved embryos.¹²

Regardless of political debate (or lack thereof), however, reproductive technology has advanced to the point where it is now possible for a person or couple to conceive a child that lacks any genetic connection to either or both of them and that is carried in utero by neither of them.¹³ Through the combination of egg and sperm donation and surrogacy, together with the improvement of medical protocols for achieving controlled ovarian hyperstimulation and the culture medium used to support the fertilized ovum, the medically and/or socially infertile American has more options for parenthood and greater chances of success than ever before. In the process, the infertile get to experience pregnancy and express control over the uterine environment of their growing offspring.¹⁴

11. See *Kass v. Kass*, 696 N.E.2d 174, 178 (N.Y. 1998) (“[A]s science races ahead, it leaves in its trail mind-numbing ethical and legal questions.” (citation omitted)).

12. European and Scandinavian countries debated and discussed these issues throughout the evolution of the technologies being discussed herein, whereas the response in the United States was to shut down funding for, and thus end, any debate regarding scientific advances in fields like stem cell research. See, e.g., Susan L. Crockin, *The “Embryo” Wars: At the Epicenter of Science, Law, Religion and Politics*, 39 FAM. L.Q. 599, 620–24 (2005) [hereinafter Crockin, *The Embryo Wars*].

13. Through the use of both an egg and sperm donor and a gestational carrier, a recipient, or intended parent may have a child that lacks any genetic connection with him or her, and may do so without going through an adoption process. See, e.g., Charles P. Kindregan, Jr., *Collaborative Reproduction and Rethinking Parentage*, 21 J. AM. ACAD. MATRIMONIAL LAW. 43, 47–50 (2008); see also CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, *ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE* 1–25 (2006) [hereinafter Kindregan & McBrien, *Assisted Reproductive Technology*].

14. E.g., Brandon S. Mercer, *Embryo Adoption: Where are the Laws?*, 26 J. JUV. L.

As a well recognized byproduct of the success of the science of in vitro fertilization, there now are an estimated 400,000 cryopreserved embryos stored in fertility clinics in the United States today.¹⁵ These are the embryos that remain after a couple or individual has successfully undergone IVF, donor IVF, or a gestational carrier arrangement (to name only a few of the possible combinations for achieving parenthood utilizing third party assisted reproduction). To date, the largest discussion of what to do with these cryopreserved embryos has centered—at least in case law—over disputes arising during divorce proceedings¹⁶ or after the death of one of the genetic parents.¹⁷ While not consistently resolved among U.S. courts, there is a sufficient body of case law in the United States to help couples address, ahead of time, issues regarding disposition of frozen embryos upon divorce or regarding children conceived posthumously.¹⁸ The existing body of case law also can help them predict the outcome of any potential dispute arising under such circumstances (divorce or death).¹⁹ The discussion, however, over how to dispose of cryopreserved embryos for a third party's family building—embryo donation or adoption—is far from being as “settled” as is the law regarding custody or inheritance disputes.²⁰

73, 74 (2006).

15. Crockin, *The Embryo Wars*, *supra* note 12, at 609 (discussing the number of embryos in frozen storage); *see also* David I. Hoffman et al., *Cryopreserved Embryos in the United States and Their Availability for Research*, 79 FERTILITY & STERILITY 1063, 1063–64 (2003) (stating that the exact number of stored embryos is not known and ranges from tens of thousands to several hundred thousand). Indeed, as of the date of this writing, the figure cited herein may well be higher as there have been thousands of additional cycles of in vitro fertilization completed since the statistics were first published, thereby raising the number of embryos cryopreserved for future use.

16. *E.g.*, *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998); *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); *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*, 696 N.E.2d at 174; *In re Marriage of Dahl*, 194 P.3d 834 (Or. Ct. App. 2008); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *In re Marriage of Litowitz*, 48 P.3d 261 (Wash. 2002).

17. *E.g.*, *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

18. *See* cases cited *supra* notes 16–17.

19. *See* cases cited *supra* notes 16–17.

20. *See, e.g.*, Crockin, *The Embryo Wars*, *supra* note 12; Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169 (2004) [hereinafter Kindregan & McBrien, *Embryo Donation*]; Jessica L. Lambert, *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 (2008); Mercer, *supra* note 14; Ann Marie Noonan, *The Uncertainty of Embryo Disposition Law: How*

The argument over the best and most appropriate means for disposing of these embryos encompasses complex discussions over stem cell research, human cloning, and the rights of medically and socially infertile Americans to build their families.²¹ This article does not attempt—nor does it need to, given the current laws regarding research into stem cells or human cloning—to address the moral, legal, or medical issues involved in using these frozen embryos to further scientific research.²² Rather, this article focuses on a rarely discussed²³ and poorly understood distinction regarding the disposition of these cryopreserved embryos solely for purposes of family building—namely, an inherent conflict and confusion over whether frozen embryos can and should be “donated” to prospective parents or placed with those parents for purposes of “adoption.”²⁴

At the heart of this poorly understood controversy lie questions involving some of the most impassioned and justifiably complicated questions to face the United States since *Roe v. Wade*²⁵ and its progeny.²⁶ The disposition of frozen embryos to non-genetically related parents for purposes of creating another family implicates three critical debates which are inconsistently addressed among state legislatures, federal and state jurists, legal scholars, bio-ethicists, and the United States Congress.

First and perhaps foremost, the issue of whether these embryos can or should be donated to or adopted by the prospective parents involves overarching notions of when life begins.²⁷ If life begins at

Alterations to Roe Could Change Everything, 40 SUFFOLK U. L. REV. 485 (2007).

21. See, e.g., Crockin, *The Embryo Wars*, *supra* note 12.

22. E.g., *id.*

23. A brief survey of literature and case law reveals more argument on how to dispose of cryopreserved embryos in the event of death or divorce than for purposes of family building. See, e.g., *supra* notes 16–17, 20.

24. Indeed, the common interchangeable use of both terms (donation and adoption) to describe two different legal processes for accomplishing the same goal—the creation of a new family unit—serves to underscore how poorly understood and analyzed this issue has become.

25. 410 U.S. 113 (1973).

26. *Planned Parenthood v. Casey*, 510 U.S. 1309 (1994); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

27. See, e.g., Susan L. Crockin, “What is an Embryo?": A Legal Perspective, 36 CONN. L. REV. 1177 (2004) [hereinafter Crockin, “What is an Embryo?"]; 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, *What is an Embryo?*, 36 CONN. L. REV. 1051 (2004); Kindregan & McBrien, *Embryo Donation*, *supra* note 20; Robert L. Stenger, *Embryos, Fetuses and Babies: Treated as Persons and Treated With Respect*, 2 J. HEALTH & BIOMEDICAL L. 33 (2006).

fertilization, some commentators argue that an adoption model must be utilized for disposition of these embryos to create a new family.²⁸ Significant practical roadblocks exist, however, to the application of an adoption model, as the vast majority of states do not permit the pre-birth termination of parental rights.²⁹ If, instead, these frozen embryos are not to be afforded protection either as “potential life”³⁰ or as “juridical persons,”³¹ other commentators argue that the donation model becomes more persuasive and practical, enabling frozen embryos to be donated to third parties without concerns regarding the pre-birth termination of parental rights.³² Thus, the first and most critical question presented is: what legal status can or should be attributed to a fertilized human ovum that has been cryogenically preserved?

It is important to note that so confusing and complicated is this determination that even scientists do not always agree on or use the same terminology when referring to fertilized human eggs.³³ The terms zygote, pre-embryo, preembryo, embryo, among others, have all been used to describe what is typically understood by the layman as an embryo that possesses the capability of growing into a fetus and later a newborn baby. Clarification at both the scientific and legal levels is essential to understanding the next two questions encompassed by this debate.³⁴

28. *E.g.*, Moore, *supra* note 2; Mercer, *supra* note 14.

29. *See infra* Part IV.

30. *E.g.*, *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (discussing 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.”).

31. LA. REV. STAT. ANN. §§ 9:123–33 (2008) (stating that an in vitro fertilized human ovum is a juridical and biological person under Louisiana law).

32. *See* Olga Batsedis, *Embryo Adoption: A Science Fiction of an Alternative to Traditional Adoption?*, 41 FAM. CT. REV. 565 (2003); Crockin, *The Embryo Wars*, *supra* note 12; Kindregan & McBrien, *Embryo Donation*, *supra* note 20; Stenger, *supra* note 27.

33. *See, e.g.*, Crockin, “*What is An Embryo?*”, *supra* note 27, at 1177–78 (describing cellular stages and differentiation of the preembryo and application of terminology thereto); *Davis*, 842 S.W.2d 588, 592–94 (discussing scientific testimony regarding the stages of embryonic development and application of appropriate terminology thereto); Howard W. Jones, Jr. & Lucinda Veeck, *What is an Embryo?*, 77 FERTILITY & STERILITY 658, 659 (2002).

34. For purposes of clarity, although not ignoring the substantial debate over what proper term should be utilized when describing and discussing a fertilized human ovum, *see supra* note 1, for simplicity the author has chosen to use the term embryo when referring to the cryopreserved embryos that are the subject of the discussion set forth herein.

Depending on how one defines these cryopreserved embryos for legal purposes, the next question revolves around what legal rights, if any, they may have. Unfortunately, state legislatures and jurists have accepted differing interpretations of those legal rights and have created divergent and inconsistent laws regarding the rights to be granted these frozen embryos. This has created conflicting and contradictory models for courts, lawyers, and medical professionals to attempt to follow when seeking to create a new family through the disposition of cryopreserved embryos. Serving to complicate and escalate the debate even further are the implications these contradictory schemes present when considered in light of the United States Supreme Court's determination that women have a degree of procreative autonomy that permits them to terminate an otherwise viable pregnancy within certain delicately balanced protections and circumstances.³⁵ To wit, a woman may not terminate her pregnancy if the fetus she is carrying has reached a degree of gestational development since it is considered to be a viable life independent of the womb and woman in which it has been growing.³⁶ The determination of what these frozen embryos are or should be considered from a scientific and/or legal standpoint, and the existing body of legal jurisprudence that seeks to inform or enable the process of creating a new family unit through the disposition of frozen embryos, implicates a woman's ability to terminate her pregnancy as provided by *Roe v. Wade* and its progeny.³⁷

Indeed, efforts by the Louisiana legislature, which has defined a frozen embryo to be a juridical person who must be placed for adoption, arguably attempt to circumvent a woman's right to choose abortion and may very well be subject to constitutional challenge.³⁸ The debate over *Roe v. Wade* and the inherent fragility

35. *Planned Parenthood v. Casey*, 510 U.S. 1309 (1994); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Roe v. Wade*, 410 U.S. 113 (1973).

36. Commentators have noted that as science changes the time at which a fetus is viable outside the uterus of a woman, the protections afforded by *Roe* are reduced. See Hollowell, *supra* note 27, at 85.

37. Insofar as the definition of an embryo as a person could be deemed to be placing undue burdens or obstacles in the path to abortion, it is arguably an unconstitutional definition. *E.g.*, *Casey*, 510 U.S. at 1309; *Davis*, 842 S.W.2d at 602 (noting that the gamete provider and/or the embryo's rights when compared to the state's interest in protecting a non viable fetus is not sufficiently compelling to allow it to interfere with a person's procreational autonomy and therefore the state's interest in a lesser developed embryo cannot be paramount).

38. LA. REV. STAT. ANN. § 9:391.1 (2008).

of the decision in the current political climate cannot be overlooked as part of the discussion over the means by which cryopreserved embryos can or may be used to create a family, as the legal protection afforded embryos either drives or diffuses much of pro-life debate.

Thus, the definition given to embryos determines, for purposes of legal debate, two paradigms or methods for disposing of frozen embryos to recipient families who wish to procreate using the frozen embryos. On one end of the spectrum are the pro-life proponents of embryo adoption who advance the definition of an embryo as a person and argue that only an adoption model serves the best interests of the child in the creation of a new family unit.³⁹ According to these theorists, in order to protect the unborn embryo, the recipient or prospective adoptive parents should go through a traditional adoption process including obtaining a home study⁴⁰ and child abuse and criminal background clearances prior to the thawing and transfer of the frozen embryo to the prospective adoptive mother's uterus. On the other end of the debate are those commentators and jurists who believe embryos should be deemed to be "cellular matter" and thus are the legal "property" of the genetic parents to be disposed of as they would dispose of other property under the law, by contract.⁴¹ These theorists posit that frozen embryos and parental rights should be transferred by contract, as is commonly done for the donation of human eggs to recipient parents.⁴²

In the middle are those who believe embryos should be afforded special status and some form of interim protection because of their unique capability to give rise to new human life.⁴³ In the seminal case of *Davis v. Davis*,⁴⁴ the court held that embryos should be afforded a special or interim status under the law due to their potential for life. It is unclear how the special or interim status afforded embryos by the *Davis* court impacts the disposition of a frozen embryo to third parties, except to note that if a

39. See *infra* text accompanying notes 68–71.

40. See ELIZABETH SWIRE FALKER, *THE ULTIMATE INSIDER'S GUIDE TO ADOPTION: EVERYTHING YOU NEED TO KNOW ABOUT DOMESTIC AND INTERNATIONAL ADOPTION* (Warner 2006) (chapter three discussing the home study process).

41. See, e.g., Batsedis, *supra* note 32, at 567; Kindregan & McBrien, *Embryo Donation*, *supra* note 20, at 185–88; Stenger, *supra* note 27, at 59.

42. E.g., Batsedis, *supra* note 32, at 567; Stenger, *supra* note 27, at 59.

43. E.g., *Davis v. Davis*, 842 S.W.2d 588, 588 (Tenn. 1992).

44. *Id.*

donation/contract model is applied, the *Davis* standard arguably would provide the genetic parents the right to revoke consent up until the time of the embryo transfer procedure, if not later, based on the constitutional protection that one cannot be forced to procreate against one's will.⁴⁵ The interim "special status" may further implicate *Roe v. Wade* in that it may interfere with a woman's right to exercise procreative freedom.

The definition of an embryo⁴⁶ under the law thus clearly defines the means by which frozen embryos can be used by third parties for purposes of conception. If an embryo is a person, then arguably the best interests standard and a traditional adoption model 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. Thus, the debate over the terms "embryo adoption" and "embryo donation" has arisen largely due to the lack of consistency being applied to the definition of embryo from a legal standpoint.

Importantly however, when the actual manner in which frozen embryos are currently being provided to recipient parents is examined, it becomes clear that much of the debate over embryo donation and embryo adoption is semantic. That is, current practice even among embryo adoption agencies is to follow a contractual or donation model for transferring parental rights of the unborn frozen embryo to the recipient parents.⁴⁷

II. THE "TYPICAL" EMBRYO ADOPTION/DONATION IN THE UNITED STATES

Upon close inspection it is clear that the concept of embryo adoption/donation is largely a semantic distinction. For example, Snowflakes Adoption Agency in Fullerton, California, which is one

45. *Id.* at 592; *see also* Crockin, *The Embryo Wars*, *supra* note 12, at 613 (noting that the non-forced procreation line of cases indicate that embryo donation contracts would be subject to challenge up until the time of transfer if following the "special status" standard for defining an embryo).

46. It should be noted that the discussion set forth herein is limited to whether an embryo should be deemed a person under the law and not to the larger ethical question of whether an embryo is a life form or a human life. *See* Stenger, *supra* note 27, at 65-67.

47. *E.g.*, *Batsedis*, *supra* note 32; *see also* Crockin, *The Embryo Wars*, *supra* note 12, at 611 (noting that "[m]ost who promote the 'adoption' terminology acknowledge that they are not referring to adoption in a legal sense, and no court procedure is involved as in legal adoption.").

of the most recognized “embryo adoption agencies” nationwide, does not follow the traditional adoption model when making an embryo adoption plan.⁴⁸ Snowflakes operates in the state of California where there are no regulations governing embryo adoption.⁴⁹ Accordingly, when making an embryo available for adoption to recipient parents, Snowflakes uses a contract model to govern the rights and responsibilities of the parties involved in its embryo adoptions.⁵⁰ Snowflakes calls its contract an “adoption agreement,” and it relinquishes the rights of the genetic parents over the embryos.⁵¹ Snowflakes does not require the participants to its embryo adoptions to execute a surrender or relinquishment of parental rights under California law post-birth, instead relying on its adoption agreement to terminate the rights of the genetic parents pre-birth.⁵² This contract further provides that the embryo, if live born, will take the name of the adoptive parents and have inheritance rights only through the adoptive parents.⁵³

Additionally, in contrast to a traditional domestic newborn adoption, in a Snowflake embryo adoption, the genetic parents cannot change their minds.⁵⁴ Before the embryos are provided to the adoptive parents for purposes of undergoing an embryo transfer procedure, the genetic parent must sign a legal document terminating their “ownership rights” to the embryos.⁵⁵ Snowflakes gives the genetic parents three days to change their mind after execution of the adoption agreement.⁵⁶ Once the embryos have been transferred to the uterus of the recipient mother, the genetic parents no longer have any legal rights or responsibilities with respect to the transferred embryo(s).⁵⁷ In the event there is a dispute regarding the embryo adoption, the adoption agreement provides further that “this is a property exchange in the case that this goes before a court of law.”⁵⁸ Thus, in its own embryo adoption agreement, Snowflakes itself acknowledges that it is not conducting

48. Batsedis, *supra* note 32, at 570.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* n.92.

54. *Id.* at 570.

55. *Id.*

56. *Id.* (citing Nightlight Christian Adoptions, <http://www.nightlight.org/snowflakefaqs.htm> (last visited Dec. 3, 2008)).

57. *See id.*

58. Batsedis, *supra* note 32, at 571, n.100.

an adoption but rather is engaging in a “transaction involving property, not persons.”⁵⁹

Similarly, Adoptions From The Heart, a well established adoption agency located on the east coast of the United States, acknowledges that its “Embryo Placement Program” involves the application of contract law and does not involve traditional principles of adoption.⁶⁰ In its promotional brochures entitled “Heartbeats: Embryo Donation Services, Donors: Give the Gift of Family” and “Recipient Families: Experience the Miracle of Childbirth,”⁶¹ Adoptions From The Heart makes it clear that in its program for the disposition of cryopreserved embryos to third parties for purposes of their conception, the parties will be entering into a contract and not an adoption:

[A] contract is signed and notarized by the donating couple authorizing the embryo donation. Once this informed consent has been signed, the donors have no legal claim to either the embryos or any children who may be born as a result of the donation, nor do they hold any responsibility for the embryos or any future children who may be born as a result of the donation.⁶²

The brochure for donating parents goes on to point out that:

[E]mbryo donation is not considered an adoption even though many agencies call it Embryo Adoption. Embryo donation is governed by contract law, not adoption law and all federal, state and local laws may apply. In addition, regulations by the US Food and Drug Administration related to human tissue donation are applicable.⁶³

Thus, while commentators have opined and contributed to the controversy surrounding the application of the adoption model to

59. *Id.*

60. Adoptions from the Heart, Heartbeats: Embryo Placement Program, <http://adoptionsfromtheheart1-px.rtrk.com/heartbeats/index.html> (last visited Dec. 3, 2008).

61. HEARTBEATS: EMBRYO DONATION SERVS., DONORS GIVE THE GIFT OF FAMILY (Adoptions from the Heart 2008) (on file with author) [hereinafter HEARTBEATS – DONORS]; *see also* HEARTBEATS: EMBRYO DONATION SERVS., RECIPIENT FAMILIES: EXPERIENCE THE MIRACLE OF CHILDBIRTH (Adoptions from the Heart 2008) (on file with author) [hereinafter HEARTBEATS – FAMILIES]. The Heartbeats embryo donation program is administered and run by Adoptions from the Heart, a licensed adoption agency in New York, New Jersey, Pennsylvania, Connecticut, Virginia, and West Virginia.

62. HEARTBEATS – FAMILIES, *supra* note 61.

63. HEARTBEATS – DONORS, *supra* note 61.

the disposition of cryopreserved embryos for purposes of creating a new family unit, it is clear that the practical application and administration of this means of family building is predominantly being conducted based on principles of contract and property law.⁶⁴ While Snowflakes may require its recipient families to undergo an adoption home study and a child abuse clearance, as is typical in a domestic adoption, it does not apply state adoption laws to the process. As noted above, Adoptions From The Heart clearly states that “embryo donation is not considered an adoption even though many agencies call it Embryo Adoption.”⁶⁵

Indeed, it would appear that this debate may largely arise over misapplication of terminology or the intentional confusion (or obfuscation) of terms by pro-life proponents. In one advertisement placed by Nightlight Christian Adoptions (Snowflakes) in support of a campaign to raise awareness of embryo adoption as a means for building families, it is stated:

[L]ive Your Dream. Experience the joy of pregnancy and give birth to your adopted child through embryo adoption.⁶⁶

As will be discussed in greater detail in Part IV, it is impossible under state law to adopt a child to whom you have given birth. In most states, well established common law presumptions provide that a woman who gives birth to a child will be deemed the legal and natural mother of that child.⁶⁷ It is thus impossible for a woman to adopt a child she has given birth to, as the law already recognizes her to be the mother of that child. It is thus oxymoronic and nonsensical to think that one can give birth to their own adopted child as this advertisement asserts.

Additionally, in more than one law review article reviewed by the author, terms such as adoption and donation, and donee and parent, were used interchangeably with no understanding of the distinction or the need for a distinction between the terms.⁶⁸ Whether intentional or not, the failure of any legal commentator to

64. See, e.g., *id.*

65. HEARTBEATS – DONORS, *supra* note 61.

66. Nightlight Christian Adoptions, *Embryo Adoption Awareness Advertisement: “Live Your Dream,”* ADOPTIVE FAMILIES MAGAZINE, Feb. 2009 (advertisement placed in the inside front cover, with support from grant #1EAAPA081009-01-00 from the U.S. Department of Health and Human Services, promotes uses the language “embryo adoption”) (on file with author).

67. *Infra* p. 512 and note **Error! Bookmark not defined.**

68. See generally Moore, *supra* note 2.

draw any distinctions between adoption and donation with respect to the disposition of frozen embryos to third parties for purposes of their conception is instructive. In a Christian response to the growing trend of embryo adoption/donation, one commentator repeatedly used the terms adoption and donation interchangeably when arguing that:

[E]mbryo *adoption* is the pro-life community's attempt to counteract a growing disrespect for life by infusing a sense of humanity into the human embryo. Even if this situation were not morally contestable, given their underlying goal, supporters of embryo *adoption* need to be working to pass legislation that will legitimize the practice of embryo *adoption* in the courts. Though disputed cases have not yet touched on this area, disputed embryos between *donating* parties have consistently been destroyed when one party objects to previously consented use. The current case law would suggest there is no respect for the life of the embryo in today's courts.⁶⁹

Regardless of whether the distinction between embryo adoption and embryo donation is semantic, clarification of the terms and the laws as they apply to this process is necessary in order to make embryo donation/adoption a continued means of family building and in order to preserve the procreational autonomy as outlined in *Roe* and its progeny, which may well be at risk.⁷⁰ In fact, as two commentators, Charles Kindregan and Maureen McBrien, have pointed out, "The longer the process is called embryo adoption, and the more common the phrase becomes, the more society may view embryos as persons entitled to legal protection. This view would challenge the basic premise of the right to choose abortion without state interference."⁷¹ Thus, these contradictory paradigms and the concomitant misapplication of terminology must be addressed and resolved if the disposition of frozen embryos to genetically unrelated third parties is going to provide a real and substantial means for building new families in the future.

69. *Id.* at 121 (emphasis added).

70. See Kindregan & McBrien, *Embryo Donation*, *supra* note 20, at 175 (describing that terminology being used is inconsistent and that even if "[v]iewed as a mere cosmetic change, the use of these terms will not affect the reality of what is happening, but could impact public acceptance or rejection of the procedure.").

71. *Id.* at 188–89.

III. DEFINING THE TERM EMBRYO

Scientists and legal scholars alike have been arguing for several years that a better definition of the term “embryo” is necessary to provide clarity for ongoing scientific research into stem cell lines and human cloning, and for clear resolution of legal disputes regarding frozen embryos.⁷² Focusing, for purposes of this article, solely on the legal definition to be attributed to the term “embryo,” cases and statutes have presented conflicting definitions of what constitutes an embryo.⁷³ Indeed, more than one commentator has noted that the single term “embryo” is inadequate to address the myriad of issues raised from the creation of embryos through assisted reproductive technologies.⁷⁴ This article will not attempt to restate the overwhelming number of publications that have analyzed this issue and/or the significance of those arguments with respect to stem cell research. Rather, it will attempt to provide an overview of the definitions presented in legal comments and cases, and propose a working definition that best fits within the existing constitutional framework.

It is well established that a fertilized human egg undergoes a dramatic evolution from the time it is first fertilized, through the process of implantation in the uterine wall to the growth and development of a fetus, and ultimately the birth of a child.⁷⁵ Of note is the significant distinction to be made between the pre-implantation embryo (sometimes referred to as a pre-embryo among other terms) and the post-implantation embryo. This distinction is important because of the developmental milestones that take place both prior to and after implantation of the embryo.⁷⁶ The events of the first few days of the fertilized egg’s existence are characteristic of rapid change and a high rate of attrition, or death, among the fertilized eggs. This “preembryonic” period has been characterized as turbulent, with conservative estimates of at least two-thirds of all in vitro fertilized eggs having abnormalities resulting in the arrest in the development of the

72. See, e.g., Crockin, “What is an Embryo?”, *supra* note 27, at 1177–81; Kindregan & McBrien, *Embryo Donation*, *supra* note 20, at 175; Jones & Veeck, *supra* note 33, at 659.

73. See Kiessling, *supra* note 27, at 1067–72.

74. *Id.* at 1092.

75. See, e.g., Jones & Veeck, *supra* note 33, at 658–59; Kiessling, *supra* note 27, at 1052; *Davis v. Davis*, 842 S.W.2d 588, 602 (Tenn. 1992).

76. Jones & Veeck, *supra* note 33, at 658.

embryo.⁷⁷ During this early time, the first few days after fertilization, identical twinning may occur.⁷⁸ Until the development of the “primitive streak” at or about fourteen days post fertilization, there is no guarantee that a single individual will ultimately result from the fertilized ovum.⁷⁹ “The primitive streak guarantees biological individuation and terminates the *preembryonic* period.”⁸⁰ The subsequent few days and weeks of the “embryonic period” are marked by the appearance of fundamental tissues and organs; at or around eight weeks post fertilization the embryo transitions into the fetal period.⁸¹ Just prior to the commencement of the fetal period, a heartbeat may be detected on ultrasound, thus distinguishing a “chemical” pregnancy from a “clinical” pregnancy.⁸² Thus, scientists have identified three distinct phases of development: the fertilized egg to the preembryo, the preembryo to the embryo, and the embryo to the fetus.⁸³ Scientists further argue that there is quite simply no “embryo” before the primitive streak forms and that terms “preembryo” and “embryo” are distinctly and biologically different stages of development.⁸⁴

Furthermore, two aspects of these developmental periods mark significant changes in the likelihood that the embryo or fetus will result in a live birth. The first occurs during the preembryonic period when the preembryo achieves a level of cellular development known as the blastocyst stage. In the *in vitro* fertilization community, preembryos that reach blastocyst development are considered more likely to result in a pregnancy than early stage preembryos.⁸⁵ Indeed, blastocyst transfers are now

77. *Id.* at 659.

78. *Id.*

79. *Id.*

80. *Id.* (emphasis in original).

81. *Id.*

82. See, e.g., ELIZABETH SWIRE FALKER, THE INFERTILITY SURVIVAL HANDBOOK: EVERYTHING YOU NEVER THOUGHT YOU'D NEED TO KNOW 50 (2004). A chemical pregnancy is a pregnancy established by the presence of human chorionic gonadotropin (HcG) in the blood or urine of the mother. A significant number of chemical pregnancies spontaneously abort, sometimes even before the pregnancy has been detected. A clinic pregnancy is a pregnancy that is established by the presence of a fetal sac on ultrasound, the presence of a fetal pole, and a heartbeat. Once the heartbeat is detected at or around six to eight weeks gestation, the risk of spontaneous abortion diminishes significantly. *Id.* at 50–51.

83. Jones & Veeck, *supra* note 33, at 659.

84. *Id.*; see also Kiessling, *supra* note 27, at 1088–89; Crockin, *What is an Embryo?*, *supra* note 27, at 1178–79 n.6.

85. SWIRE FALKER, *supra* note 82, at 224–26.

a common means of reducing the risk of high order multiple pregnancies in the IVF patient, as physicians are able to select only one or two blastocysts for embryo transfer.⁸⁶ The second significant demarcation occurs at or around six weeks of embryonic development, when a heartbeat may be detected on ultrasound. The establishment of a heartbeat distinguishes a “chemical” pregnancy from a “clinical” pregnancy and with it a significantly reduced chance of miscarriage.⁸⁷ The preembryo, whether frozen at blastocyst stage or earlier, or transferred to the mother’s uterus instead of being frozen, is not guaranteed to result in the detection of a pregnancy or a live birth.⁸⁸ Many preembryos that are transferred to the mother’s uterus on either day three post-fertilization or as a blastocyst do not implant in the uterine wall thus resulting in a negative pregnancy test, or implant in the uterine wall but, for any number of reasons from chromosomal abnormalities to uterine environmental issues, do not continue to grow to the fetal stage or result in a live birth.⁸⁹

The frozen embryo that is the subject of the instant discussion and has not yet developed a primitive streak, may also not have achieved blastocyst development (although many preembryos are now being frozen at the blastocyst stage of development), and most certainly has not developed to a point where cellular individuation can be determined and pregnancy diagnosed with any degree of reliability. Thus, frozen embryos that may be available for transfer and are the subject of this article arguably fall within the scientific definition of a preembryo.

Just as scientists failed to develop a clear terminology for the development of the human embryo,⁹⁰ judges and state legislatures have also struggled with the definition of an embryo. During the 1970s and following the U.S. Supreme Court’s decision in *Roe v. Wade*,⁹¹ several states enacted statutes which sought to prevent tampering or experimentation on a fetus.⁹² Many of these statutes used the terms “embryo” and “fetus” interchangeably whether it

86. *Id.* at 146, 226.

87. *Id.* at 50.

88. Kiessling, *supra* note 27, at 1061–62.

89. *Id.* at 1058–62, 1087–89; Jones & Veeck, *supra* note 33, at 659.

90. Kiessling, *supra* note 27, at 1088–89.

91. *Roe v. Wade*, 410 U.S. 113 (1973).

92. See Crockin, *The Embryo Wars*, *supra* note 12, at 603–04; see also MASS. GEN. LAWS ANN. ch. 112, § 12J (West 2003).

was in context of fetal homicide or scientific research.⁹³ Louisiana defines an embryo as a juridical person who may be available for adoptive implantation and has all the rights afforded persons in Louisiana.⁹⁴ Of those states which have embryo donation statutes, the term embryo is often used without a clear statutory definition, thus furthering confusion.⁹⁵ Florida is the only state to use a definition most clearly aligned with the scientific analysis presented herein, using the term “preembryo” and defining it as the product of an egg fertilized by a sperm prior to the appearance of the “embryonic axis.”⁹⁶

Case law further muddies the waters by providing numerous and conflicting analyses of the status of frozen embryos and the protections to which they are entitled, dependent largely on the jurisdiction and issue presented. Most instructive are the cases involving disputes between divorcing progenitors regarding the disposition of their frozen embryos. In one of two seminal cases involving the disposition of frozen embryos during a divorce, the Tennessee Supreme Court in *Davis v. Davis*⁹⁷ sought to resolve conflicting requests between progenitors regarding their frozen embryos. The wife sought to have the embryos transferred to her uterus in a post-divorce effort to conceive a child, while the husband objected and sought to have the frozen embryos remain in storage until such time as he determined whether he wanted to parent a child outside of their marriage.⁹⁸ While noting that *Roe v. Wade* does not recognize embryos to be persons within the meaning of the Fourteenth Amendment, the court in *Davis* held that embryos are entitled to some interim, or “special protection” due

93. See IDAHO CODE ANN. § 18-4016 (2004); MASS. GEN. LAWS ANN. ch. 112 § 12J (West 2003) (“[F]or purposes of this section, the word ‘fetus’ shall include also an embryo or neonate.”).

94. LA. REV. STAT. ANN. §§ 9:121, -123 (2008). Indeed, it is arguable that Louisiana’s definition of an embryo is unconstitutional insofar as it denies a pregnant woman the procreational freedom granted in *Roe*. This statute is further objectionable in that a physician could arguably be subject to fetal homicide charges if she or he inadvertently thaws and allows an embryo to die prior to transfer to a uterus. See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 595 (Tenn. 1992) (discussing lower court’s ruling that would have afforded preembryos “the legal status of persons and vested them with legally cognizable interests separate from those of their progenitors.”).

95. Crockin, *The Embryo Wars*, *supra* note 12, at 603-04.

96. FLA. STAT. ANN. §§ 742.13-14 (West 2005); accord Crockin, *The Embryo Wars*, *supra* note 12, at 604.

97. 842 S.W.2d at 589.

98. *Id.*

to their potential for creating human life.⁹⁹ Noting that the couple had not executed any written agreements regarding the disposition of any cryopreserved embryos with their infertility clinic and that Tennessee lacked any statute governing such disposition,¹⁰⁰ the *Davis* court undertook a thorough review of both case law and scientific literature. Further noting that the issue presented was a matter of first impression,¹⁰¹ the court looked to extensive commentary in legal and medical journals.¹⁰² Rejecting a property analysis, the *Davis* court applied a balancing test which weighed the interests of each of the parties, taking into consideration their procreative rights.¹⁰³ While also noting that embryos cannot be considered persons under Tennessee law,¹⁰⁴ the court concluded—based largely on the scientific opinion of one expert and an ethics opinion from the American Fertility Society (now known as the American Society for Reproductive Medicine)—that embryos are neither person nor property but rather “occupy an interim category that entitles them to special respect because of their potential for human life.”¹⁰⁵

In contrast, the New York State Court of Appeals case *Kass v. Kass*,¹⁰⁶ which is factually similar to *Davis*, involved a dispute over cryopreserved embryos during a divorce. In that case, Chief Justice Kaye enforced a divorcing couple’s prior written agreement to donate any frozen embryos to scientific research in the event they divorced, as set forth in consent documents they executed with their fertility clinic prior to undergoing in vitro fertilization (IVF).¹⁰⁷ This was decided over the objections of the mother who wanted to use the frozen embryos for conception and the father’s objections to being forced into unwanted parenthood.¹⁰⁸ The court

99. *Id.* at 596.

100. *Id.* at 590.

101. *Id.* at 589.

102. *Id.* at 590–91.

103. *Id.* at 603–04.

104. *Id.* at 594–95.

105. *Id.* at 597; see also *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000) (following *Davis* and upholding in divorce dispute one parent’s right not to procreate using cryopreserved embryos over competing claim from other genetic parent); Kindregan & McBrien, *Embryo Donation*, *supra* note 20, at 188 (“[I]n *A.Z. v. B.Z.*, a Massachusetts court agreed with the *Davis* analysis, at least with respect to the classification of cryopreserved embryos in an interim category between personhood and property, ruling that embryos are deserving of special respect.”).

106. 696 N.E.2d 174 (N.Y. 1998).

107. *Id.* at 175.

108. *Id.*

expressed a “need for clear, consistent principles to guide parties in protecting their interests and resolving their disputes, and the need for particular care in fashioning such principles as issues are better defined and appreciated.”¹⁰⁹ The court next considered whether the procreational rights of either party or any protected interest of the frozen embryo would override the consent documents signed by the parties at the IVF clinic.¹¹⁰ Citing *Roe v. Wade*,¹¹¹ the court noted that disposition of these frozen embryos neither implicated issues of privacy or bodily integrity in the area of reproductive freedom, nor were the “pre-zygotes recognized as ‘persons’ for constitutional purposes.”¹¹² Thus, the court held that the relevant inquiry turned on who had dispositional authority over the frozen embryos, which was clearly articulated in the parties’ agreement signed at the time they entered into the IVF process at their fertility clinic.¹¹³ The court thus specifically declined to decide whether embryos are entitled to “special respect” as set forth in *Davis*.¹¹⁴ Instead, the embryos were donated to science in accordance with the consent documents the parties’ signed with the IVF clinic.¹¹⁵ Although not expressly stated in *Kass*, the court arguably followed a property analysis in determining how the parties intended to dispose of their cryopreserved embryos.

Other cases are informative although far less instructive as to whether cryopreserved embryos are considered persons or property under the law, or afforded some interim status as articulated in *Davis*. In *York v. Jones*,¹¹⁶ the court attempted to resolve a dispute between a couple undergoing IVF at a clinic in Virginia regarding who possessed control over cryopreserved embryos. When the couple moved to California, they sought to have their frozen embryos transferred to a local fertility clinic for use in an embryo transfer procedure.¹¹⁷ The clinic in Virginia refused to release the

109. *Id.* at 179.

110. *Id.*

111. 410 U.S. 113 (1973). The court also cited *Bryn v. New York City Health & Hosp. Corp.*, 286 N.E.2d 887, 890 (1972), *appeal dismissed*, 410 U.S. 949 (1972).

112. *Kass*, 696 N.E.2d at 179.

113. *Id.* “The central issue is whether the consents clearly express the parties’ intent regarding disposition of the pre-zygotes in the present circumstances.” *Id.* at 180.

114. *Id.* at 179.

115. The court concluded that the parties intended to donate the embryos for research purposes. *Id.* at 182.

116. 717 F.Supp. 421 (E.D. Va. 1989).

117. *Id.* at 424–25.

embryos.¹¹⁸ Relying on theories of property and bailment, the court held in favor of the parents.¹¹⁹ Without analyzing or considering the definition of a frozen embryo or what protected interests it may have, the court assumed that the embryos were the couple's property and ordered their release to the California clinic.¹²⁰ Consistent with the decision in *York*, the court in *Hecht v. Superior Court*¹²¹ held that sperm was property within the meaning of the California probate code noting, however, that its value lies in its potential to create a child after fertilization, growth, and birth.¹²²

Additionally, in *In re Marriage of Witten*, the Iowa Supreme Court found that embryos are not children and therefore the best interest of the child standard did not apply to embryos.¹²³ In *Jeter v. Mayo Clinic Arizona*,¹²⁴ the Arizona Court of Appeals affirmed a lower court's decision that a cryopreserved, three-day-old, eight-celled "pre-embryo" was not a "person" for purposes of recovery under Arizona's wrongful death statute.¹²⁵

Thus, depending on the jurisdiction and the interest or issue presented, embryos may be considered property¹²⁶ or have no constitutionally protected interests.¹²⁷ The interim standard of affording frozen embryos "special respect," however, has been applied in Massachusetts, where the court in *A.Z. v. B.Z.*¹²⁸ applied the interim standard and avoided having to address two inconsistent, and arguably inapplicable, areas of the law: child custody and personal property.¹²⁹ In addition, several

118. *Id.* at 424.

119. *Id.* at 425, 427. The court denied the defendant's motion to dismiss and ruled that the plaintiffs stated a claim upon which relief may be granted. *Id.* at 427.

120. *Id.* at 424–25.

121. 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

122. *Id.* at 283 (discussing *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992)).

123. 672 N.W.2d 768, 775 (Iowa 2003).

124. 121 P.3d 1256 (Ariz. Ct. App. 2005).

125. *Id.* at 1259, 1261; *see also* *Miller v. Am. Infertility Group of Ill.*, No. 1-05-3202, 2008 WL 4722566 (Ill. App. Ct. Oct. 24, 2008) (holding that although the Illinois Wrongful Death Act provides recovery for the wrongful death of a fetus, a blastocyst or embryo created through in vitro fertilization does not fall within the purview of that act).

126. *See* *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Hecht*, 20 Cal. Rptr. 2d 275; *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989).

127. *See* *Roe v. Wade*, 410 U.S. 113 (1973); *Jeter*, 121 P.3d at 1256; *Witten*, 672 N.W.2d at 768; *Kass*, 696 N.E.2d at 174.

128. 725 N.E.2d 1051 (Mass. 2000).

129. *See* *Kindregan & McBrien, Embryo Donation*, *supra* note 20, at 188 (“[I]n *A.Z. v. B.Z.*, a Massachusetts court agreed with the *Davis* analysis, at least with

commentators have noted that the interim standard set forth in *Davis* and followed in *A.Z. v. B.Z.* will “insulate abortion rights from legal attack on the basis that embryos are persons.”¹³⁰

From a statutory standpoint, while some states such as Louisiana have codified the definition of an embryo to mean a juridical person,¹³¹ other states have expressed that embryos are property¹³² and recognize the recipient/intended parents as the legal and natural parents of the child conceived from the embryo donation.¹³³ The Uniform Parentage Act¹³⁴ and the American Bar Association’s Proposed Model Act on Assisted Reproductive Technologies both define an embryo as property subject to the disposition by its progenitors.¹³⁵ The American Society for Reproductive Medicine further supports this view.¹³⁶

It is clear that embryos are not persons within any interpretation of the law save isolated state statutes that are arguably subject to substantial constitutional challenge.¹³⁷ Moreover, given the fact that most cryopreserved embryos will not ultimately give rise to life—indeed the special respect standard is based on the presumption of the *possibility* of life—and given that the cryopreserved embryo has yet to clearly distinguish or individuate into something more closely resembling life, assigning special respect to frozen embryos may ultimately undermine efforts to utilize these embryos for family building with non-genetically related parents and undermine constitutional notions of personhood.

Embryos are comprised of living cellular matter, but absent the existence of a primitive streak and the successful implantation of the embryo in the uterus and/or the presence of a heartbeat, there

respect to the classification of cryopreserved embryos in an interim category between personhood and property.”).

130. *E.g., id.* at 189.

131. LA. REV. STAT. ANN. §§ 9:121, 9:123 (2008).

132. *E.g.,* OKLA. STAT. ANN. tit. 10, §§ 554–55 (2007); TEX. FAM. CODE ANN. §§ 160.702–.707 (2002).

133. OKLA. STAT. ANN. tit. 10, §§ 554–55 (2007); TEX. FAM. CODE ANN. §§ 160.702–.707 (2002).

134. UNIF. PARENTAGE ACT § 702 (2000), 9B U.L.A. 355 (2001).

135. *E.g., id.*; AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGIES, § 603; http://www.abanet.org/family/committees/ART_MOD_050506Draft.pdf (last visited Nov. 24, 2008).

136. Batsedis, *supra* note 32, at 567.

137. *See supra* note 38 and accompanying text.

is no possibility for the embryo to have life.¹³⁸ It has been noted, “[i]mplantation and the development of an embryonic disc is a more accurate requirement for [defining] embryo status.”¹³⁹ The danger inherent in assigning qualities of personhood, even special respect, based on an incalculable likelihood that a given cryopreserved embryo will result in a live birth, when weighed against the well established procreative freedoms of both men and women and the constitutional right not to procreate, militates against defining an embryo as anything other than property.

IV. EMBRYO ADOPTION, PARENTAL AND PROCREATIVE RIGHTS.

Importantly, while the definition and status of an embryo cannot be ignored as part of the discussion regarding the appropriate disposition of cryopreserved embryos to third parties, one cannot overlook the significant inherent conflict presented by the traditional adoption model and issues regarding the termination of parental rights. Forty-nine of the fifty United States do not permit a biological mother (typically a pregnant birth mother) to terminate her parental rights until after the birth of the child.¹⁴⁰ Although state laws vary more widely, birth fathers are similarly and routinely afforded a legal right to parent their children.¹⁴¹ Thus, adoption law cannot and should not be applied

138. See *supra* notes 72–89 and accompanying text.

139. Kiessling, *supra* note 27, at 1089.

140. Compare ALA. CODE § 26-10A-13 (2008) (permitting pre-birth termination of parental rights), with ARIZ. REV. STAT. ANN. § 8-107 (West 2008) (“[A] consent given before seventy-two hours after the birth of the child is invalid.”). Most state statutes are predicated upon concerns that a pre-birth consent to relinquish parental rights cannot constitute a meaningful, or knowing consent to place a child for adoption and terminate parental rights to that child. See N.Y. DOM. REL. LAW § 115-b (McKinney 2008); *Matter of Giulio De Filippis v. Kirchner* 217 N.Y.S.2d 145 (N.Y.App. Div. 1995) (finding that “a pre-birth consent was invalid as it was inconsistent with the legislative objectives of protecting the natural parent from improvidence or overreaching and insuring that a consent is a product of a fully deliberate act.”) (citing *People ex rel. Anonymous v. Anonymous*, 139 N.Y.S.2d 189 (N.Y. App. Div. 1988); *Adoption of Female Infant B v. Khatuna B.*, 51 N.Y.S.3d 419 (N.Y. App. Div. 2008) (“[F]urthermore, as in *De Filippis*, the surrender agreement here was executed after the birth of the child, when respondent had sufficient opportunity to reflect on whether she wished to cede her parental rights. As was noted in *De Filippis*, a pre-birth consent is less likely to be the result of a fully deliberate act.”).

141. The difference between the termination standards for birth mothers and birth fathers turns on the timing and requirements of notice and/or consent to the adoption. Compare *Robert O. v. Russell K.*, 604 N.E.2d 99, 100 (N.Y. 1992) (holding that an unwed father who was unaware of the pregnancy or birth of his

to the disposition of embryos to third parties for purposes of family building simply because forty-nine state statutes invalidate any pre-birth consent to terminate their parental rights.¹⁴² Moreover, because embryos are clearly not considered to be children under any cognizable theory,¹⁴³ it is wholly inapposite to rely on adoption statutes that apply to the placement of children.¹⁴⁴

Further complicating the application of adoption laws to the disposition of frozen embryos to third parties are historical presumptions (codified in most states) which recognize the woman who gave birth to the child and her husband, if married at the time of birth, to be the legal and natural father of the child.¹⁴⁵ Indeed, this presumption has been expanded to include cases in which the birth mother did not bear a genetic link to the child to whom she gave birth¹⁴⁶ and is reflected in recent changes to statutory language regarding the presumption of parentage.¹⁴⁷ Thus, applying traditional principles of state adoption law—which require the post-birth consent to the adoption and post-birth termination of parental rights—has the potential to create even

child until eighteen months after the child's birth was neither entitled to notice, nor was his consent to the adoption required where he failed to take any steps to discover the pregnancy or the birth of the child), and *In re Cassidy* YY, 802 N.Y.S.2d 520, 521–22 (N.Y. App. Div. 2005) (“[I]nasmuch as an unwed father must act promptly to assert his parental rights, we affirm. Petitioner failed to manifest a willingness to be a parent at any time during the period from conception . . . until . . . after the adoption. . . . [P]etitioner does not allege that the mother actively concealed her pregnancy from him, and he . . . made no effort to contact the mother following their months of sexual intercourse to inquire as to the possibility that their relationship had resulted in a child.”), and *In re Baby Girl U*, 638 N.Y.S.2d 253, 255 (N.Y. App. Div. 1996) (“[E]ven if we were to accept respondent’s contention that his failure to act was due to the actions of the mother, and he was therefore excused from satisfying the six-month time requirement, we find that Family Court correctly concluded that respondent failed to engage in any conduct indicative of a manifestation of parental responsibility.”), with 23 PA. CONS. STAT. §§ 2511, 2513, 2711, 2714 (2008) (stating that a birth father *must* be notified of a pending adoption and his consent is unnecessary only if his parental rights have been previously terminated).

142. *Kindregan & McBrien, Assisted Reproductive Technology*, *supra* note 13.

143. *See supra* Part I.

144. *See id.*

145. *E.g.*, *Kindregan & McBrien, Assisted Reproductive Technology*, *supra* note 13.

146. *McDonald v. McDonald*, 608 N.Y.S.2d 477, 479–80 (N.Y. App. Div. 1994) (holding the mother who conceived via egg donation to be legal and natural mother of the children conceived, even though she did not provide the eggs) (citing *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)).

147. *Id.*; N.Y. DOM. REL. LAW § 73 (McKinney Supp. 2008) (changing the word “natural” child to “birth” child); *Id.* § 24 (substituting “birth parents” for “natural parents”).

greater instability and risk than exists in a traditional domestic adoption. While all adoptive parents assume some risk that the birth parents may choose to parent the child they conceived, there are clearly defined statutory limits on the right of a birth parent to revoke consent to an adoption.

For example, in a New York private-placement adoption, a birth mother who executes an Extra Judicial Consent to the adoption of her baby has forty-five days in which to revoke that consent.¹⁴⁸ This is based on a “common-law presumption favoring the biological parents’ rights to custody”¹⁴⁹ New York further recognizes that the woman who gave birth to a child and her husband are the legal and natural parents of any child born during their marriage regardless of whether they are genetically related to that child.¹⁵⁰ These two presumptions, whether legislative or based on common law, are becoming increasingly difficult to reconcile, especially in the context of an embryo adoption.

Using New York law as an example, applying its parental termination laws and its presumption of maternity and paternity¹⁵¹ to an embryo “adoption” might result in the legal nightmare of having, at the time of the child’s birth, four legally recognized parents of the once cryogenically preserved embryo. That is, the recipient or intended parents who successfully gestated and delivered the newborn, if married at the time of birth, will be presumed to be the legal and natural parents of the child under New York law.¹⁵² Simultaneously, the genetic parents (who in a conventional adoption scenario stand in the shoes of the birth mother and father), have not yet been able to statutorily terminate their parental rights and have the benefit of a well established presumption in favor of retaining custody of their biological child.¹⁵³ If that newborn were to have a life-threatening illness

148. N.Y. DOM. REL. LAW § 115-b.

149. *People ex rel. Anonymous v. Anonymous*, 530 N.Y.S.2d 613, 615 (N.Y. App. Div. 1988).

150. *E.g.*, N.Y. DOM. REL. LAW § 73 (as amended July 21, 2008) (“[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.”); *McDonald*, 608 N.Y.S.2d at 480 (holding gestational mother who gave birth from donated eggs was the natural mother of her children).

151. N.Y. DOM. REL. LAW §§ 24, 73 (see commentary to section 73 by Alan D. Schienkman, recognizing the strong common law presumption of legitimacy of children born to a married woman).

152. *Id.* § 24

153. *See, e.g.*, Kindregan, *supra* note 14, at 50; *see People ex rel. Anonymous v.*

there are potentially four legally recognized “parents” who have decision-making power regarding that newborn’s medical care.

Equally frightening is the prospect that when applying the traditional adoption model, under New York Law the recipient/intended parents could carry the pregnancy to term and deliver the child, only to face the genetic parents’ sudden change of heart, assertion of their genetic link, and a lack of termination of their parental rights, creating a contested adoption.¹⁵⁴

Thus, the application of adoption law is not only inapposite but creates a complicated legal quagmire of potential issues for a court to resolve in the inevitable instance in which an embryo adoption is contested.

Although analogous to a surrogacy dispute, it is unclear whether existing case law which has been applied in surrogacy contests and which looks to the parties’ intent¹⁵⁵ at the time the surrogacy was entered into in order to establish parentage will be sufficiently persuasive enough to override decades of public policy seeking to preserve the parental rights of birth parents.¹⁵⁶ Indeed, following either of the fact patterns presented above and applying New York law, both sets of parents likely would be afforded some form of protected legal rights as parents to the child conceived from the embryo adoption. In *Perry-Rogers v. Fasano*, the Appellate Division of the New York Supreme Court was forced to address competing claims for parentage that resulted from the mis-implantation of embryos created during IVF.¹⁵⁷

In the spring of 1998, plaintiffs Deborah Perry-Rogers and her husband Robert underwent an IVF cycle at a clinic in New York City.¹⁵⁸ At the same time, defendants Donna and Richard Fasano were also undergoing IVF treatment at the same clinic. Unbeknownst to both parties, when transferring the Fasano’s

Anonymous, 530 N.Y.S.2d at 615 (discussing historical presumption in favor of birth parents).

154. Compare N.Y. DOM. REL. LAW § 73 with N.Y. DOM. REL. LAW § 115-b.

155. See *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998); *In re Marriage of Witten*, 672 N.W.2d 768, 777 (Iowa 2003).

156. See, e.g., *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19, 24 (N.Y. App. Div. 2000); *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785, 789 (Cal. Ct. App. 2003) (adhering to the California Supreme Court’s determination that there can be only one natural mother to a child); see also *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y.2d 185 (1971), cert. denied sub nom, *DeMartino v. Scarpetta*, 404 US 805 (1971)).

157. 715 N.Y.S.2d at 21.

158. *Id.*

embryos into Donna Fasano's uterus, the IVF clinic inadvertently included embryos belonging to the Perry-Rogerses.¹⁵⁹ Shortly thereafter the clinic notified both couples of the mistake and advised them to undergo genetic and amniocentesis testing.¹⁶⁰ Upon learning of the mix-up, the Perry-Rogerses immediately attempted to contact the Fasanos.¹⁶¹

The following December, Donna Fasano delivered two healthy baby boys of different races.¹⁶² One baby, who was Caucasian, was determined to be the genetic child of the Fasanos.¹⁶³ The other boy, Akiel, who was African-American, was subsequently determined to be the genetic child of the Perry-Rogerses.¹⁶⁴ The Fasanos took no action regarding the apparent error nor did they respond to the Perry-Rogers' attempts at contact until the Perry-Rogerses commenced a lawsuit against them and the fertility clinic.¹⁶⁵ The Perry-Rogerses alleged, *inter alia*, medical malpractice against the clinic and sought a declaratory judgment regarding the parties' rights, obligations, and genetic relationship with respect to Akiel.¹⁶⁶ The Perry-Rogerses sought full custody of Akiel based on the fact that the Fasanos were "genetic strangers" to him.¹⁶⁷ The Fasanos sought visitation based on a prior agreement between the parties.¹⁶⁸

In reversing the initial award of custody to the Fasanos and directing further proceedings to establish the Perry-Rogers' legal parentage of Akiel, the Appellate Division noted:

[O]n this issue we will not simply adopt the Rogerses' suggestion that no gestational mother may ever claim visitation with the infant she carried in view of her status a "genetic stranger" to the infant. In recognition of current reproductive technology, the term "genetic stranger" alone can no longer be enough to end a discussion of this issue. Additional consideration may be relevant for an initial threshold analysis of who is, or may be, a

159. *Id.*

160. *Id.*

161. *Id.* at 21–22.

162. *Id.* at 22.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 22–23.

168. *Id.* at 22.

“parent.”¹⁶⁹

Noting that the laws of the State of New York traditionally distinguish “natural parents” from adoptive, step, or foster parents, the court reasoned that advances in reproductive technologies created new legal issues revolving around the definition of the term “mother.”¹⁷⁰ The court thus undertook a brief survey of cases with similar or instructive fact patterns.¹⁷¹

The *Perry-Rogers* court first discussed the seminal California case of *Johnson v. Calvert*,¹⁷² in which a gestational carrier refused to relinquish custody of a child she carried for another couple and to whom she had no genetic connection.¹⁷³ The California Supreme Court in *Johnson* relied on the parties’ intent as expressed in a surrogacy contract and awarded custody of the child to its genetic parents.¹⁷⁴ The *Johnson* court noted that in defining the term “mother,” “when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.”¹⁷⁵

The *Perry-Rogers* court next turned its attention to a 1994 New York case, *McDonald v. McDonald*,¹⁷⁶ involving a divorce dispute regarding the custody of children conceived during the course of the marriage and through the assistance of an egg donor.¹⁷⁷ The *McDonald* court applied the intent analysis set forth in *Johnson* and found the mother to be the legal and natural mother, rejecting the father’s position that only a genetic parent and natural parent has a superior claim to custody.¹⁷⁸

Thus, the court in *Perry-Rogers* noted that under an intent analysis:

[I]t is apparent . . . that a “gestational mother” may possess enforceable rights under the law, despite her being a “genetic stranger” to the child. Given the complex possibilities in these kind of circumstances, it is

169. *Id.* at 23 (citation omitted).

170. *Id.* at 23–24.

171. *Id.* at 24.

172. 851 P.2d 776 (Cal. 1993) (cited in *Perry-Rogers*, 715 N.Y.S.2d at 24).

173. *Id.* at 778.

174. *Id.* at 782.

175. *Id.*

176. 608 N.Y.S.2d 477 (N.Y. App. Div. 1994) (cited in *Perry-Rogers*, 715 N.Y.S.2d at 24).

177. *Id.* at 478.

178. *Id.* at 480.

simply inappropriate to render any determination solely as a consequence of genetics. . . . [I]t is worth noting that even if the Fasanos had claimed the right to custody of the child, application of the “intent” analysis . . . would—in our view—require that custody be awarded to the Rogerses. It was they who purposefully arranged for their genetic material to be taken and used in order to attempt to create their own child, whom they intended to rear.¹⁷⁹

The court, however, noted in dicta that there might be circumstances in which both a genetic mother and a gestational mother would have competing interests in being declared parents, and the court would have to treat both the genetic and gestational mother as parents.¹⁸⁰

It is thus clear, following established case law which attempts to resolve competing claims of parentage and conflicting and inconsistent state statutes, that there is no clear resolution to the issue of what will happen in the inevitable event that an embryo adoption is contested. Indeed, application of the intent analysis set forth above may be inappropriate in an embryo adoption. Two commentators have each posited two perhaps seemingly contradictory reasons why the intent theory for resolving embryo adoption disputes is unworkable. One commentator, Jessica Lambert, has noted that it is not an appropriate legal analysis, “because ‘adopting’ a[n] . . . embryo is unlikely to be seen as the equivalent of bringing about the conception and birth of a child.”¹⁸¹ Another commentator, Charles Kindregan, has aptly pointed out that it is difficult to apply the intent standard when

179. *Perry-Rogers*, 715 N.Y.S.2d at 24.

180. *Id.* at 25 n.1 (discussing possibility for both parties in a lesbian couple to be declared the child’s mother, where a biological parent might be entitled to visitation notwithstanding having placed child for adoption, and finding Fasano’s nominal parental relationship over Akiel should have been corrected before the development of a parental relationship with him). The facts presented bore more similarity to cases involving a mix-up of newborn infants in a hospital nursery, which the court noted should be corrected immediately, as compared to one in which a “gestational mother has arguably the same rights to claim parentage as the genetic mother. Under such circumstances, the Fasanos will not be heard to claim the status of parents . . .” *Id.* at 25.

181. Lambert, *supra* note 20, at 569 (noting in contrast to a surrogacy dispute that in the “embryo donation context the recipient couple has neither orchestrated the creation of the embryo nor initiated the implantation of it.” There is thus more difficulty applying the same “reasoning of intended parenthood to impose legal parental rights (and the resulting burdens of unwanted parenthood that are the focus of the balancing test) in the embryo donation context . . .”).

each party to an embryo adoption at some point sought to become a parent.¹⁸²

Of additional concern would be the possibility that a court might apply the best interests standard normally utilized to resolve contested adoptions. As at least one commentator has pointed out:

[W]hen frozen embryos are bestowed with the rights of personhood it effectively confers upon them more rights than developing fetuses. Given the political and legal ramifications of affording an embryo rights that would provide a corresponding limitation on procreative liberty of the potential parents . . . [it] would be ill-advised to adopt a “best interests” standard for cases regarding disputes over embryos.¹⁸³

It is thus clear that the adoption paradigm for disposition of cryopreserved embryos to third parties is inapposite for numerous reasons. Traditional adoption laws pertaining to the relinquishment of parental rights simply cannot be applied in a pre-birth context. Furthermore, public policies favoring recognition of the parent who gives birth as the legal parent, in contrast to the relinquishment standard, clearly places the parties to an embryo adoption at odds. Both have recognizable rights that potentially come into play in a contested embryo adoption. If the contested embryo adoption were to take place pre-birth when parentage issues are even murkier, traditional notions regarding the protection of children—a category to which embryos cannot be assigned—may require the application of the “best interests” standard to protect the embryo. This is even more likely to happen in a jurisdiction that favors the “special respect” standard established in *Davis*. Providing rights of personhood to the embryo in a contested adoption directly pits the embryo against the procreative rights of all four potential parents. “Simply calling embryo donation ‘embryo adoption’ does not, and cannot, make it fit within those legal constructs, and legal commentators, consumers, and ethicists have all questioned the apparent bias and potential erosion of procreative and abortion rights reflected in this initiative.”¹⁸⁴

182. Kindregan, *Collaborative Reproduction*, *supra* note 13, at 53.

183. Lambert, *supra* note 20, at 556–57.

184. Crockin, “*What is an Embryo?*”, *supra* note 27, at 1184.

V. EMBRYO DONATION BY CONTRACT AND STATUTE: THE ONLY WORKABLE SOLUTION

It is evident that the misuse of terminology has created larger issues than the actual application of the adoption paradigm to the disposition of cryopreserved embryos to third parties for purposes of conception. Whether this is an intentional effort to buttress pro-life arguments and undermine procreative autonomy established in *Roe v. Wade*,¹⁸⁵ or simply due to confusion¹⁸⁶ or a lack of awareness of the complexities of the issues presented,¹⁸⁷ it is critical that the legal and scientific communities resolve these issues.

The very advantages sought to be achieved through the use of frozen embryos for family building by third parties—an affordable means of building a family, control over the pregnancy, the ability to experience pregnancy and childbirth, together with the potential finality of the process with no concerns about a birth parent coming back and asserting parental rights—initially made embryo donation an exciting opportunity for infertile families.¹⁸⁸ These goals are all undermined by the application of principles of adoption. Indeed, the requirement that an infertile couple undergo a home study (a mechanism usually utilized by the state to protect the best interests of a child—a category this article has previously determined is inapplicable to frozen embryos), child abuse clearances, and background checks is not only burdensome but also sets apart the recipient parent from other infertile patients undergoing third party assisted reproduction. There is no logical reason to require the recipient of a frozen embryo to jump over additional hurdles that individuals who are building their families through egg and sperm donation are not required to undertake.¹⁸⁹

185. 410 U.S. 113 (1973); see Crockin, *The Embryo Wars*, *supra* note 12, at 611, 623; Kindregan & McBrien, *Embryo Donation*, *supra* note 20, at 188.

186. See Lambert, *supra* note 20, at 550–51 (discussing confusion in terminology that may affect a court's determination of parental rights and responsibilities).

187. See Kindregan & McBrien, *Embryo Donation*, *supra* note 20, at 176 (noting that physicians have been transferring embryos between consenting parties without concern for legal considerations).

188. See Crockin, *The Embryo Wars*, *supra* note 12, at 616–17; see also Nightlite Christian Adoptions, *supra* note 66.

189. The author in no way means to assert that psychological counseling is not appropriate. Indeed, it is the author's belief that the psychological counseling offered to recipients of other types of third party assisted reproduction serves to protect the same interests, education, awareness, and resolution of grief regarding the underlying infertility is entirely appropriate to any person choosing third party

Moreover, requiring recipient families to participate in an unnecessary and burdensome process in order to participate in a form of assisted reproduction, which has a low success rate, instead serves to promote two undesirable goals. First, it drives up the cost of what is otherwise one of the more affordable forms of third party assisted reproduction. Second, it sets up the recipient or intended parent for severe disappointment. By establishing presumptions and creating discussions regarding the inevitability of parenthood—as is the normal dialogue in an adoption home study—the recipient/intended parent may begin to assume that the frozen embryo transfer will result in a pregnancy when statistics do not bear out that probability.¹⁹⁰

Although there are some 400,000 cryopreserved embryos in the United States,¹⁹¹ due to regulations governing the donation of human tissue promulgated by the U.S. Food and Drug Administration,¹⁹² it has been estimated that only 2% (or eight thousand) of those frozen embryos are realistically available for donation or adoption for purposes of a third party's family building.¹⁹³ The likelihood that any given recipient of an embryo donation/adoption will conceive is much lower than with a standard fresh (non-frozen) transfer of embryos.¹⁹⁴ While success rates for fresh IVF transfers consistently approach 50%, the average live birth rate for frozen embryo transfers is approximately 30%.¹⁹⁵ Indeed, the limited number of frozen embryos actually available for transfer to recipient parents,¹⁹⁶ combined with the lower success

assisted reproduction.

190. See Angela Woodall, *Embryo "Adoption" Program Gives Hope to Infertile Couples*, OAKLAND TRIB. Dec. 26, 2004 ("[T]hey must understand not all the embryos turn into babies.") (quoting Arthur Caplan, Chairman of the Department of Medical Ethics and Director of the Center for Bioethics, University of Pennsylvania)); Crockin, *The Embryo Wars*, *supra* note 12, at 630 (noting that three out of four embryos are lost during the natural process of conception).

191. Hoffman et al., *supra* note 15, at 1068.

192. See, e.g., 21 C.F.R. §§ 1271.80, 1271.85, 1271.90 (2008).

193. Crockin, *The Embryo Wars*, *supra* note 12, at 609.

194. According to 2006 statistics reported by the Centers for Disease Control, success rates for non-ovum donor fresh IVF cycles in women under 35 (based on national averages) is 44.9%, compared to success rates for frozen embryo cycles in the same group of patients of 33.1%. SARTCORS ONLINE, CLINIC SUMMARY REPORT: ALL SART MEMBER CLINICS, available at https://www.sartcors.online.com/rptCSR_PublicMultYrear.aspx?ClinicPKID+0 (last visited Dec. 31, 2008) (on file with author).

195. *Id.*

196. According to one study, 71% of patients change their mind about donating their frozen embryos to third parties. Crockin, *The Embryo Wars*, *supra*

rates for this technology when compared to other forms of third party assisted reproduction like egg and sperm donation, has resulted in a limited number of facilities or organizations actually conducting embryo donation/adoptions in the United States.¹⁹⁷

The cost for an embryo donation/adoption, however, is much lower than for any other form of assisted reproduction and adoption, thus still making it an attractive alternative to many infertile families.¹⁹⁸ Indeed, should resolution of the legal ambiguities surrounding embryo adoption/donation be resolved, it may become a more popular means of family building for more people.

It is clear, however, that the limited number of embryos available for donation/adoption has negatively impacted what was initially thought to be a potentially explosive new business.¹⁹⁹ Frozen embryo banks and agencies routinely fail due to the limited supply of frozen embryos and the complexities presented by federal and state law.²⁰⁰ Although significantly promoted and endorsed by the Bush Administration, and despite federal funding,²⁰¹ there are very few viable places to go if one is interested in participating in an embryo donation/adoption. Very few infertility clinics report having active embryo donation/adoption programs, leaving the potential consumer/recipient parent to work with a select few embryo adoption agencies, privately through attorneys, or sometimes independently on the Internet.²⁰² Of those agencies

note 12, at 615 (citing Susan C. Klock et al., Correspondence, *The Disposition of Unused Frozen Embryos*, 341 NEW ENG. J. MED. 69 (2001)).

197. See Crockin, *The Embryo Wars*, *supra* note 12, at 616 (“[I]n practice, the volume interest in this option never materialized for multiple, unanticipated reasons.”).

198. *Id.*

199. See *id.* at 616–17.

200. Indeed, the 2005 promulgation of FDA regulations, designed to ensure that embryos and other cellular-based matter created through the donation of human ova and/or sperm were free of infectious disease, resulted in making most, if not all, of the embryos created prior to effective date of the regulations ineligible for embryo donation/adoption. That is, most embryos which were created from donor egg or sperm, or which will be donated themselves, did not undergo the intensive screening mandated by the FDA in order to make them eligible for donation. See 21 C.F.R. § 1271.80 (2008).

201. The embryo adoption program Snowflakes is federally funded. Crockin, *The Embryo Wars*, *supra* note 12, at 616, 623; see also Nightlite Christian Adoptions, *supra* note 66.

202. Elissa K. Zirinsky, *Adoption's New Frontier*, CBS NEWS.COM, July 28, 2005, http://www.cbsnews.com/stories/2005/07/28/national/main712541.shtml?source=search_story (discussing how one couple found an embryo donor on a message

conducting embryo donation/adoption there are only a handful with active programs, including The National Embryo Donation Center, Snowflakes (a division of Nightlight Christian Adoptions)²⁰³ and relative newcomers such as Adoptions From The Heart.

In contrast to the difficulties embryo adoption/donation agencies are having in establishing a foothold in the world of reproductive technology and business, egg donation agencies abound. This is due largely in part to the ease with which an egg donation may be implemented from a legal perspective. Many state statutes present a workable model for absolving egg donors of parental rights.²⁰⁴ Whether it is through a direct statute²⁰⁵ or reasoning by analogy based on a sperm donation statute,²⁰⁶ the termination of parental rights of an egg donor is easily undertaken through contract and with statutory support. Similarly, gestational carrier agreements, when supported by statutes, readily protect the parental interests of the recipient/intended parents to the baby carried by a third party.²⁰⁷ It is these models that are best utilized and adapted to embryo disposition to third parties if it is going to become a popular means of family building. Agencies and clinics that are reluctant to step into this business likely are reluctant to do so because of the lack of guidance from the law and the ambiguity regarding the definition of the embryo.

board posted on www.ivfconnections.com); Liza Mundy, *Out of The Freezer, Into the Family: The Booming, and Bizarre, Business of Embryo Adoption*, SLATE, May 31, 2005, <http://www.slate.com/id/2119845/> (discussing matching recipient and donating families on a Yahoo message board).

203. See, e.g., Batsedis, *supra* note 32, at 569; see also Crockin, *The Embryo Wars*, *supra* note 12, at 623–24 (discussing federal funding of Snowflakes by Bush Administration).

204. See, e.g., CONN. GEN. STAT. § 45a-775 (Supp. 2008) (“[A]n identified or anonymous donor of sperm or eggs used in [artificial insemination with donor sperm or eggs], or any person claiming by or through such donor, shall not have any right or interest in any child born as a result of [artificial insemination with donor sperm or eggs].”); DEL. CODE ANN. tit. 13, § 8-102(8) (Supp. 2006) (“Donor” means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include: (i) A husband who provides sperm, or a wife who provides eggs, to be used for assisted reproduction by the wife; (ii) A woman who gives birth to a child by means of assisted reproduction, or (iii) a parent under subchapter VII of this chapter). “A donor is not a parent of a child conceived by means of assisted reproduction.” *Id.* § 8-702 (2004).

205. DEL. CODE ANN. tit. 13, § 8-207.

206. See, e.g., N.Y. DOM. REL. LAW § 73 (McKinney Supp. 2008).

207. See, e.g., 750 ILL. COMP. STAT. ANN. 47/1–75 (West Supp. 2008).

VI. CONCLUSION

It is incumbent upon legal practitioners and jurists to recognize the appropriate definition of an embryo, as cellular matter subject to disposition under a property or contract theory of law, and for state legislatures to provide coherent structures for the legal transfer of embryos to third parties along with parental rights to the recipient parents. States such as Texas and Oklahoma, together with the Uniform Parentage Act and the American Bar Association's Model Act on Assisted Reproductive Technologies, provide good examples of statutory frameworks that enable a workable structure for embryo donation.

It is time to abandon outdated and inapposite terminology. Adoption is not an appropriate or justifiable paradigm for the disposition of frozen embryos for purposes of conception. Rather, a consistent and meaningful standard can be found through the application of contract and property law together with clear guidance from legislatures. Through the proper application of the law and consistent use of appropriate terminology, embryo donation can become more popular and provide an affordable and workable alternative for many socially and medically infertile people in the United States.