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Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos

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I. Introduction

A. Cryopreserved Embryos

Hundreds of thousands of cryopreserved embryos[1] lie frozen in fertility banks throughout the United States.[2] They are the byproduct of infertility treatments which

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[1] For convenience we use the term embryo to mean both pre-embyros and embryos. Typically the term embryo denotes a fertilized ova at the stage of implantation. *See* Joshua S. Rubenstein, *Posthumous Corporeal Rights: Is There Sex After Death? in* **What You Need to Know About the New Genetic Laws** 375, 390 (2001) (explaining reproductive technology terms). A pre-embryo is a four to eight cell zygote that exists within fourteen days of creation. *Id.* Pre-embryos are what are cryopreserved. *Id.* Embryos exist when the cells differentiate, i.e. a stage in the IVF procedure which comes after the point at which the fertilized ova is cryopreserved and then thawed. *Id.*

The courts are by no means uniform in the use of their terminology for embryos existing at different stages of development. The Supreme Court of Tennessee used the term "embryo" to describe cryopreserved embryos; Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), *cert. denied, sub nom.*, Stowe v. Davis, 507 U.S. 911 (1993) (involving divorce dispute over which party should control use of cryopreserved fertilized ova). The Supreme Judicial Court of Massachusetts, however, elected the term "pre-embryo" in A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000) (enforcing the male's choice to avoid use of the cryopreserved fertilized ova in post-divorce dispute over decision-making about pre-embryos). The New Jersey court also used the term "pre-embryo" in J.B. v. M.B. and C.C., 2001 WL 909294 (N.J. 2001) (involving divorce dispute over the disposition of cryopreserved fertilized ova produced for IVF). The Court of Appeals of New York used the term "pre-zygote" in Kass v. Kass, 91 N.Y.2d 554 (1998) (holding control of cryopreserved fertilized ova be resolved by reference to agreement of parties).

In this article, we refer to embryos during the cryopreserved fertilized ova stage *and* during the subsequent implantation in the body of the "adopting" female stage, and therefore we use the term "embryo" consistently regardless of the stage of development.

began in the early 1970's.[3] Since 1978, infertile couples have been undergoing *In Vitro* Fertilization (IVF), a procedure in which eggs from ovaries are extracted, and fertilized with sperm in a petri dish to create embryos.[4] Embryos are then implanted in the woman's uterus, in the hopes of producing a pregnancy. For two decades, cryopreservation technology has enabled couples to freeze extra embryos resulting from

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[2] "[H]undreds of thousands of embryos remain in storage . . ." Melanie Blum, *Embryos and the New Reproductive Technologies*, *at* http://www.surrogacy.com/legals/embryotech.html (last visited Jan. 14, 2003). The American Society for Reproductive Medicine is conducting a study to quantify how many frozen embryos exist. Sheryl Gay Stolberg, *Some See New Route to Adoption In Clinics Full of Frozen Embryos*, **The N.Y. Times** (Feb. 25, 2001). One estimate ranged up to nearly 400,000 embryos in storage, of which about 3% have been earmarked for medical research and 2% intended for donation to recipients other than the genetic parents. Debra Rosenberg, *The War Over Fetal Rights,* **Newsweek**, 40, 44 (June 9, 2003).

[3] In the early 1970's, scientific research was being conducted on potential use of IVF at Columbia University and Columbia-Presbyterian Hospital in New York City. Dr. Landrum B. Shettles was attempting to use the gametes of a Florida couple to produce an embryo when his superior at the hospital intentionally destroyed them, which resulted in a much-publicized lawsuit. See Stuart Lavietes, *Dr. L.B. Shettles, 93, Piorneer in Human Fertility,* **New York Times** 31 (Feb. 16, 2003).

4 Oocytes (ova or eggs) are removed from the woman's body after hormonal injections to produce multiple oocytes which are then fertilized in a petri dish, resulting in embryos that can then be transferred into the uterus. The first recorded child of this procedure was Louise Brown, born in England in 1978. Emily McAllister, *Defining the Parent-Child Relationship,* 29 **Real Prop., Prob. And Tr. J.** 60-61 (1994). See also Andrea L. Bonnicksen, **In Vitro Fertilization** 147-51 (1989) (containing in depth explanation of IVF).

their IVF treatments.[5] Couples typically fertilize about a dozen eggs *in vitro*, and then freeze the extra ones. Freezing allows couples to avoid having to repeat egg extraction and fertilization each time they attempt pregnancy.[6] But sometimes, the number of cryopreserved embryos exceeds the needs of the couple, creating legal issues with regards to who may make decisions about disposing the surplus embryos.7 The problem may be brought to a court in a dispute between the man and woman8 or between a clinic

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[5] McAllister, *Id.* at 62 (providing reasons for cryopreservation). Cryopreservation is necessary when ovarian stimulation results in retrieving multiple eggs that are fertilized with sperm and result in several embryos. *Id.* Cryopreservation eliminates the need to transfer all fertilized embryos, thus avoiding an increased chance of multiple pregnancies. *Id.* Cryopreservation involves cooling and dehydrating the embryo, treating it with cyroprotectant and storing it in this frozen state. *Id.* When needed, the embryo is thawed and rinsed of the chemical protectant before transfer. *Id.* at 63. Although cryopreservation may decrease an embryo's viability, live births have occurred from embryos which have been cryopreserved for a decade. *See id.* Cryopreservation even permits a child's birth *after* the death of its genetic parents by implantation of the embryo in another woman's uterus. *Id.*

6 Jennifer Kornreich, *Souls On Ice,* **Redbook**, Jan. 1, 2000, at 104. Since IVF procedures typically cost between $7,000 and $20,000, and since few insurance companies cover it, doctors stimulate the ovaries with drugs and harvest as many eggs as possible at one time. *Id.* This is why couples often end up with so many extra embryos. *Id.*

7 The first attempt to deal legally with the options for disposing of unused embryos was in a report of the State of Victoria, Australia, when an American couple died in an airplane accident after depositing fertilized ova in a clinic. *State of Victoria, Report on the Disposition of Embryos Produced by In Vitro Fertilization (1984), summarized in* Walter Wadlington & Raymond C. O'Brien, **Domestic Relations - Cases and Materials**, 5th ed., 741 (2002) [hereinafter *State of Victoria*].

8 See the *Davis, A.Z.* and *Kass* decisions cited supra in note 1 (involving disputes

and the couple.9 A dispute can arise about the disposition of gametes or embryos even after the death of a person10 or the death of the genetic parents.11

In order to avoid such disputes, clinics typically require couples undergoing IVF to sign an agreement memorializing what they want done with their surplus cryopreserved embryos.12 Options include indefinite storage, donating them to research, or destroying them.13 However, to some couples, none of these options is

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between divorcing spouses over disposition of cryopreserved embryos).

9 York v. Jones, 717 F. Supp. 421 (E.D.Va. 1989) (IVF clinic resisted efforts of man and woman to remove their cryopreserved embryos to a clinic in another state).

10 In Hecht v. Kane, 16 Cal. App.4th 836 (1993) the former wife and children of a deceased man opposed the release of his cryopreserved sperm to his mistress to whom he had willed the gametes. See also Woodward v. Commissioner of Social Security, 760 N.E.2d 257 (Mass. 2002) (Social Security Administration argued that children born more than two years after death of their father who had banked his sperm for his wife's future use were not his children; the Massachusetts court ruled the children were the man's legal heirs under state law).

11 See State of Victoria, supra note 7, at 741 (noting dilemma as to disposition of cryopreserved embryos after death of the genetic parents).

12 Ami S. Jaeger, *Who is the Parent?* 25 No. 2 **Fam. Advoc.**, Fall 2002, at 7, 8.

13 Id. See also Kass v. Kass, 91 N.Y.2d 554 (N.Y. 1998) (enforcing agreement to donate cryopreserved embryos for research).

acceptable, and in some jurisdictions may even be illegal.14 Enter what is now referred to as "embryo adoption," the latest alternative in the reproductive technology world.

B. What is Embryo Adoption?

In addition to donating embryos to research or destroying them, couples now have the option of donating their surplus embryos to other infertile couples, a process commonly referred to as embryo adoption. After the donation, the embryos are implanted in the female of the donee couple and the genetically unrelated donee couple raises any resulting child as if it were their own.15 In essence, embryo adoption provides a means by which a woman can give birth to an "adopted" child. Unlike traditional adoption, however, embryo adoption permits an otherwise infertile couple to experience pregnancy, control prenatal care, and get to know their child's genetic parents.[16]

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14 Destruction of an embryo may be illegal under Louisiana law; see La. Rev. Stat. Ann. §§ 9:123-9:136 (stating in vitro fertilized ovum is a judicial person and biological human being under Louisiana law). In Massachusetts, a statute prohibits the use of embryos for experimental purposes; see Mass. Gen. L. Ann. ch. 112, § 12J (2003) (prohibiting experimentation on a live fetus either before of after it is implanted in the uterus).

15 Susan Lewis Cooper & Ellen Sarasohn Glazer, Choosing Embryo Adoption, at http://www.perspectivepress.com/carembryo.html (last visited Oct. 8, 2002). See also Embryo Adoption - The Future is Now, at http://adoption.about.conm/library/weekly/aa071299.htm; Bush to Promote 'Embryo Adoption', MSNBC Aug. 20, 2002, at http://www.msnbc.com/news/796883.asp.

16 Sheryl Gay Stolberg, *Adoption of Leftover Embryos Emerging as an Option for Some* Couples, **Milwaukee J. Sentinel**, at 01G (Mar. 19, 2001) (quoting Susan L. Crockin, a

C. A Report of an Embryo "Adoption":

Bob and Suzanne Gray had twenty-three embryos left over from their fertility treatments.[17] The Grays are Christians who believe that life begins at conception.[18] They believe they have the moral obligation to find their cryopreserved embryos suitable families in order to give them the best future possible.[19] The Christian Snowflake Embryo Adoption Program matched and coordinated an embryo transfer between the Grays and the Vests. Cara Vest gave birth to the Grays genetic baby boy in May, 2002 and since that time, the two families have been in frequent contact.20 The Grays intend to donate each embryo to infertile couples for implantation in order to give each of them a chance to be born.

Boston lawyer who specializes in reproductive issues).

[17] *A Tale of Two Families,* ABC News, *at* http://printerfriendly.abcnews.com/printerfriendly/Print?fetchFromGLUE=true&GLUESer. (last visited Aug. 26, 2002).

[18] *Id.*

[19] *Id.* The Grays also had moral objections to abortion, and the husband stated that destroying an embryo or using it for experimentation would not be different from abortion. *Id.* "'Snowflake babies' are some of the multiple unused embryos resulting from in-vitro fertilization and other alternative reproductive technologies." John Crouch, *Adoption in the 21st Century,* 25 No. 2 **Fam. Advoc.,** Fall 2002, at 32, 32. The word "Snowflake" reflects each embryo's individuality. *Id.*

20 A Tale of Two Families, supra note 17.

Embryo adoption is becoming an attractive option for couples like the Grays who are uncomfortable with destroying their embryos or donating them for research.21 An added feature for donation is that on the receiving end, gestating donated embryos is less expensive and less complicated than going through a traditional cycle of IVF, or than paying an egg donor for her donation.[22]

The idea of donating a couple's cryopreserved embryos to another couple seems like a simple idea. The process, however, raises several legal hurdles that ought to be addressed before this new reproductive option becomes commonplace. This article

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21 News reports indicate that the Bush administration developed plans to distribute nearly one million dollars to promote embryo donation, noting there are "tens of thousands of embryos" in fertility clinics. Bush to Promote 'Embryo Adoption', supra note 15.

[22] Milandria King, *Cold Shoulder Treatment: The Disposition of Frozen Embryos Post-Divorce,* 25 **Thur. Mar. L. Rev.** 99, 131 (1999). Costs per IVF cycle alone average around $10,500. *Id.* Egg donors are sometimes compensated $15,000. Stolberg, *supra* note 16, at 01G (declaring embryo adoption an inexpensive alternative to IVF). *See also* Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 **Law & Soc'y Rev.** 257, 257 (2002) (citing an advertisement for an egg donor promising compensation of $25,000 plus expenses and another offering $50,000).

explores how the law *could* treat embryo donation for purposes of "adoption" and potential problems the practice raises.[23]

II. Analysis

A. Legal Theories:

The term "embryo adoption" is misleading, because it leads people to believe that adoption law applies to and governs the procedure of donating ones embryos to another infertile couple for implantation and gestation. Further misleading the public is the practice of donee couples often voluntarily submitting to criminal background checks and homestudies to determine their parental fitness, as they would if they were adopting children rather than embryos.[24] The media also falsely portrays embryo adoption as "legal adoption," when no legal guarantees can or should be made.25 Even some IVF

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[23] Emphasis is on the word "could" since there are few reported cases and little statutory law directly dealing with most of the issues raised by the authors in this article.

[24] *See* Aaron Zitner, A Cold War on Embryo Adoptions; Transfers that help infertile couples have kids likely are the next flash point in the abortion debate. Rights advocates are in a tough position. **L.A. Times**, Part A; Part 1; Page 1 (Mar. 22, 2002). Lucinda Boren, an embryo recipient states: "I really believe that I adopted children – babies – and not some dot on the page." *Id.* "I just adopted them at a very young stage." *Id.*

25 See Embryo Adoption - The Future is Now, supra note 15 (referring to embryo adoption as legal adoption).

physicians seem to believe that apart from the fact that embryo adoption occurs far earlier than baby adoption, the processes are similar.26

The word "adoption" creates a false sense of security for couples who believe they are voluntarily and legally terminating their parental rights when they donate their embryos to another couple. No court has to date resolved a contested embryo adoption dispute, and the parties involved should not simply assume that an embryo can be legally adopted, thus terminating the donor's legal rights and interests. The legal risk of unintentionally maintaining parental interests and rights may perhaps act as a complicating factor in the donation of embryos.

It is apparent that terminology plays some role in the debate over embryo adoption. Some supporters of "embryo adoption" might opt for a change to "embryo donation" or "embryo transfer" if it becomes clear that the adoption concept is not achieving pubic support. In order to soften criticism of the adoption analogy, the use of the term "embryo donation" suggests a non-commercial transfer of ownership for which no express statutory authority is needed. "Donation," however, is a property concept, and some may resist the substitution of property law categories for traditional parentage

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26 Blum, supra note 2 (noting doctors believe their is little difference between pre and post-birth adoption).

concepts as a means of providing legal protection for the parties to the transaction. "Embryo transfer" is a broader term, which could encompass both traditional family law concepts and property transactions. Perhaps "embryo donation for transfer" is the clearest terminology.[27] Viewed 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.

Regardless of what terminology is used to explain the procedure, adoption law does not and cannot really apply to donating embryos because in many states, statutes specifically invalidate biological parents' consent to adoption which is given prior to child birth. The Massachusetts statute, for example, states that parental consent to adoption must be in writing and is not valid until four days after the child's birth.28 Similarly, under the Uniform Adoption Act, valid surrender and consent to adoption can

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[27] *See* Phyllis Griffin Epps, *The Entwined Destinies of Roe v. Wade and Assisted Reproductive Technology at* http://www.law.uh.edu/healthlawperspectives/Reproductive/000906Entwined.html (Sept. 6, 2000) (referring to embryo adoption as "donation for transfer into another woman").

[28] Mass. Gen. L. Ann. ch. 210, §2 (2003) (stating written parental consent to adoption must be made in writing and executed no sooner than the fourth day after birth of child). Exceptions to a statute governing consent to adoption are strictly construed in order to protect the rights of the biological parent. *In re* Adoption of McNutt, 732 N.E.2d 470 (Ohio App. 1999).

be given only after the child's birth.[29] It logically follows that since embryos are not children, adoption statutes cannot apply to their donation. Even in the absence of such a statute, courts refuse to honor pre-birth agreements to surrender a child for adoption.[30] For example, the famous New Jersey *Baby M* 31 decision that recognized the parental rights of a gestational surrogate mother was based in substantial part on the court's belief that the pre-conception, pre-birth, agreement to surrender a child constituted a "contractual system of termination and adoption designed to circumvent our statute."32

Apparently, physicians have been transferring embryos between consenting parties for a number of years without concern for legal considerations or even a contract between the parties.33 As the practice of embryo adoption is currently evolving,

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29 Uniform Adoption Act (1994) § 2-204(a), 9 Uniform Laws Ann., Part I, at 53 (Supp. West 2001).

30 Homer H. Clark, Jr. 2 The Law of Domestic Relations in the United States, § 21.5 at 611 (2d ed. 1987) (noting many state statutes validate only consent given a specified period after the child's birth, and even in the absence of such a statute, courts have ruled prenatal consent to adoption invalid).

31 Matter of Baby M, 537 A.2d 1227 (1988) (ruling pre-conception agreement by surrogate mother to surrender child for adoption after birth of child invalid and unenforceable).

32 Id. at 1246.

33 "Doctors have been quietly transferring embryos between willing couples for years." Zitner, supra note 24, at Part A, P. 1.

however, the use of contractual arrangements is becoming characteristic of the practice. Such contracts address embryo disposition in terms of parental rights and visitation issues in the contingencies of death, separation, or divorce of the parties. Such provisions are adopted from egg donation and surrogacy contracts, which a number of commentators now advocate.34 The use of a pre-birth contract to determine parental rights and interests in an embryo donation scenario, however, presents it own problems. Pre-birth contractual attempts that provide only that donors consent to surrendering custody of the embryo, and that remain silent on adoption may not be valid and enforceable. As the court decided in the Baby M case, a pre-birth contract that does not address adoption may be held unenforceable if the court construes it as an attempt to evade the purpose of the adoption statute. The Supreme Judicial Court of Massachusetts addressed this issue in *R.R. v. M.H.*, a case in which the surrogate mother decided to renounce the pre-birth contract to give up custody of any resulting child conceived, and in the sixth month of pregnancy announced that she intended to keep the baby.35 The Massachusetts court

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34 Noel A. Fleming, *Navigating the Slippery Slope of Frozen Embryo Disputes: The Case for a Contractual Approach,* 75 **Temp. L. Rev.** 345, 371 (2002); John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos,* 51 **Ohio L. J.** 407, 414 (1990); Paula Walter, *His, Hers or Theirs – Custody, Control and Contracts: Allocating Decisional Authority Over Frozen Embryos,* 29 **Seton Hall L. Rev.** 937, 948 (1999); Jessica Weiner & Lori Andrews, *Emerging Issues in Liability and Paternity,* 25 No. 2 **Fam. Advoc.** Fall 2002 15, 17 (Fall 2002).

35 R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998) (surrogate acting for a married couple

held "[a]lthough a consent to surrender custody has less permanency than consent to adoption, the legislative judgment that a mother should have time after a child's birth [to decide whether to consent to adoption] weighs heavily in our consideration whether to [enforce] a prenatal custody agreement."36 The enforceability of contractual agreements in embryo donation cases also remains uncertain: can either of the genetic parents revoke the contract after the birth of the child and seek to claim custody of the child?

The use of an adoption or contract model, while attractive and understandable, is likely to encounter legal pitfalls in the absence of a statute specifically authorizing embryo donation and determining the respective rights and liabilities of all parties involved. Adoption of children was not permitted under the early common law of England37 or America.38 This is important because it means that adoption is purely the creature of statute rather than common law, and adoption does not exist outside of

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contracted to give the husband custody of child if one was conceived and born, inseminated herself with sperm of the husband, and then renounced the agreement during her pregnancy).

36 Id. at 796.

37 Adoption was not permitted in England until the enactment of The Adoption of Child Act, Geo. 5, c. 29 in 1926.

38 The American states enacted adoption laws throughout the 19th Century, starting with Massachusetts St. 1851, c. 324.

legislative authorization.39 Given the intensity of the recent debate over stem-cell research, abortion, sales of ova, cloning and other controversies, it is not likely that a consensus on embryo adoption which would enjoy widespread legislative support is going to develop in the near future.

In the event a state determines to enact a statute to create a mechanism for embryo adoption, it might give some consideration to starting with a review of the Louisiana statute. That state statutorily authorizes "adoptive implantation of fertilized human ovum" when genetic progenitors renounce their parental rights over their cryopreserved embryos in favor of their use by another married couple.40 The statute requires the donee couple to consent to the adoption of the embryo by executing a notarial act of adoption.41 Louisiana is not a common law state, and much of its code is premised on French law. Indeed, this statute appears to be premised in part on the French law which accords dignity to the human embryo, but it does not expressly follow the French model of exempting embryos conceived *in vitro* from legal protection. French law provides for

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39 "The law of adoption is purely statutory. . ." Adoption of Tammy, 619 N.E.2d 315, 317 (Mass. 1993).

40 La. Rev. Stat. Ann. § 9:130 (West Supp. 2002) (expressly authorizing donation of a fertilized human ovum by a couple who is not being compensated for the embryo).

41 Id.

destruction of excess embryos which are not used for IVF implantation.42 Louisiana law treats the embryo as a judicial person and biological human being43 and provides for its adoption.44 The Louisiana statute does not provide a mechanism for destruction of the excess embryos, and clearly favors the use of extra embryos to produce pregnancies. The Louisiana statute also does not attempt to address the multiple legal issues which are bound to arise from embryo adoption, presumably leaving those for the courts to resolve on a case-by case basis. Such issues include tort liability, resolution of support and custody disputes, embryo theft and fraud etc.

B. Applying Gestational Surrogacy Law:

Given the difficulties which exist in applying adoption law to embryo adoption, another legal analogy might be considered.45 Rather than attempting to analogize traditional adoption law to the practice, the law governing gestational

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42 Jonathan F.X. O'Brien, *Cinderella's dilemma: Dies the In Vitro Statute Fit? Cloning and Science in French andAmerican Law,* 6 **Tul. J. Int'l. & Comp. L.,** 525, at 527-35 (1998) (summarizing French law governing the embryo).

43 La. Rev. Stat. Ann. § 9:121-9:136 (West Supp. 2002) (statutes governing embryos).

44 La. Rev. Stat. Ann. § 9:130 (West Supp. 2002) (statute authorizing adoptive implantation of fertilized human ovum).

45 See supra Part II-A (discussing inapplicability of adoption law to the donation of embryos).

surrogacy arrangements may be better applied. In a gestational surrogacy arrangement, a woman gestates an embryo which is created from the gametes of another couple.46 In the sense that the birth mother is unrelated to any resulting child,47 gestational surrogacy is similar to embryo adoption. The only difference is that in gestational surrogacy, the birth mother intends to relinquish any resulting child upon its birth while in embryo adoption, the birth mother intends to keep and raise any resulting child upon its birth. Applying the law that governs gestational surrogacy arrangements to embryo adoption scenarios would circumvent the problem with applying adoption law by minimizing the difficulties associated with pre-conception and pre-birth consent to "adoption" of embryos.

The theory of legally treating gestational surrogacy and embryo adoption analogously is consistent with the holdings in noteworthy decisions of the courts in Massachusetts and California. In *Culliton*48 and *Johnson,*49 the courts determined that

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46 The Massachusetts court has described the process as one in which "the birth mother has had transferred to her uterus an embryo formed through in vitro fertilization of the intended parents' sperm and egg." R.R. v. M.H., supra note 35, 689 N.E.2d at n. 10.

47 In a gestational surrogacy arrangement the birth mother and child are not genetically related except in the situation where one of the genetic parents is a blood relative of the birth mother. Id.

48 Culliton v. Beth Israel Deaconess Hosp., 756 N.E.2d 1133, 1136 (2001) (in uncontested case court employed its equity jurisdiction to rule that the genetic parents are

adoption law is inapplicable to gestational surrogacy arrangements.[50] In *Johnson,* the California court ruled that "[g]estational surrogacy differs in crucial respects from adoption."51 Furthermore, the Massachusetts court in Culliton ruled that adoption law applies only when the birth mother has a genetic relationship to the child.52 In other words, in the reproductive technology arena, adoption law only applies to traditional surrogates due to their genetic relation to the child; it does not apply in cases of gestational surrogacy, where the birth mother is genetically unrelated to the child. Since a woman gestating an "adopted" embryo also bears no genetic relationship to any resulting child, such a situation should be treated like gestational surrogacy arrangements,

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the legal parents of child being carried by pregnant surrogate who had no genetic connection to child in her womb and that adoption laws do not bar the arrangement).

49 Johnson v. Calvert, 5 Cal. 4th 84, 96 (1993) (in contested case court ruled that genetic parents are the legal parents, not the birth mother who was not genetically related to the child and rejected the birth mother's argument that the adoption statute prohibited the arrangement).

50 *Id. and Culliton,* supra note 48*,* 756 N.E.2d, at 1137-38 (distinguishing gestational surrogacy arrangements in which the birth mother is unrelated to the child, from traditional surrogacy arrangements, in which the birth mother is also the genetic mother of the child). Id.

51 *Johnson*, *supra* note 49, 5 Cal. 4th at 96.

52 Id. Adoption law applies when there is a genetic connection but does not when there is no genetic connection, as in a gestational surrogacy arrangement. Id.

and adoption law should not apply.53 In other words, if embryo "adoption" and gestational surrogacy are basically the same reality, then they ought to be treated similarly, but independently from traditional adoption law concepts. If this is so, then embryo adoption arrangements, like gestational surrogacy arrangements, should be governed by the terms of the contract that the parties execute.

Contracts memorializing the intent of the parties in connection with embryo "adoption" should spell out the parental rights of the donor and donee couples. In *Culliton*, the Massachusetts court honored the parental rights portion of the contract, holding that the genetic parents in a gestational carrier arrangement could be placed on the child's birth certificate as the legal parents when all parties agree.54 Likewise, this decision could apply to embryo adoption arrangements, permitting a court to enter a declaratory judgment rendering the intended parents (the donee couple) the legal parents of any resulting child, as long as all parties agree. As discussed in *Culliton*, delays in

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53 *Culliton*, supra note 48, 756 N.E.2d, at 1137-38 (stating adoption law only applies when birth mother is related to child).

54 Id. In Smith v. Brown, 718 N.E.2d 844 (Mass. 1999) the court was asked to rule on the parenthood issue in an uncontested gestational surrogacy case in which all relevant parties sought a declaration of their rights, but the court discharged the trial judge's report of the case on procedural grounds. See also Belisto v. Clark, 644 N.E.2d 760 (Ohio 1994) (court authorized placing the names of the intended parents on birth certificate of child carried by gestational surrogate).

declaring the intended parents the legal parents increases the risk of interfering with a child's access to medical treatment during or shortly after birth. It could also deprive a child of inheriting from his legal parents should a legal parent die intestate before a declaration of parentage, and perhaps leave support rights in limbo.[55]

C. *Legal Parenthood – The Case for an Intent Based Approach:*

Parentage issues become convoluted when a couple decides to donate their extra embryos. Initially, the purpose of a couple undergoing IVF treatments is to create embryos and produce children to be raised as their own. Initially the couple intends to retain parental rights over children resulting from their IVF treatments. However, when a couple completes their family, decisions may have to be made about any extra croypreserved embryos, whether this decision was initially anticipated or not. When a couple decides to donate their surplus embryos to another infertile couple, their intent to retain parental rights should logically cease. This change of intent of the progenitor couple should then be memorialized in a contract, which is intended to explain and protect the rights of all involved parties.

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55 *Culliton,* supra note 48, 756 N.E.2d, at 1139. See also, Jaqueline Ceurvels, *Recent Court Decisions: Select Recent Court Decisions,* 27 **Am. J. L. & Med.** 491, 492 (2001) (discussing *Culliton* decision).

Prior to the development of assisted conception techniques, the birth mother was considered the legal mother of any child she bore; the birth mother's husband, if any, was presumed to be the legal father. Although this traditional model happens to coincide with the intent of the parties in an embryo donation scenario (since the birth mother/intended mother would be considered the legal mother) it does not coincide with most assisted reproductive scenarios. Under the traditional model, for example, a traditional surrogate is considered the legal mother because she bears the child, even though it is not her intention to be the legal mother.56 A traditional adoption follows, permitting the surrogate to relinquish her parental rights after the birth for the benefit of the intended parents.

In a gestational surrogacy arrangement, a woman serves as the "carrier" of a child conceived *in vitro* with the fertilized ovum of another woman, and gives birth to a child which is not biologically related to her. The intent of this arrangement is that any resulting child is for the benefit of a couple, and is not intended to be the child of the birth mother. The intended parents can be the genetic parents.57 Alternatively, the intended

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56 Matter of Baby M, 537 A.2d 1227 (N.J. 1988) (holding genetic-mother-surrogate was the legal mother of child).

57 See *Johnson*, supra note 49, 5 Cal.4th (the embryo implanted in the uterus of the surrogate was produced *in vitro* using the gametes of the intended parents).

parents might have no genetic connection with the embryo, if that embryo was produced *in vitro* with gametes provided by donors other than the intended parents.58 Under gestational surrogacy arrangements, the birthmother and genetic mother are not the same woman, forcing the courts to decide whom to consider the legal parents. The existence of gestational surrogacy arrangements forced the law to reconsider the application of the traditional birth mother rule, which only serves to frustrate the intentions of the parties in many assisted reproduction scenarios. The new Uniform Parentage Act (U.P.A.) carves out exceptions for establishing parentage in assisted reproduction.

The U.P.A. recites the traditional rule that a woman giving birth to a child establishes maternity,59 but then creates an exception for a child conceived through an approved and legally recognized gestational surrogacy agreement.60 A state statute

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58 In re Marriage of Buzzanca, 61 Cal. App.4th 1410 (4th Dist., 1998) review denied, 1998 Cal. LEXIS 3830 (1998) (in case where neither surrogate birth mother nor intended parents assumed parental responsibility and ovum and sperm of third-party donors were used to produce embryo in vitro which was implanted in surrogate; the court ruled that intended parents were the legal parents even though neither had genetic connection to child and wife was not birth mother).

59 Uniform Parentage Act (U.P.A.) (2000), § 201(a)(1), 9B U.L.A. 309 (2002).

60 Id., § 201(a)(4). Article 8 of the U.P.A. suggests a hearing to validate a gestational agreement to declare the intended parents the legal parents of a child born pursuant to the agreement. 9B U.L.A. 360-370 (2002); Michael Morgan, *The New Uniform Parentage Act,* 25 **Fam. Advoc.** 11, 13 (No. 2, Fall 2002). The drafters of the new U.P.A. eliminated the word "surrogacy" as being confusing and propose use of the term

which creates a presumption that a child born of a surrogate is the legal child of the intended parents61 would partway achieve the goal of the U.P.A., but of itself does not create a comprehensive method of resolving all the problems which surrogacy can create. However, even if a state does not enact the U.P.A., the courts will have to carve out an exception to the traditional birth mother rule in gestational surrogacy litigation on a case by case basis. It is likely that the exception will be framed in the light of the intent of the parties in entering the arrangement.

Several decades ago, it was predicted that advanced reproductive technology would someday present major challenges to the law.62 That day has now arrived, and issues created by the no-longer theoretical debate are now being litigated in the courts and discussed in the legislatures. The various forms of assisted reproduction now available have essentially nullified former legal perceptions of parenthood based on biology or gestation alone. An intent based model toward legal parenthood is the only

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"gestational agreement." See Prefatory Comment to Article 8, 9B U.P.A. 360 (2002). A few states have enacted statutes which exempt surrogacy agreements from the adoption law provision which makes it a crime to receive compensation for child selling. Ala. Code § 26-10A-34; Iowa Code, § 170.11; W. Va. Code § 48-4-16(e)(3).

61 See Ark. Code Ann. § 9-10-201(b) - (c). The Uniform Parentage Act adopts the "intended parent" rule in gestational agreements. 9B U.L.A. § 801 (2002).

62 Charles P. Kindregan, State Power Over Human Fertility and Individual Liberty, 23 Hastings L.J. 140 (1972).

model that survives as reproductive science fast outpaces the law. The intent based theory to legal parenthood declares the parties who intend to rear the child are the legal parents. The theory is accurate and incapable of being defeated if the parties' intentions are stipulated in a carefully drafted legally binding contract that is recognized by applicable law.

The intent based model toward legal parenthood has already been applied in several noteworthy decisions. In *Johnson*63 the California court honored the intent of the parties. The court declared that the parents who intended to rear the child were the legal parents even though the wife was not the birth mother. The court was confronted with a parentage contest between the Calverts, the gamete providers, and Johnson, the gestational surrogate mother who contractually agreed to carry the child for them.64 The court considered the intent of the parties the critical factor in resolving the dispute. This was because the parties intended for the Calverts to rear any resulting child, and but for that surrogacy plan the child would not have been born.[65] It followed that the intent of

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63 Johnson v. Calvert, supra note 49, 5 Cal. 4th at 93.

64 Id. See also Susan Frelich Appleton, "*Planned Parenthood": Adoption, Assisted Reproduction and the New Ideal Family,* 1 ***Wash. U. J. L. & Pol'y.*** 85, 88 (1999) (discussing Johnson v. Calvert).

65 Johnson v. Calvert, supra note 49, 5 Cal. 4th, at 93.

the Calverts to have a child trumped any parental right Johnson may have acquired due to the bond she formed with the child during gestation.[66] The *Johnson* court determined that when "genetic consanguinity and giving birth [both] establish[] a mother and child relationship, 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."67

In the opinion of the authors, *Johnson* was correctly decided and should also apply to an embryo donation scenario. The transfer of an embryo creates a biological mother and a birth mother. They are two different women, but both cannot be the legal mother.[68] In the context of a gestational surrogacy situation, the intended mother should

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66 Id.

67 Id. at 93.

68 In *Johnson* the American Civil Liberties Union argued as *amicus curiae* that the court should recognize both the egg donor and the surrogate as the mothers. The court rejected this as impractical as it would create competing parental rights in a third party. Johnson v. Calvert, supra note 48, 5 Cal.4th, at 92. In Michael H. v. Gerald D., 491 U.S. 110 (1989) the Court rejected a constitutional claim by a child whose legal father under state law was the husband of her mother that she had a right to have two fathers, the other being her biological father.

The concept of de facto parent opens the door to a kind of dual motherhood in which a non-parent who has functioned as a mother with the consent of the biological mother could gain custody or visitation rights. See E.N.O. v. L.M.M., 771 N.E.2d 868 (Mass.

be considered the legal mother because she intended to raise the resulting child as her own. Likewise, in an embryo adoption scenario, the embryo recipient/birth mother should be considered the legal mother to remain consistent with the intent based model of legal parenthood.

In addition to protecting the rights of the parents, the application of the intent based model also serves to protect the child. In *Buzzanca,* for example, a California ruled against an intended father who tried to avoid his child support obligation. The man and his wife arranged to have an embryo which was genetically unrelated to either of them implanted in a gestational surrogate. When the child was born, the husband and wife were divorcing and the husband disclaimed any financial responsibility for the child. He argued that an absence of a biological connection to the child relieved him of any support obligation.[69] Reversing the trial judge who had (remarkably) ruled that the child had no parent, the California Court of Appeals identified the couple who had planned to rear the child as the legal parents, emphasizing "the intelligence and utility of a rule that looks to

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1999) (de facto mother allowed to visit with child over mother's objections after relationship between the women broke up). Disputes between two women claiming to each be the mother of a child date to Biblical time; see 1 Kings 3: 25-26. King Solomon's solution to the dispute was effective but would not work in a modern court.

[69] In re Marriage of Buzzanca, supra note 58, 61 Cal.App.4th. at 1412-13. The wife accepted parental responsibility for the child; the surrogate birth mother appeared in the case and disclaimed any interest in the child.

intentions."[70] The need for some rule in embryo donation cases is apparent since as the California court commented "[t]hese cases will not go away."[71] Certainly a strong argument can be made that the rule should require that parental status should "depend upon the preconception intent of the parties."[72]

A New York appellate court decided the *Perry-Rogers*73 case, which grew out of a tragic mistake involving an embryo transfer.74 Two couples were participating in IVF. An embryo of an African-American couple was mistakenly implanted in the uterus of a Caucasian woman. The Caucasian woman delivered two children; one African-American and the other Caucasian. The Caucasian child was the birth mother's genetic offspring,

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[70] Id., 61 Cal. App. 4th at 1424. *See also* Appleton, supra note 64, at 89 (discussing *Buzzanca*).

71 In re Marriage of Buzzanca, supra note 58, 61 Cal.App.4th at 1429 (referring to legal cases growing out of the use of modern reproductive technology).

72 John Lawrence Hill, *What Does it Mean to be a "Parent"?* 66 **N.Y.U. L. Rev.** 353, 415 (1991) (arguing that the law refers to intent in many areas and that it is especially useful to do so when the intended parents are the "first cause, or prime movers, of the procreative relationship.") *Id.*

[73] Perry-Rogers v. Fasano, 715 N.Y.S.2d 19 (App. Div., 1st Dept., 2000).

74 Raizel Liebler, *Are You My Parent? Are You My Child? The Role of Genetics and Race in Defining Relationships afer Reproductive Technological Mistakes,* 5 **DePaul J. Health Care L.** 15 (2002) (including analysis of the Perry-Rogers decision).

while the other child was produced from the embryo of the African-American couple. After considerable dispute between the couples, the African-American child was delivered to its genetic parents, but the Caucasian couple wanted legal visitation with the child. The court ruled for the genetic African-American parents in denying visitation, essentially ruling that the genetic parents were the intended parents. The court, however, did not rely primarily on the genetic connection.75 The court noted that if this had been a custody dispute rather than a visitation dispute, it would have awarded custody to the African-American parents because they had arranged for their genetic material to be taken and cryopreserved in an attempt to produce a child of their own who they intended to raise.76

An earlier New York decision illustrates the greater importance of intent over genetics as a basis for legal parenthood. A woman became pregnant with a donor ovum fertilized with her husband's sperm. When the couple divorced, the husband argued that he had a superior right to custody of the child because he was the genetic parent while his wife had no genetic connection to the child. The court rejected this argument. Since both

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75 But the court noted that genetics are not entirely irrelevant, and that with "current reproductive technology, the term 'genetic stranger' can no longer be enough to end a discussion." *Id.* at 23.

76 *Id.*

husband and wife intended to become parents, they had equal standing as parents even though the wife was not the biological mother of the child.[77]

The authors advocate applying the intent based model to legal parenthood, which emerged in gestational surrogacy cases, to embryo donation cases. Although the traditional birth mother rule coincidentally works for embryo donation, an intent based model should apply across the board to protect the rights of all parties involved, including the children.78 As in gestational surrogacy cases, and pursuant to the Massachusetts holding in Culliton, all parties involved could document their intentions in a contract and obtain a declaration of legal parentage prior to the birth of any resulting child.79 Such a

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77 McDonald v. McDonald, 608 N.Y.S.2d 477 (App. Div., 2nd Dist. 1992).

[78] *But see* Kermit Roosevelt III, *The Newest Property: Reproductive Technologies and the Concept of Parenthood,* 39 **Santa Clara L. Rev.** 79, 91-96 (1998) (challenging the utility of an intent based rule and proposing property based approach to establishing legal parenthood).

But see, Helen M. Alvare, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective,* 40 **Harv. J. on Legis.** 1 (2003) (arguing that a child's rights are best protected by government regulation or collaborative assisted reproduction).

[79] *See Culliton,* supra note 48 , 756 N.E. 2d at 1139. *Culliton* decided that parentage can be determined in a pre-birth declaratory action and that the genetic/intended parents in gestational surrogacy arrangements are the legal parents. *Id.* This determination should also apply in an embryo adoption scenario so that the intended parents (i.e. the donee couple) can be adjudicated the legal parents prior to birth, even though they are not the genetic parents.

declaratory judgment would resolve the problem of the donor couple potentially retaining parental rights when donating their embryos. It is precisely at the time of donation of the embryo, when the parties are all in agreement, that an uncontested declaratory judgment action would be most effective. Resolving the respective rights and liabilities of the parties after a child is born would leave too many potential disputes to be resolved.80

While the authors advocate the intent based model of legal parenthood to assisted conception scenarios, it is important to note that the traditional birth mother model only should continue to apply to natural conception. For example, a man who mistakenly impregnates a woman should not be able to invoke his lack of intent to bring a child into the world to avoid support obligations.81 In such circumstances, the intent of the parties is irrelevant and the traditional birth mother rule and presumption that her husband is the legal father should apply. The intent-based model to legal parenthood is appropriately applied to assisted reproduction scenarios but not to natural forms of conception.

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79 Clarifying legal parentage prior to a child's birth provides stability for that child from the moment of birth by establishing custodial rights and determining who may make medical decisions on behalf of the child. Jaeger, *supra* note 12, at 10.

81 Jaeger, supra note 12, at 8. See Pamela P. v. Frank S., 59 N.Y.2d 1 (1983) (father cannot raise as a defense in a paternity matter that mother had defrauded him into believing she was using contraception prior to their having sexual intercourse during which a child was conceived).

Existing case law does and any new statutes should reflect the fundamental differences and purposes in natural versus assisted conception.

D. Are Embryos Property, Persons or in an Interim Category?

Property rights include the rights to control, possess, use, exclude, profit from and dispose of assets.[82] Property rights complicate an analysis of embryo donation. While blood, hair, semen, eggs, teeth and skin are routinely donated without causing legal problems, the issue becomes more complicated when dealing with an embryo because two people, rather than one, have equal rights to it.[83] The law treating human body parts, tissues and fluids as property is less than clear.[84] The American Society for Reproductive Medicine has taken the position that gametes and concepti are the property

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[82] Black's Law Dictionary 1233 (revised 7th ed. 1999) (defining property). *See also* Barry Brown, *Reconciling Property Law with Advances In Reproductive Science*, 62 **Stan. L. & Pol'y Rev.** 73, 75 (1995) (discussing property rights in organs and tissues); Roosevelt, *supra* note 78, at 80 (analyzing the body as property).

[83] *See* Roosevelt, *supra* note 78, at 82 (noting body parts that are transferred); *See also* Brown, *supra* note 82, at 77. If both progenitors of an embryo die simultaneously, should the embryos be treated as the property of one or the other of the decedent's estate or should they be divided as if each decedent was a tenant in common? *Id.*

84 *See generally* Rubenstein, *supra* note 1 (containing an extensive analysis of the inconsistent attempts to resolve disputes over body parts, fluids, tissues etc.).

of the donors.85 But while the law allows some right of donation in the products of one's body, it shies away from treating human reproductive material simply as property.86 "The fact that it is appropriate for people to regard gametes as the possession of the provider in the sense that no one (including the government and medical research facilities) may commandeer them does not mean, however, that a gamete provider has the right to sell that material . . . The liberal ideal of 'self ownership' does not mean that we can do whatever we like with all our body parts."87

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85 *Ethical Considerations of the New Reproductive Technologies*, 46 **Fertility & Sterility** 89s (1986). The right of a person to sell her property is an ordinary incident of ownership, but the American Society for Reproductive Medicine limits payment to ova donors to compensation for inconvenience, time, discomfort, and risk and *not* the value of the donated ova; *see* Jay A. Soled, *The State of Donors' Eggs: A Case of Why Congress Must Modify the Capital Asset Definition,* 32 **U.C. Davis L. Rev.** 919 (1999) (noting that in reality ova donors are paid for their eggs and they should receive preferential tax treatment under the capital asset definition of the tax code).

86 The Uniform Anatomical Gift Act, 8A Unif. Law. Ann. 29 (1991) provides for organ donation, but by including restrictions and prohibiting sales, stops short of endorsing a property concept in human body parts. The National Organ Transplant Act, 42 U.S.C. §§ 273-274, supports organ donation but prohibits sales. *See also* Rubenstein, *supra* note 1, at 386-88 (analyzing posthumous corporeal rights).

87 Shanley, *supra* note 22, at 271 (concluding that conceptual models should be altered from ownership of gametes to one of stewardship).

In the Tennessee divorce appeal in *Davis,*88 the court grappled with how to decide a contest between a divorced couple over the disposition of their cryogenically preserved embryos.89 The court did not classify embryos as human persons since they have not been born or even implanted and developed to thestage of viability . This accords with the Supreme Court's interpretation of personhood in a constitutional sense as promulgated in Roe v. Wade.90 In *Roe,* the Supreme Court interpreted the word person as used in the Constitution to exclude the unborn.91 But the Tennessee court in *Davis* also declined to consider embryos as property because treating embryos as property would belittle their potential for human life.92 The court created an "interim

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[88] Davis v. Davis, 842 S. E.2d 588 (Tenn. 1992), *cert. denied, sub nom*., Stowe v. Davis, 507 U.S. 911 (1993).

[89] *Id.*

[90] Roe v. Wade, 410 U.S. 113 (1973).

[91] *See* Tracy Haslett, *J.B. v. M.B.: The Enforcement of Disposition Contracts and the Competing Interests of the Right to Procreate and the Right Not to Procreate Where Donors of Genetic Material Dispute the Disposition of Unused Preembryos,* 20 **Temp. Envtl. L. & Tech. J.** 195 at 214 (2002), *citing Roe* (noting that Supreme Court in the abortion context expressly rejected the view that embryos are legal persons from the moment of conception). *See also* **Experiments on Embryos** 68 (Anthony Dyson & John Harris eds., 1990) (discussing complication of finding "beginning" for human life). A fertilized egg cannot be considered a new individual because it is possible that two weeks later, it could split, creating twins. *Id.*

[92] *Davis*, supra note 88, 842 S.W.2d at 593. *See also* Moore v. Regents of the University of California, 215 Cal. App. 3d 709 (1988) (holding man did not have property interest in his removed spleen). Haslett, *supra* note 91, at 203 (most commentators believe that

category" that entitled the embryos "to special respect because of their potential for human life."93 In deciding *Davis,* the court permitted the donors who provided the genetic material that created the embryos to "retain decision-making authority as to their disposition."94 While *Davis* rejected an outright property analysis, it held that the husband and wife whose gametes were used to produce the embryo had an ownership interest at least to the extent of having the right to determine disposition of the embryos.95

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embryos are neither persons or property). Confusion over the property/person distinction is reflected in the view of one commentator who wrote that "[a]lthough embryos are legally chattel the prenatal transfer of property is supplemented by a home study and other processes that are characteristic of adoption." Crouch, *supra* note 19, at 32.

[93] *Davis*, supra note 88, 842 S.W.2d at 597.

[94] *Id.* The court concluded that in determining disposition of pre-embryos: (i) the first choice is the preferences of the progenitors, (ii) if those choices are in conflict or cannot be ascertained, a pre-existing agreement should be consulted and honored, (iii) and only if such an agreement does not exist should the relative interests of the parties be considered, with the interest of the party seeking to avoid procreation favored unless the other party cannot achieve parenthood by means other than utilization of the pre-embryos in question. *Id.* at 604.

[95] Samantha Hayden, *The Ambiguous State of Cryogenically Preserved Embryos: The Legacy of Davis v. Davis*, 15 **Mass. Fam. L. J.** 91, 96 (1997) (May 2001) (summarizing decision in *Davis).* While the embryos are frozen, both gamete donors have the same level of interest in them. Haslett, *supra* note 91, at 211 (analyzing difference between birth mother's and donor's relationship to embryo).

The Tennessee court declined to treat the product of human conception as mere property subject to division,96 and it appears unlikely that any court will ever treat embryos simply as property subject to division under a community property or equitable property divorce statute. Indeed, the proponents of embryo adoption who believe that the products of conception have human existence are likely to raise the strongest objections to treating embryos as mere property.

In A.Z. v. B.Z.,97 the Massachusetts court agreed with the Davis analysis at least as to the status of cryopreserved embryos as occupying an interim category between the category of personhood and property, ruling that embryos are deserving of special respect.98 In other words, in the thinking of the Massachusetts court, cryopreserved embryos are treated as legally being something between persons and property. An interim category is necessary because it enables the courts to avoid having to apply two inapplicable areas of the law; the law of custody, which applies only to children, and/or

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96 *Davis*, supra, note 88, 842 S.W.2d. at 588 (holding excess embryos resulting from IVF procedure are not property subject to division in a divorce action).

97 A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000) (divorce case in which husband obtained injunction preventing wife from using or donating cryopreserved embryos).

98 Id. See also King, supra note 22, at 113 (noting that use of the "special respect" category in the A.Z. v. B.Z. decision eliminated the need to resolve a dispute over embryos by using custody or property law analysis).

the law of personal property. There are only a few decisions, but A.Z. v. B.Z. reflects the prevailing view on the status of cryopreserved embryos.99

E. Embryo Adoption and the Implications for Abortion Rights

The use of the phrase "embryo adoption" might suggest that embryos are persons with full legal rights as are post-natal babies who are adopted in the traditional manner. An agency which promotes embryo adoption, Snowflake, embraces its Christian pro-life stance in using the phrase embryo adoption in part to elevate the status of the embryo to that of a person.100 However, such a view is not consistent with the legal status of the embryo.101 Affording embryos the status of persons would erode the legal theory on which the Supreme Court abortion decisions are based.[102] The longer the process is called embryo adoption and the more common it becomes, the closer society may creep toward the view that embryos are persons entitled to legal protection. This would

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99 "[T]he 'special respect' perspective is the currently prevailing view on the legal status of frozen embryos." King, surpra note 22, at 124.

100 The Snowflake program is run by an organization known as Nightlight Christian Adoptions. A Tale of Two Families, supra note 17.

101 See supra Part II-D (discussing prevailing legal view of status of embryo).

102 Bush to Promote 'Embryo Adoption, supra note 15
(explaining elevating status of embryo could support effort to roll back abortion rights by undermining the theory of Roe v. Wade).

challenge the basic premise of the right to choose abortion free from state interference. Maintaining an interim category for treating embryos somewhere between persona and property will insulate abortion rights from legal attack on the basis that embryos are persons.

F. Insuring the Dignity of the Embryo

A continuous increase in the practice of embryo adoption will force the development of legislative or court protocols to govern the procedure. For reasons discussed previously in this article, the standards developed should be consistent with the dignity or special respect concepts, and should not be based on existing adoption law, property law or child custody/personhood law. Under such standards, couples with excess embryos left over from IVF treatments would be able to donate them for use by an "adopting" couple or person as long as the innate dignity of the embryos is preserved. In order to promote this dignity, the donee couple must agree to assume responsibility for any child produced by the IVF and adoption procedure. This includes assuming responsibility for children born with genetic and/or physical abnormalities.

The law should also require a judicially pre-approved contract spelling out such issues as the responsibility of the donee couple for child support. If the donor couple is allowed visitation with any resulting child, this should also be covered in the agreement.

However, as to both child support and visitation, a court (not the contract) will have final power to resolve any disputes.

The argument might be made that the dignity of the embryo should preclude commercial sales. While embryos are not children in the legal sense, some will be offended by the idea that businesses could traffic in the selling of human embryos. Nevertheless, the reality is that commercialization of the embryo market is inevitable, given the already common practice of selling ova and sperm.[103] But even aside from the reality that simple demand for embryos will inevitably invite commercialization in a free market is the practical impossibility of drafting and enforcing laws which would prevent it. Clinics would find ways to compensate donors for their time, pain, inconvenience, travel, medical and other expenses and charge "service fees" etc. which in total would amount to considerable amounts, and thus avoid the stigma associated with outright sales of embryos. The Snowflake Agency, for example, promotes embryo adoption,104 and collects a fee from the adopting parents.105 The agency claims on its website that the

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[103] Shanley, *supra* note 22, at 257 (citing payments to egg providers); *Sperm Banks Go Online,* **Newsweek,** Apr. 21, 2003, page E14 (citing sales of sperm over the internet). The commercialization of assisted reproduction technology may be best reflected in a radio commercial used in Washington D.C. area traffic reports which proclaim "Genetics and IVF Institute of Virginia. Have a baby or your money back. Guaranteed." *Quoted* in Alvare, supra note 78, at 2.

104 See supra Part I-C (detailing story of an embryo match made by Snowflake).

105 SNOWFLAKES Frequently Asked Questions, at http://www.snowflakes.org/FAQs.htm#ap10 (last visited Apr. 17. 2003).

adopting parents' fee covers a homestudy, the matching of couples, maintenance of files, preparing legal documents etc. Such justification for fees avoids the stigma that the agency is involved in facilitating the sale of embryos between one couple and another.106 Justifying fees also permits clinics to avoid the language in some state statutes that might be interpreted to prohibit the payment of money for the transfer of cryopreserved embryos.107

While egg donation and surrogacy agreements routinely and justifiably provide reimbursement for "inconvenience, time, discomfort, and for the risk undertaken," any payment transactions involved in the transfer of donated embryos might be considered suspect.108 In comparison to egg donations, which involve medical care and inconvenience to the donor, arguably justifying payment of fees, donation of already produced cryopreserved embryos requires no further medical treatment. Therefore,

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[106] *Id*.

107 Susan Crockin, et al, **Adoption and Reproductive Technology Law in Massachusetts,** at §10.3.8 (2000) (commenting that some state statutes might be interpreted to prohibit sales of embryos).

[108] Susan L. Crockin, *Collaborative Reproduction: An Invitation to Legislate?* 72 **Fertility & Sterility** No. 5 (Nov. 1999). The American Society for Reproductive Medicine specifies that donors be paid for the "inconvenience, time, discomfort, and for the risk undertaken" as opposed to being paid for the eggs donated. Rubenstein, *supra* note 1, at 387. *See also* Stolberg, *supra* note 16, at p. 01G (noting that egg donors are compensated up to $15,000, but the donee of an embryo has to pay only the cost of the embryo transfer, i.e. about $3,000). As to commercial sales of sperm on the internet see *Sperm Banks Go Online,* **Newsweek**, April 21, 2003, P. E14 (disscussing the sale of gametes on websites offering sperm produced by donors with certain physical appearances, employment or religion).

anything other than a reasonable agency fee for matching couples in an embryo donation might be considered highly suspect and violative of statutes prohibiting the sale of embryos. However, even if anti-commercialization legislation was drafted and enforced, it would likely encounter constitutional problems as constituting a restriction on the "presumptive primacy of procreative liberty."[109] Certainly there are many that would argue that any governmental attempt to prevent access to reproductive technology capable of being marketed to infertile couples intrudes on fundamental liberty interests.

G. Potential Obstacles to Embryo Donation

Even if there is no money or sale involved, some statutes might even preclude the mere donation of embryos. For example, the Massachusetts statute prohibits the sale, transfer, distribution, or donation of embryos for experimental purposes.110 Whether such statutes apply to embryo donation depends on whether the donation of embryos to treat infertility amounts to "experimentation." Such a question is a specific statutory

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109 Naomi D. Johnson, *Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?* 68 **Brooklyn L. Rev.** 853, 879 (2003) (note summarizing constitutional theories which might be used to challenge government regulation of embryo donation) quoting Radhika Rao, *Assisted Reproduction Technology and the Threat to the Traditional Family,* 47 **Hastings L.J.** 951, 951 (1996).

110 See Mass. Gen. L. Ann., ch. 112, §12J (2003). "No person shall knowingly sell, transfer, distribute or give away any fetus for a use which is in violation of the provisions of this section." Id. For purposes of this statute the word "fetus" includes an embryo or neonate. Id. Conviction for violation of the statute can be punished both by fine and imprisonment. For a list of state laws prohibiting research on embryos and payments for embryos, see Table III, State Laws On Embryo Research and Commercialization, at http://www.kentlaw.edu/islt/TABLEIII.htm (last visited May 24, 2003).

interpretation for the courts to decide,111 although as IVF becomes more accepted as a common medical procedure rather than an experimental one, it becomes less and less likely that treatment for infertility will be considered "experimentation." Furthermore, in Massachusetts, some protection is offered to those experimenting with embryos. When a medical procedure using embryos is contemplated, the institutional review board can approve and document it and the protocol and approval submitted to the district attorney, which serves as a defense in any criminal action brought under the experimentation statute.112 As long as some states maintain criminal statutes which arguably could apply to IVF and embryo adoption, persons considering being embryo donors, donees or intermediaries must carefully consider the potential criminal liability.

H. Who is Eligible to Receive Donated Embryos?

It is black letter law that the legal system should promote the best interests of children. It must therefore be asked who should qualify as a potential donee parent(s) of surplus cryopreserved embryos. As a point of reference, when an embryo donation issue reaches a court, judges might initially apply the same principles that govern qualifying potential parents in traditional adoptions.

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[111] Crockin, supra note 107, §10.3.5 (discussing different interpretation of statutes prohibiting experimentation on embryos).

112 Mass. Gen .L. Ann., ch. 112, § 12(a)(VI) (2003).

In some jurisdictions, an unmarried person can legally adopt, and by the same token, a single woman should be eligible for embryo "adoption." Single women now routinely employ artificial insemination by donor sperm to get pregnant and parent alone. Following this trend, it is likely that single women will have a legally recognized right to gestate an "adopted" embryo. There is no longer a stigma attached to nonmarital children being raised in single parent homes, and it is unlikely that the legislature would intervene in a fruitless attempt to prohibit use of donated embryos by unmarried women.113

When IVF first emerged, only medically proven infertile couples could avail themselves of the service.114 Now, the standards are more lenient, and a showing of idiopathic infertility should suffice.115 The law is unlikely to impose an infertility standard as a perquisite to "adopt" surplus embryos. Given the trend with IVF, it is unlikely that the service will be limited to a certain genre of people. In many states, such

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113 Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family,* 92 **Utah L. Rev.** 158, 189 (1996).

114 George J. Annas, *Commebtaries Human Cloning: A Choice or an Echo? 2*3 **Dayton L. Rev.** 247, 260 (1998). See also A Glossary of Infertility Terms and Acronyms, at http://www.inciid.org/glossaryijk.html (last visited Oct. 25, 2001). Infertility is "[t]he inability to conceive after a year of unprotected intercourse in women under 35, or after six months in women over 35, or the inability to carry a pregnancy to term. Also included are diagnosed problems such as anovulation, tubal blockage, low sperm count, etc."

115 Id. A few states, including Florida, New Hampshire, and Virginia continue to limit the use of surrogacy to infertile couples. For a complete list of surrogacy laws, see Table IV – State Laws On Surrogacy, at http://www.kentlaw.edu/islt/TABLEIV.htm (last visited May 24, 2003).

as in Massachusetts, same-gender couples can adopt and therefore, same-gender couples would be eligible embryo donees.116 It is likely that an attempt to exclude same-gender couples and/or singles from adopting embryos would not withstand judicial scrutiny. A legal requirement for racial matching between donors and donees would be constitutionally unenforceable, as would a judicial enforcement of a racial-matching contract governing embryo transfer. However, even if not specifically enforceable in a court of law, presumably a private arrangement to provide a racial match would not offend the law.117

I. Embryo Creation

Another consideration is whether couples will be able to intentionally create embryos for other couples. Initially, embryo donation surfaced as a solution to alleviate the problem of the existence of thousands of surplus cryopreserved embryos.118 Now, however, couples can create custom made embryos.119 While embryo donation refers to

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116 Adoption of Tammy, 619 N.E.2d 315, 317 (Mass. 1993) (holding adoption statute does not preclude same-gender joint adoption).

117 See infra Part II-N (discussing private eugenic arrangements).

118 Some patients were notified that clinics no longer wanted to store their embryos and some who had religious or moral objections to discarding them chose to donate them to other infertile couples. Cooper & Glazer, supra note 15.

119 See *Embryo Adoption: The Future is Now,* supra note 15 (explaining made to order embryos). A best interests of the parents approach will supercede a best interests of the child approach if eugenic embryo creation is permitted. See id. But some have argued that the potential to make a pre-designed child by embryo selection is a valid reason for government regulation of assisted reproduction, as distinguished from coital

the donation of an existing embryo, embryo creation contemplates creating embryos with donated or purchased eggs and sperm.120 Embryo creation is attractive to couples who lack viable gametes and to those who may favor custom making their embryos to enhance genetic selection. Embryo creation enables couples to create embryos from the gametes of hand picked donors.121 Without a doubt, embryo creation will fuel heated ethical debates over whether the procedure is tantamount to creating children for adoption or whether it is merely a logical and inevitable extension of single gamete donation.122

It is already documented that couples have created embryos through IVF for the sole purpose of using the resulting child to save an existing child.123 Jack and Lisa Nash's first child Molly, for example, was born with Fanconi anemia (FA), a rare genetic disease that leaves the inflicted vulnerable to breakdown in bone marrow, and at risk for infection and leukemia. The Nashes learned that they both carried a mutation for FA in the same gene, and that their children would have a one-in-four chance of developing FA.

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reproduction. See Alvare, supra note 78.

120 Cooper & Glazer, supra note 15.

121 Id.

122 Id.

123 David Wasserman, *Having One Child to Save Another: A Tale of Two Families,* 23 **Phil. And Public Policy Q.** 21 (Winter/Summer2003) ;Gurney Williams III, *Made to Order Baby,* **Parenting,** at 100 (June/July 2001) (discussing conception of a child to produce a tissue donor to save an earlier-born child)..

They also learned that the only way to save Molly was to get her a bone marrow transplant. They underwent IVF with therapeutic intent, which involved creating embryos with their gametes, genetically testing and discarding those embryos with the feared mutation, and implanting only healthy embryos. As a result, Adam was born, and Molly was cured using blood drained from Adam's umbilical cord. Creating Adam to save Molly raised an ethical debate, but nevertheless, the practice will no doubt be repeated. Presumably, couples like the Nashes have paved the way for future use of embryo creation as a means of addressing medical problems.124

J. Post-birth Contact between Donor and the Child

In recent years there has been growing interest in the theory of "open adoption."125 This refers to the fact that subject to the right of final decision-making in the adoptive parents, legislation,126 or court rulings,127some form of post-adoption visitation exists between the child and its biological parents. The Snowflake Agency, for example, encourages open adoption, and most likely leaves visitation arrangements up to

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124 Id., Williams (detailing Nash's story).

125 Cook, *Open Adoption,* 30 **J. Fam. L.** 471 (1991-92); Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice,* 75 **Boston U. L. Rev.** 997 (1995).

126 See Mass. Gen. L. Ann., ch. 210, § 6C (2003) (authorizing court approval of a written agreement between biological parents and adoptive parents for post-adoption contact or communication).

127 Adoption of Vito, 728 N.E.2d 292 (Mass. 2000) (providing in dictum that a court hearing an adoption petition may employ its equity powers to provide for post-adoption visitation with biological parents).

the couples who use the service. Since embryo "adoption" is not legal adoption, statutes and case law applying open adoption rules do not expressly apply. However, there is no bar to the parties from entering into a visitation contract enabling the embryo donors to visit with any resulting child. A court, however, may decline to specifically enforce such an agreement.128

Open embryo adoption arrangements can be fraught with difficulty. Case law involving known sperm donors offers an analogous point of reference. Although donor insemination statutes exist in some states to protect the rights of donors, they usually only apply to anonymous donors and/or to married women, or contemplate that the insemination be performed by a physician.129 Therefore, such statutes do not protect known sperm donors, any may not even apply when anonymous donors donate to unmarried women or when women inseminate themselves, without the assistance of a physician.130 In addition to the known donor's rights being at stake, the donee's rights can also be compromised, as evidenced by cases where known donors have successfully

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128 See supra Part I-C (relaying story of an open embryo adoption).

129 Brashier, supra note 113, at n. 326. For a list of states with donor insemination statutes, see *Table I, Artificial Insemination Donation*, *at* http://www.kentlaw.edu/islt/TABLEI.htm (last visited May 24, 2003).

130 Brashier, supra note 113, at n. 326. Prior to the enactment of New Jersey's artificial insemination statute, a known sperm donor who provided sperm to an unmarried woman was considered the legal father, even if that was not his original intention. C.M. v. C.C., 377 A.2d 821, 824 (N.J. Juv. & Dom. Rel. Ct. 1977).

asserted parental rights.131 Courts have weighed factors such as the mother's marital status and the existence of an agreement between the parties when determining a donor's parental rights.132 Although the existence of a contract would certainly help to clarify the interests of all the parties, there is no guarantee that the original intent of the parties entering into an open embryo adoption arrangement will be honored in the event that one of the parties has a change of heart.

In the opinion of the authors, anonymous embryo donations, resembling the closed adoption system, are less risky than having an open arrangement. Some programs maintain the anonymity of embryo donors, providing adopting parents only with medical information about the gamete providers.133 The statutes that exist in some states to extinguish the rights and responsibilities of sperm donors could offer a point of reference for anonymous donating couples in embryo donation scenarios. Many states have statutes that protect donors in artificial insemination by a nonspousal donor (AID).134 Courts have construed these statutes to mean that donors have no parental

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131 In re Thomas S. v. Robin Y., 618 N.Y. S.2d 356, 357 (App. Div. 1994), motion for stay granted, 650 N.E.2d 1328 (N.Y. 1995) (holding agreement between known gay sperm donor and lesbian birth mother to terminate his parental rights unenforceable).

132 Brashier, supra note 104, at 191-92.

133 *Embryo Adoption- The Future is Now,* supra note 15 (discussing anonymous embryo adoption).

134 Brashier, supra note 113, at 189 (discussing AID statutes). The statutes were enacted to define the rights and obligations of the parties when the donor is anonymous. Id. For a list of states with donor insemination statutes, see *Table I, Artificial*

responsibilities and that any resulting children have no right to inherit from or through their genetic father, even if his identity is later discovered.135 Such statutes were enacted to protect donors from the possibility of facing paternity suits as a result of their donation.136 Statutes similar to those that protect sperm donors could be enacted for embryo donors, insulating donors from any later claim by the donee parents and/or resulting children. In the absence of a statute governing the matter, a court faced with a dispute between donee parents and/or resulting children against the gamete providers could reference law dealing with anonymous sperm and egg donors. Although the determination of any outcome would be speculative at best, donors are more likely to be protected in anonymous situations than in situations where the donors are known.

If the issue of the legal status of the embryo donees is clarified by a post-birth adoption of the child, and if the state recognizes open adoption, that law could be employed to provide for visitation. While it would be ideal for courts to honor the intent

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Insemination Donation, *at* http://www.kentlaw.edu/islt/TABLEI.htm (last visited May 24, 2003).

135 Brashier, supra note 113 at 190-91. See e.g., In re R.C., 775 P.2d 27, 30, 33 (Colo. 1989) (noting agreement between mother and donor not considered in determining parental rights and responsibilities where donor is anonymous; that anonymous donors likely would not have donated semen if they could have later been found liable for support obligations; and that women likely would not use anonymously donated semen if they might have to share parental rights and duties with donor/stranger). For a list of the twenty-two states where anonymous sperm donors are not the legal fathers, see *Table I, Artificial Insemination Donation, at* http://www.kentlaw.edu/islt/TABLEI.htm (last visited May 24, 2003).

136 Brashier, supra note 113, at 190.

of the parties with regards to visitation as outlined in their pre-natal contract, it is doubtful that a court would enforce it to compel visitation over the objections of the adoptive parents.137 However, requiring all recipient couples to proceed with traditional adoption processes to terminate the rights of biological parents would be administratively burdensome and could deter the development of the practice of embryo donation.138

In an ideal world in which embryo adoption flourished, the donor's parental rights would be legally terminated upon embryo transfer. Also in this ideal world, a declaration of legal parentage of the donees would be permitted, allowing the names of the intended parents to be placed on a birth certificate. Also, a hearing would be held to validate pre-

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137 Generally parents have the right to exclude non-parents from visiting with their children. Troxel v. Granville, 530 U.S. 57 (2000) (recognizing due process rights of parents not to be compelled by courts to allow visitation with a non-parent such as grandparents). But see, A.L.I., Principles of the Law of Family Dissolution, § 2.03(1) (Tent. Draft No. 3, Part 1) (1998) (proposing to allow de facto parents to visit with children over parental objections in certain circumstances); Charles P. Kindregan, The Non-traditional Family: Visitation and the New Concept of the de facto Parent, 17 Mass. Fam. L. J. 112 (Jan. 2000) (discussing situations in which a non-parent may obtain a court order for visitation).

138 In Massachusetts, where same-gender co-parent and stepparent adoptions are becoming increasingly common, the Probate and Family Courts now permit motions to waive homestudies and motions to waive the six month residency requirements administratively, rather than having the parties appear twice as they formerly did; once to approve the motions and once to finalize the adoption. Mass. Gen. L. c. 210, § 5A authorizes the court to waive the homestudy and residency requirement when one of the petitioners is the parent of the child being adopted, which is very common in same-gender adoptions and step-parent adoptions.

birth contracts, as the new Uniform Parentage Act suggests, and the contract would be enforceable. If such procedural steps were permitted by the law to ensure the enforceability of a pre-birth contract, it is more likely that a court would enforce any visitation arrangement stipulated in that contract. The problem is that these are *ideal* solutions, but in most jurisdictions there is little or no legal basis for them. It is unlikely that all state legislatures will move to provide a statutory basis for pre-birth embryo contracts so that it will be left to the courts to gradually create procedures to deal with the matter.

K. Inheritance Considerations

The debate over whether the intended parents, the biological parents, and/or the birth mother are the legal parents has obvious implications on the inheritance rights of children resulting from reproductive technologies. Before reproductive technologies existed, posthumously born children were always born within nine months of their biological father's death. Such children are considered legal heirs and are entitled to inherit from their father's estate. Cyropreservation technology for embryos, however, permits the existence of "heirs" several years after the death of either one or both genetic parents. The inheritance rights of these children is far less certain than those conceived through sexual intercourse and born within nine months of their father's death.

Inheritance issues of potential heirs were presented in 1984, when an American couple died in an airplane accident after depositing fertilized ova in a clinic in Australia,

leaving no will and a substantial fortune.139 The clinic storing the embryos was inundated with calls from potential surrogates, attempting to cash in on potential inheritance rights of any resulting children.140 Since then, several cases have presented similar questions. For example, in the California case of *Hecht*141 the former wife and children of a deceased man opposed the release of his cryopreserved sperm to his mistress to whom he had willed the gametes and sought a judicial order to destroy the sperm; on appeal the court ruled that no public policy prevented a single woman from using sperm for post-mortem conception even if it were to extend the administration of the estate pending possible conception and birth of afterborn children.

In the Massachusetts case of *Woodward*142 the court determined that artificially conceived children born more than nine months after their father's death may inherit

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139 State of Victoria, supra note 7, at 741; Constance Holden, *Two Fertilized Eggs Stir Global Furor,* 225 **Science** 35 (July, 1984).

140 Holden, supra note 139, at 35. The issue was further complicated because the sperm used was not the husband's. Id.

141 Hecht v. Kane, 16 Cal.App.4th 836 (1993).

142 Woodward v. Commissioner of Social Security, 435 Mass. 536, 537-38 (2002). After Lauren Woodward's husband, Warren, was diagnosed with leukemia, the childless couple had Warren's sperm medically withdrawn and preserved in case his leukemia treatment left him sterile. Warren died soon thereafter. Two years later, Lauren gave birth to twin girls conceived through artificial insemination using her deceased husband's preserved sperm. Subsequently, Lauren applied for Social Security survivor benefits for her children but was denied when the administrative law judge ruled that the children were not "ascertainable heirs as defined by the intestacy laws of Massachusetts." On certified questions submitted by the federal court to the state supreme court it was determined that a posthumously conceived child may inherit from a decedent under

under certain circumstances. The court ruled that a posthumously conceived child may inherit if the surviving parent or legal representative proves the decedent is the genetic father of the child; and that the decedent affirmatively consented to use of sperm for posthumous conception and to the support of any resulting child.143 Even where such circumstances exist, however, time limitations may preclude a posthumously conceived child's inheritance rights.144

Clarification of inheritance rights of any resulting children is another benefit to obtaining a declaration of legal parentage prior to the child's birth in an assisted reproduction scenario. If such a declaration can be obtained under applicable state procedure, legal parentage is established and any rights of the child to the estate of the embryo donors' estates are extinguished. Nevertheless, it is advisable for embryo donors to establish in their wills their intent to exclude from inheritance any children resulting from their donated embryos (if that is in fact what they wish). If a will does not contain such language, it is possible that a resulting child could make a claim against its biological parents' estates under a pretermitted child statute, which protect biological children who are not specifically provided for in their parents wills. The law presumes that such children were left out mistakenly and permits them to inherit, absent express

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certain circumstances. Id. at 537.

143 Id. at 538.

144 Id.

language in the will excluding them from inheriting. Therefore, in order to avoid such claims, biological parents who donate their embryos should consider specifically and expressly excluding children conceived by embryo donation in their wills.

The estates of embryo donors who die without wills will be governed by the laws of intestacy. For example, under the Massachusetts intestacy statute, if a decedent leaves issue, the issue inherit a fixed portion of his real and personal property, subject to debts and expenses, the rights of the surviving spouse, and other statutory payments.145 The term "issue" means all lineal (genetic) descendants, which obviously would include children resulting from the embryos produced by the gametes of the deceased person. Furthermore, the Massachusetts intestacy statute does not contain an express, affirmative requirement that posthumous children must "be in existence" as of the date of the decedent's death.146 Arguably, children who come into existence after the deaths of their genetic parents could have a claim against the estates of those parents when a legal adoption of the child has not occurred before their death(s). Furthermore, children born out of wedlock are for the most part treated equally with marital children, and since posthumous children born after the father's death are technically not born in the marriage,[147] they are entitled to the same rights and protections of the law as children

145 Mass. Gen. L. Ann.,ch. 190, § 1 (2003).

146 *See* Mass. Gen. L. Ann., ch. 190, § 8 (2003).

[147] See Mass.Gen. L., ch. 209C, § 5(a) (2003) (when a child's birth occurs within 300 days of the termination of the marriage by the father's death the statutory presumption of

conceived before death.148 Although legislators did not anticipate such claims when they drafted intestacy statutes, applying such laws to embryo donation would leave embryo donors' estates subject to claims by any and all genetic children, except those adopted after birth. Although the success of these types of claim are not certain, couples considering donating their embryos should consider having a will to negate any such possibility.

L. Misappropriation of Embryos:

California has enacted a law making it a crime to misappropriate embryos.149 As a matter of first impression one might think that imposition of criminal liability for misusing embryos is unnecessary. However, embryos have real financial value, and people desperate to have a birthed child may pay substantial amounts of money for IVF without knowing that the child they produce was actually generated by another couple. This actually occurred at a clinic at the University of California at Irvine. In 1995, it became public that ova produced by female patients were being transferred to

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the father's parentage applies; the paternity of a a child born after that period must be established by a parentage judgment).

148 *See* Mass. Gen. L. Ann., ch. 209C, § 1(children born out of wedlock are entitled to the same protections as all other children).

149 Cal. Penal Code, § 376g. For a description of California legislation and regulation of ART programs, see *Section IV: Regulation and Oversight of ART Programs, at* http://www.ucop.edu/healthaffairs/reports/art/sec4.pdf (last visited May 24, 2003).

other patients for profit.150 Later it was learned that not only ova were misused but also that as many as 500 couples were potential victims of embryo misappropriation at the University clinic.151

M. Malpractice Liability:

Whenever medical services are engaged there is potential tort liability if those services are not performed at a level of due care and the patient is caused injury by the act or omission. No reported malpractice cases to date involve voluntary and consensual embryo adoption, but the potential for malpractice in such cases is illustrated by the cases involving other reproductive technologies.

Obviously, a physician who uses an embryo produced by a couple without their permission to implant in another patient is exposed to financial liability. The lawsuits which grew out of the University of California at Irvine scandal152 are testimony to that. Injuries to the couples whose eggs or embryos were misappropriated include a lost ability to have children, inability to raise the resulting child in their own

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150 Blum, *supra* note 2.

151 Blum, supra note 2 (reporting study of the inventory, tank logs and other documents by attorney for clinic patients).

152 See supra Part II-L.

religion when the embryos were given to couples practicing a different religion, and depression from the belief that they have biological children they will never know.153

A similar but distinguishable situation exists when without the knowledge of a female patient, medical personnel fertilize her eggs with sperm of a man other than her husband or male companion and then implant the resulting embryo. Although it did not involve embryos, the infamous case of Dr. Cecil Jacobson who used his own sperm to impregnate his artificial insemination patients rather than that of donors or husbands 154 highlights a potential danger for misuse of gametes in the IVF process. An incident in Florida also illustrates this danger. A Caucasian woman and her African-American husband provided their eggs and sperm for the clinic to fertilize *in vitro* as part of the IVF procedure. But subsequent DNA testing showed that the after-born twins were only genetically related to the wife and not to the husband. The clinic used the sperm of someone other than the husband to produce the embryos.155 This resulted in a lawsuit against the clinic which was settled. Damages included the loss of the chance to have a child which was genetically related to both the husband and wife, the consequent divorce of the couple, and an agreement that the husband was not liable for support of the

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153 Liebler, supra note 74, at n.20 (summarizing various types of claims growing out of the University of California at Irvine fertility scandals).

154 Jacobson was sentenced to five years in prison and his conviction was affirmed. United States v. Jacobson, 4 Fed.3d 987 (4th Cir. 1993) [unreported], cert. denied, 511 U.S. 1069 (1995).

155 See details in Liebler, supra note 74, at 37-44 and sources cited therein.

children.156 Negligence in producing and implanting embryos was also illustrated by the *Perry-Rogers* case discussed earlier in this article, where a woman gave birth to two children of different races.157

The wrongful birth cases are also relevant. For example, in the *Viccaro* case the Massachusetts court ruled that a married couple who were given negligent preconception genetic counseling could recover damages for extraordinary medical and educational costs associated with the birth of a child with severe genetic defects since they would not have had the child had the genetic counselors informed them of the serious risks of having a child with such defects.158 There are clinics which provide embryos of anonymous donors for "adoption" by couples seeking to have a child,159 which raises the potential of clinic liability in the selection and screening of gamete providers. Case law suggests that a reproductive clinic owes a duty of due care to screen

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156 Liebler, supra note 74, at 37-44; See also Sarah Lyall, British Judge Rules Sperm Donor is Legal Father in Mix-up Case, **N.Y. Times Int'l.**, Feb. 17, 2003, at page A5 (requiring man whose sperm was mistakenly used to fertilize the eggs of a woman undergoing IVF treatment to pay child support while English couple retains child custody, but granting sperm donor some legal input in raising child).

157 See supra notes 73-76 and accompanying text (explaining facts in *Perry-Rogers*).

158 Viccaro v. Milunsky, 551 N.E.2d 8 (Mass. 1990) (but damages for emotional distress offset by emotional benefits parents enjoy from the companionship with the child).

159 Embryo Adoption - The Future is Now, supra note 15 (reporting study of the inventory, tank logs and other documents by attorney for clinic patients) (citing University of Iowa Health Center).

donors in surrogacy cases,160 and it follows that they would owe the same duty of care in embryo adoption cases.

N. Eugenic Considerations:

An argument could be made that the state or federal government should enact regulations designed to control the transfer of embryos. Such regulations could be based on the power to regulate health by requiring the testing of donors of eggs, sperm or embryos before they are used in assisted human reproduction procedures.[161] Such regulations would be based on a negative eugenics theory, i.e. limiting the dangers of transmission of disease or genetically-related disease to the donee and child. Initially, state law restricting HIV-infected couples from using assisted reproductive technologies to have a child may have seemed like a sensible form of negative eugenics given the danger of AIDS. However, the development of newer technologies for minimizing the chances of HIV transmissionsmay now result in an inference that such laws are unduly

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160 Stiver v. Parker, 973 F.2d 261 (1992) (for-profit surrogacy clinic held liable for failure to screen sperm donors when sexually transmitted disease was a foreseeable risk and the child conceived by the procedure contracted cytomegalis inclusion disease); Huddleston v. Infertility Center of America, Inc., 700 A.2d 453 (Pa. App. 1997) (holding clinic owes surrogate mother and child a duty to protect them from foreseeable risks).

161 New Hampshire became the first state to require by law that couples undergoing In Vitro Fertilization must first submit to medical examinations. See N.H. Rev. Stat. Ann. § 168-B: 14.

burdensome and perhaps violative of the Americans with Disabilities Act.162 Government has a dismal record enacting legislation affecting human reproduction and the danger exists that once government gets involved in eugenic choices it will become manipulative to produce certain socially or politically desirable results.

In the first half of the 20th Century, the fear that the United States would be overrun by incompetent children being born to incompetent parents led many states to enact compulsory eugenic sterilization laws. Under these laws, mentally retarded persons of child-bearing age could be forcibly rendered infertile.163 Notwithstanding the fact that the Nuremberg War-Crimes Tribunal denounced the Nazi practice of using compulsory sterilization to prevent the birth of undesirable persons, an earlier Supreme Court164 decision upholding the practice in this country has never been overruled. While it is unlikely that a modern American legislature would enact a compulsory eugenics law regarding embryo transfer, even a law limiting who may donate embryos

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162 Lynn M. Zuchowski, *The Americans with Disabilities Act-Paving the Way for Use of Assisted Reproductive Technologies for the HIV-Positive,* XXXVI **Suffolk Univ. L. Rev.** 185 (2002).

163 See Charles P. Kindregan *Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States,* 43 **Chi-Kent L. Rev. 1**23 (1966) (surveying the history and legal development of compulsory eugenic sterilization).

164. Buck v. Bell, 274 U.S. 200 (1927) (upholding the power of the state to compel the sterilization of a mentally retarded woman on eugenic grounds).

based on eugenic factors would be viewed by many as an unwarranted intrusion into an area where private choice had previously held sway.

It is likely, however, that private eugenic arrangements will be attractive to some people. These may be based on a desire for children of a particular gender165, or a certain race,166 or with other attractive characteristics.167 In traditional adoption scenarios, strong arguments have been made for and against racial or ethnic matching, which offer a point of reference for embryo adoption.168 The Indian Child Welfare Act, for example, was enacted to limit the removal of Indian children from their families and the placement of such children with non-Indian families, citing the deleterious effect of

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165 Kenan Farrell, Where have All the Young Girls Gone? Preconception Gender Selection in India and the United States, 13 **Ind. Int'l. & Comp. L. Rev.** 253 (2002) (noting the use of abortion in India to eliminate female fetuses and that while this is not common in the U.S. the potential for using new pre-conception reproductive technology to achieve gender selection without the need for abortion may increase gender selection here).

166 Weinder & Andrews, supra note 34, at 16 (reporting a college newspaper advertisement for an egg donor offering to pay $80,000 to a Caucasian woman with an SAT score of about 1300).

Expectations in regard to the appearance of a child may of course exceed reality. The comment of the famous Irish wit George Bernard Shaw should be recalled when he rejected the request of an attractive woman to bear his child with the comment that the child might have her mind and his looks. Referenced in Walter Wadlington & Raymond C. O'Brien, **Domestic Relations-Cases and Materials, 5th Ed.** (2002), n.14, at 697-98.

167 Weiner & Andrews, supra note 34, at 16 (noting an advertisement for an auction of donor eggs from fashion models on the Internet to persons willing to pay up to $150,000 in hopes of having a physically attractive child).

168 Douglas E. Abrams & Sarah H. Ramsey, **Children and the Law** 502 (2000).

denying Indian children exposure to the ways of their people.169 Furthermore, the National Association of Black Social Workers opposes transracial adoption claiming it deprives black children of their heritage.170 It is uncertain whether such opposition will exist with embryos, as it does with children. While a best interest of the child approach may work for existing children, it might not be as easily applied to potential children.

Further complicating the eugenics concerns are couples who wish to select for disability by using IVF and preimplantation genetic testing to ensure their children's genetic heritage reflects their parents disability.171 A dwarf couple, for example, could use genetic testing to implant only those embryos carrying the achondroplastic gene, so as to ensure they would have a dwarf child.172 Likewise, a deaf couple could make hearing choices for children by using preimplantation genetic diagnosis and embryo transfer.173 Such considerations present questions such as whether being a dwarf or

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169 Id. At 93-94. An effort is made to place Indian children in foster or adoptive homes that reflect Indian heritage. Id. at 94. The statute is 25 U.S.C.A. §§ 1901-1963 (2003).

170 Abrams & Ramsey, supra note 168 at 502.

171 Dena S. Davis, **Genetic Dilemmas** 51-52 (2001).

172 Id.

173 Id. Connexin 26 is a recently discovered genetic mutation that is responsible for approximately half of all genetic deafness. Id. at 51. If both male and female have the connexin 26 mutation, they have a one in four chance of having a deaf child naturally. Id. Through IVF and preimplantation genetic diagnosis, however, they can transfer into the uterus only deaf embryos, to ensure they will have a deaf child. Id.

being deaf are disabilities that compromise quality of life and therefore, should not be purposefully selected.174 No matter what the law is or may be, it is obvious that some people will make private attempts to achieve a eugenically desirable outcome in egg, sperm and embryo donation.

O. Legislative Regulation and Political Considerations:

Once the state becomes involved in regulating human reproduction, the attractiveness of politically favored doctrines becomes a real danger. History demonstrates this all too amply. The federal Comstock Law175 reflected the Victorian anti-contraceptive attitudes and banned the introduction of contraceptive devices and information into interstate commerce. The 19th Century fear that the prevailing family order would be upset if women were able to assert control over their own reproductive choices was reflected in the fact that until 1944, federal law banned the use of the mails to transmit information about contraception.176

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174 Davis, supra note 171, at 52-63 (discussing whether being deaf is a harm). Some deaf people argue that deafness is a linguistic and cultural identity rather than a disability. Id. at 52.

175 17 Stat. 598 (1873).

176 The ban was overturned in Consumers Union of the United States v. Walker, 145 F.2d 33 (D.C. Cir. 1944) (ruling that consumer magazine could mail material dealing with contraceptives to married couples).

The politicization over the debate as to whether the Food and Drug Administration should permit the use of mifepristone (RU- 486) demonstrates how politics and the science of reproduction become embroiled in political controversies even today.177 The history of state involvement in regulating human reproduction also provides a number of other illustrations of how reproductive choices can be made captive to a political viewpoint. These involve statutes which were based on prevailing morality and regulated private choices to limit reproduction. Until the Supreme Court affirmed the right of a woman to terminate her pregnancy during the early stages free from state interference178 states enacted a wide-range of laws imposing criminal penalties to prohibit or strictly regulate the termination of pregnancy.179 Some states criminalized the use or sale of contraceptives until the Supreme Court ruled that married couples,180

177 Regarding the debate over RU-486 see generally Leonard A. Cole, *The End of the Abortion Debate,* 138 ***U. Pa. L. Rev.*** (1989); See also David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective,* 62 **Alb. L. Rev.** 833 (1999); Lawrence Lader, **A Private Matter: RU 486 and the Abortion Crises** (1995).

178 Roe v. Wade, 410 U.S 113 (ruling that the right of privacy protects a woman's right to choose abortion free from state prohibition during the early stages of pregnancy as a matter of due process).

179 For a discussion of state statutes regulating abortion prior to the decision in Roe v. Wade see Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes,* 46 **N.C. L. Rev.** 730 (1968).

180 Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing that the right of privacy insures that a married couple can have access to contraception and contraceptive counseling free from state interference).

unmarried persons181 and minors182 had a right to gain access to these common means of protection against unwanted pregnancy.

While the fear that attempts to legislate embryo donation could become entangled in political debates over morality and religion may prove unfounded, it is just as possible that the fear will be realized. Experience demonstrates the fact that controversies over matters related to human reproduction in a democratic society tend to become highly political. Debates over such current issues as regulation of stem-cell research, prohibitions on reproductive cloning[183] and whether the use of RU 486 should be legalized suggest the nature of the problem. The famous maxim of Oliver Wendall Holmes that a "page of history is worth a volume of logic"184 is worth considering in the light of this history.

The absence of controlling legislation will leave resolution of complex issues involving embryos to the courts to be decided on a case-by case basis. It has been

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181 Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding state cannot convict a man of distributing contraceptive to an unmarried college student).

182 Carey v. Population Services International, 431 U.S. 678 (1977) (declaring unconstitutional a state statute which prohibited the sale or distribution of contraceptives to minors).

183 For a list of state legislation governing cloning, see State Cloning Legislation – May 2003, at http://www.kentlaw.edu/islt/StateCloningLegislation.pdf (last visited May 24, 2003).

184 Oliver Wendell Holmes, quoted in Santosky v. Kramer, 455 U.S 745 at 769 (1982).

suggested that the inability of the legislatures or the courts to develop a coherent body of law governing embryo donation will at some point in the future require the Supreme Court to step in and develop an analysis.185 Whether this is true or not, for the present, the matter of disposing of embryos is likely to come up in a number of different legal contexts, and the courts will be hard-pressed to find common ground. This being so, judges will be inclined to look to various legal analogies, including those discussed in this article. These include the law governing adoption, gestational surrogate parenting, sperm and egg donation, property and personhood. No one analogy fits embryo transfer perfectly, but some are better than others. As expressed earlier in this article, the intent-based formula towards legal parenthood developed in the gestational surrogacy cases seems most useful at this point in time.

III. Conclusion:

Lawyers and judges are trained to think by analogy when they confront a new reality. This article has shown that the use of the adoption analogy to categorize the transfer of a cryopreserved embryo to a recipient is far from perfect. We believe that

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185 Jill Madden Melchoir, Cryogenically Preserved Embryos in Dispsitional Disputes and the Supreme Court: Breaking Impossible Ties, 68 **U Cin. L. Rev.** 921 (2000) (suggesting a lack of regulation and likely inability of courts to reach on consensus on disposition of the growing number of crypreserved embryos makes it likely that the Supreme Court will ultimately address the matter).

embryo "donation" is a more accurate term than embryo "adoption" because it is consistent with both reality and the existing case law. The analogy of gestational surrogacy is also helpful, especially as the law governing those cases has come to focus more on the intent of the parties in resolving disputes than on such static matters as who gave birth or who provided the gametes.

The decisions which treat embryos in an interim category between property and personhood is also helpful. Embryos deserve special respect because of their potential for fully-developed human life. But cryopreserved embryos are not legal persons entitled to legal protection under existing law. Whatever one's views about modern reproductive technology, an analysis of the law governing cryopreserved embryos ought not to become entangled with the fury of the debate over abortion, and deserves to be viewed on its own merits or demerits.

The word "donation" defeats any implication that the law governing adoption controls the procedure. Although some religious agencies advocate the term embryo donation, they can advance their cause for saving embryonic life without pushing for the legal consideration of embryos as persons. Donation implies something generous, i.e. giving to another the potential of life, the ability to bear a child. This essentially is what is involved when one couple provides their embryos to another couple. There will be some who will argue that the law of the marketplace should prevail in embryo transfer. But if the practice is to become one of true donation, then at least ideally it should not

become unduly entangled in commercial transactions based on the purchase and sale of embryos. The commercialization of ova and sperm banking provides a poor example for embryo donation, which is much more complicated because it involves two persons rather than one. However, notwithstanding this, statutes which outlaw the payment of money for eggs, sperm or embryos are likely to prove unenforceable. The continued availability of large numbers of unused cryopreserved embryos suggests that the law of supply may control rather than the law of demand, reducing the attractiveness of widespread commercialization of the procedure.

As embryo donation becomes more common, the courts will be forced to confront the application of personal injury law, property, contract, and probate and family law doctrines to the procedure. In the absence of legislation the courts will have to do this on a common law basis or in the development of equity doctrines. As the problems associated with the procedure become more obvious in the court cases, it is to be hoped that the legislatures of the various states will respond with the enactment of statutes which address problems of embryos from the viewpoint of areas of the law in which an existing body of law is already available. This includes the law of custody, support and contract. But the danger of asking the political branches of government to resolve embryo transfer issues by legislation is that they will become entangled in religious and political conflicts which will make the law either oppressive or unresponsive to the legitimate reproductive needs of people.

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