

**ARE YOU MY MOMMY?
A CALL FOR REGULATION OF EMBRYO DONATION**
MICHELLE L. ANDERSON*

*Are you my mother?*¹

INTRODUCTION

John and Mary Smith² tried for two years to start a family, but they were unsuccessful.³ Their options were adoption or assisted reproduction.⁴ They wanted their own children, so they decided to try assisted reproduction first.⁵ After undergoing testing, they underwent an in vitro fertilization procedure.⁶ The procedure was successful and produced eleven viable embryos.⁷ Three of these embryos were transferred to Mary; the rest were stored for later use.⁸ Unfortunately, the first attempt was not successful, so they tried again.⁹ Three of the stored embryos were again

Copyright © 2006, Michelle L. Anderson.

* J.D., 2006, Capital University Law School, B.S.N., 1999, University of Cincinnati. The author would especially like to thank Teresa Anderson, B.S.N., R.N. and Elizabeth West, R.N.C., B.S.N. from the Institute for Reproductive Health in Cincinnati, Ohio, for their invaluable assistance with this Comment. Also, many thanks are extended to the editors who assisted with this work.

¹ P.D. EASTMAN, ARE YOU MY MOTHER? 22 (1960).

² The names have been changed to protect the privacy of the individuals who discussed their experiences with the Author.

³ Telephone Interview with Anonymous Sources (Nov. 30, 2005) [hereinafter Anonymous Interview I].

⁴ *Id.* Assisted reproduction refers to the wide variety of medical treatments available to assist couples in achieving pregnancy. Ctrs. for Disease Control & Prevention, Assisted Reproductive Technology, <http://www.cdc.gov/ART/index.htm> (last visited Mar. 1, 2007) [hereinafter Assisted Reproductive Technology]. It includes those procedures where both the sperm and the egg are handled. *Id.*; see also discussion *infra* Part I.A.

⁵ Anonymous Interview I, *supra* note 3.

⁶ *Id.* In vitro fertilization is any procedure in which the woman's eggs are removed, fertilized, and returned. CTRS. FOR DISEASE CONTROL & PREVENTION, 2003 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3 (2005) [hereinafter SUCCESS RATES]; see also discussion *infra* Part I.A.

⁷ Anonymous Interview I, *supra* note 3.

⁸ *Id.*

⁹ *Id.*

transferred—and this time, Mary became pregnant.¹⁰ Two of the three embryos had successfully implanted.¹¹ Nine months later, Mary gave birth to twin daughters.¹²

The Smiths now have five remaining embryos cryopreserved¹³ in the fertility center.¹⁴ They pay annual storage fees of \$400.¹⁵ They have decided not to use the embryos themselves.¹⁶ Now they must decide what to do with the remaining embryos.¹⁷ Their choices are to continue to keep the embryos in storage, paying the annual fees; thaw (i.e., destroy) the embryos; donate the embryos for scientific research; or donate the embryos to another infertile couple.¹⁸ They cannot decide upon the best option for them, so their embryos remain in storage.¹⁹

Doug and Tammy Jones²⁰ faced the same dilemma.²¹ They, too, underwent successful in vitro fertilization and now have four children.²² They had four embryos in storage, but the physicians informed them that Tammy would be unable to bear any additional children.²³ After considering the options available to them, they chose to have their embryos thawed and destroyed.²⁴ They chose this option because they were not comfortable having someone else raise their genetic children, and because

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Surplus embryos are cryopreserved for later use. Camilla Warrick, *Miracle Babies: Embryo Adoption: A Potent—and Controversial—Solution for Infertility*, CINCINNATI POST, July 20, 1998, at 1B. They are frozen in liquid nitrogen and stored at minus 196 degrees Celsius. *Id.*

¹⁴ Anonymous Interview I, *supra* note 3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Katheryn D. Katz, *Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation*, 18 WIS. WOMEN'S L.J. 179, 188 (2003).

¹⁹ Anonymous Interview I, *supra* note 3.

²⁰ The names have been changed to protect the privacy of the individuals who discussed their experiences with the Author.

²¹ Telephone Interview with Anonymous Sources (Dec. 12, 2005) [hereinafter Anonymous Interview II].

²² *Id.*

²³ *Id.*

²⁴ *Id.*

their religious beliefs did not allow them to donate the embryos to science.²⁵

Gregory and Jody Miller, on the other hand, chose to donate their surplus embryos to science.²⁶ Because Jody was forty years old, they did not have the option of donating the embryos to another couple²⁷—the chances of success with her embryos would be considerably lower than desired.²⁸ They did not wish to destroy the embryos: they wanted to “do something purposeful with them.”²⁹ They did not see the embryos as children; rather, they saw them as something important that needed to have a useful purpose.³⁰ They donated the embryos to Johns Hopkins University Medical Center for scientific research on genetic disorders.³¹

²⁵ *Id.*

²⁶ Sandra Knispel, “Extra” Embryos: *The Post-IVF Paradox*, *CONCEIVE*, Winter 2005, at 84, 86.

²⁷ *Id.*

²⁸ See NIELS H. LAUERSEN & COLETTE BOUCHEZ, *GETTING PREGNANT: WHAT YOU NEED TO KNOW RIGHT NOW* 519 (rev. ed. 2000) (stating that aged eggs are harder to fertilize); see also Interview with Terry Anderson, B.S.N., Registered Nurse, Inst. for Reproductive Health, in Cincinnati, Ohio (Jan. 5, 2006) [hereinafter Anderson Interview]. It is actually very rare for an older woman to have any surplus embryos. See GEOFFREY SHER ET AL., *IN VITRO FERTILIZATION: THE A.R.T. OF MAKING BABIES* 105 (2005) (a woman over age forty generally produces fewer eggs); see also Anderson Interview, *supra*. Most women over age forty undergoing in vitro fertilization use all of the embryos produced in order to achieve pregnancy. See Inst. for Reproductive Health, *In Vitro Fertilization*, http://www.cincinnati-fertility.com/In_Vitro/Overview.htm (last visited Mar. 3, 2007) (centers transfer high numbers of embryos to get the best IVF statistics); see also Anderson Interview, *supra*. Some programs have policies that embryos produced from women over a certain age are not eligible for donation to other couples. See SHER ET AL., *supra*, at 229 (“Donor agencies . . . usually limit the age of ovum donors to under 35 years in an attempt to minimize the risk of ovarian resistance and negate the adverse influence of the biological clock on egg quality.”); see also Anderson Interview, *supra*. The chances of a successful pregnancy are lower because of the age of the original eggs. Anderson Interview, *supra*; see also LAUERSEN & BOUCHEZ, *supra*. Also, there are many genetic disorders that occur in women over age thirty-five; thus, many recipient couples are reluctant to accept embryos from a woman over this age. See LAUERSEN & BOUCHEZ, *supra*, at 502 (risk of birth defects for conceived child increases as a woman ages); see also Anderson Interview, *supra*.

²⁹ Knispel, *supra* note 26.

³⁰ *Id.* at 86–87.

³¹ *Id.* at 86.

Andrew and Julia Thomas³² morally could not choose any option but donating their surplus embryos to another couple.³³ They viewed the embryos as potential children.³⁴ The fertility center offered this service, so they donated their surplus embryos anonymously to another couple using the center.³⁵ Emotionally, it was a very difficult decision.³⁶ They understood the draining nature of the assisted reproduction process.³⁷ They tried to imagine how they would have felt if their procedure had not been successful.³⁸ They knew they would have been devastated.³⁹ Julia, though, was reluctant to donate the embryos because she would never know how her children were being raised.⁴⁰ Because the process was anonymous, she would look at every child on the street, wondering if it were hers.⁴¹ Her concerns were outweighed, though, by her need to help others achieve what she had achieved—a family.⁴²

Jacqui and Jeff Worthley also chose to donate their extra embryos to another couple.⁴³ Unlike the Thomases, they wanted to choose the recipient couple.⁴⁴ They posted information on an in vitro fertilization website, and they received many emails requesting their embryos.⁴⁵ They used a questionnaire to narrow the candidate pool and eventually requested pictures of the potential recipient couples.⁴⁶ They finally chose a couple who shared many of their physical traits.⁴⁷ The Worthleys also set up certain stipulations to which both couples had to adhere: notify them of the gender of the child(ren); keep addresses current; and allow the child to

³² The names have been changed to protect the privacy of the individuals who discussed their experiences with the Author.

³³ Interview with Anonymous Sources, in Columbus, Ohio (Dec. 4, 2005) [hereinafter Anonymous Interview III].

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Knispel, *supra* note 26, at 84–85.

⁴⁴ *Id.* at 85.

⁴⁵ *Id.* at 84–85.

⁴⁶ *Id.* at 85.

⁴⁷ *Id.*

contact them in the future.⁴⁸ Unfortunately, the donated embryos did not result in a successful pregnancy at first, and the recipient mother was devastated.⁴⁹ They are determined to try again with the rest of the donated embryos.⁵⁰

When Patrisha Wilson was seventeen years old, she was told by her doctors that a future pregnancy was unlikely.⁵¹ Later, after being unsuccessful at achieving pregnancy on her own, she began looking into other options.⁵² Patrisha began the emotionally and financially draining journey of assisted reproductive technology.⁵³

Patrisha tried artificial insemination and donor programs.⁵⁴ She was told that she could carry a child but could not produce the egg needed to have a child.⁵⁵ A donated embryo was her only option.⁵⁶ Patrisha was placed on a waiting list for frozen embryos and was told that it could take over two years to receive a donor embryo, because not many were available.⁵⁷ Finally, Patrisha found a fertility clinic that had frozen donor embryos available.⁵⁸ In June 2003, Patrisha underwent a transfer procedure with donor embryos, and she became pregnant.⁵⁹ In January 2004, Patrisha finally gave birth to a baby boy, Nathan.⁶⁰

Patrisha's dream of motherhood came true as a result of donated embryos. If the couple who donated the embryos had decided to keep the embryos in storage or discard them, Patrisha's dream of becoming a mother would have never come true. Patrisha was one of many women on a waiting list to receive donor embryos from those who had a surplus.⁶¹ At many fertility treatment centers, the waiting list to receive a frozen donor

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Teri Brown, *Fertility Success Story*, PRECONCEPTION.COM, <http://preconception.com/resources/articles/success.htm> (last visited Mar. 3, 2007).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

embryo is at least two to three years long.⁶² One reason for this is that couples with surplus embryos are reluctant to donate them to other childless couples because the embryo donors will then have other genetic children⁶³ besides those they are raising.⁶⁴ The possibility that their children will have genetic siblings is great if the couple decides to donate their surplus embryos.⁶⁵ The couple therefore goes through the same emotional decisionmaking process as is done before giving an infant up for traditional adoption.⁶⁶

Another reason that couples are unwilling to donate their surplus embryos to other couples is that few regulatory procedures are in place to ensure that the embryo will be going to a “good home.”⁶⁷ Unlike traditional adoption, which carries with it multiple procedural requirements,⁶⁸ embryo donation is largely unregulated.⁶⁹ Many psychologists are promoting traditional adoption statutes as necessary to regulate embryo donation.⁷⁰ These psychologists feel that such regulation will protect the parties involved and make them accountable to society and to future generations.⁷¹ More couples would feel willing to donate their

⁶² *Id.*

⁶³ In this Comment, I refer to both “genetic” and “biological” children and parents. I use the term “genetic” to refer to those related by genes. I use the term “biological” to refer to those related by the process of actual pregnancy and birth. Thus, the “birth” mother will be the biological mother of the child.

⁶⁴ See Knispel, *supra* note 26.

⁶⁵ See *id.*

⁶⁶ See Judith Bernstein et al., Letter to the Editor, *Safeguards in Embryo Donation*, 65 FERTILITY & STERILITY 1262, 1262 (1996).

⁶⁷ See John A. Robertson, *Ethical and Legal Issues in Human Embryo Donation*, 64 FERTILITY & STERILITY 885, 886–87 (1995).

⁶⁸ See, e.g., OHIO REV. CODE ANN. §§ 3107.01–.06 (LexisNexis 2003); MICH. COMP. LAWS ANN. §§ 710.21–.70 (West 2002).

⁶⁹ Susan L. Crockin, “*What is an Embryo?*”: *A Legal Perspective*, 36 CONN. L. REV. 1177, 1182 (2004). According to Crockin, only eight states have enacted statutes specifically addressing embryo donation. *Id.* at n.22; see DEL. CODE ANN. tit. 13, §§ 8-102, 8-701 to -707 (Supp. 2004); FLA. STAT. ANN. §§ 742.11–.14 (West 2005); LA. REV. STAT. ANN. §§ 9:126, 9:130 (2000); N.D. CENT. CODE §§ 14-18-01 to -07 (2004); OKLA. STAT. ANN. tit. 10, § 556 (West Supp. 2007); TEX. FAM. CODE ANN. § 160.702 (Vernon 2002); VA. CODE ANN. §§ 20-156, 20-158 (2000); WASH. REV. CODE ANN. §§ 26.26.705–.735 (West 2005); see also discussion *infra* Part I.D.

⁷⁰ Bernstein, *supra* note 66.

⁷¹ *Id.*

embryos if such regulations were in place.⁷² One reason few regulations exist is that very few state statutes acknowledge the existence of embryos⁷³—courts have been left to determine their status, whether they are persons, property, or something between the two.⁷⁴ States not only need to address the legal status of embryos statutorily, but they also need to enact legislation regulating the donation procedures to protect the best interests of both the genetic parents and the children. Patrisha's son Nathan may never be able to obtain information about his genetic parents, because no state requires fertility centers to maintain this information.⁷⁵ This Comment focuses on the need for such regulation, emphasizing the psychological effects of the lack of regulation.

Part I gives a broad overview of the history of assisted reproductive technology, focusing on the different treatments available and the methods utilized. It describes the medical procedures commonly used in fertility centers, focusing on gamete donation, egg donation, and embryo donation. It also describes current legislation affecting both traditional adoption and the treatment of embryos, focusing on the current lack of consistency in the legal treatment of embryos. Part II then focuses on the need for governmental regulation of embryo donation, concentrating on both the child's interests and the encouragement of embryo donation. Part III analyzes why traditional adoption statutes cannot feasibly regulate this process. It also describes the potential effects of characterizing embryo donation as "embryo adoption." Finally, Part IV suggests provisions that should be included in any statutory enactments concerning embryos, focusing on the guidelines suggested by the American Society of Reproductive Medicine.

⁷² See *id.* at 1262–63; see also Chantal Laruelle & Yvon Englert, *Psychological Study of In Vitro Fertilization—Embryo Transfer Participants' Attitudes Toward the Destiny of Their Supernumerary Embryos*, 63 FERTILITY & STERILITY 1047, 1049–50 (1995) (discussing the effects of unknown risks on embryo donation and the usefulness of improved education to potential donors).

⁷³ The low number of states regulating the donation of embryos demonstrates the refusal of most states to acknowledge the existence of embryos. See sources cited *supra* note 69.

⁷⁴ See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 594–97 (Tenn. 1992); *Kass v. Kass*, 696 N.E.2d 174, 178–79 (N.Y. 1998); see also discussion *infra* Part I.D.

⁷⁵ Paula J. Manning, *Baby Needs a New Set of Rules: Using Adoption Doctrine to Regulate Embryo Donation*, 5 GEO. J. GENDER & L. 677, 684–88 (2004).

I. HISTORY OF EMBRYO DONATION

A. *History of Assisted Reproductive Technology*

Assisted reproductive technology (ART) is an umbrella term that refers to fertility treatments where both egg and sperm are handled.⁷⁶ Since ART is an umbrella term, it includes several types of treatments, including in vitro fertilization (IVF), gamete intrafallopian transfers (GIFT), and zygote intrafallopian transfers (ZIFT).⁷⁷ It may or may not include sperm or egg donation to the couple seeking treatment.⁷⁸

ART began in 1978 when the first “test-tube baby” was born in England.⁷⁹ Louise Brown was the first child conceived through a procedure developed by Dr. Robert Edwards and Dr. Patrick Steptoe called IVF.⁸⁰ Louise Brown, who was born through a revolutionary procedure at the time, gave hope to millions of infertile couples throughout the world.⁸¹ The first IVF program in the United States began in the late 1970s at the Eastern Virginia Medical School in Norfolk, Virginia.⁸² Today, there are approximately four hundred clinics in the United States assisting infertile couples in their quest to become parents.⁸³

In the United States, it is estimated that forty-five million couples are of childbearing age and five million of these couples are infertile for one reason or another.⁸⁴ One out of every twelve couples—about 8%—are involuntarily infertile.⁸⁵ Infertility is the “inability to conceive after one full year of normal, regular heterosexual intercourse without the use of any contraception.”⁸⁶ A woman’s chances of getting pregnant without medical

⁷⁶ SUCCESS RATES, *supra* note 6.

⁷⁷ *Id.* IVF is a procedure in which the woman’s eggs are removed and fertilized in the lab with sperm and the resulting embryo is transferred to the woman’s uterus through the cervix. *Id.* GIFT is when an instrument guides unfertilized eggs and sperm into the woman’s fallopian tubes. *Id.* ZIFT is a process in which the woman’s eggs are fertilized in the lab with sperm and the fertilized eggs (not yet an embryo, but rather, a zygote) are then guided with an instrument into the fallopian tubes of the woman. *Id.*

⁷⁸ The term also includes the donation of sperm or eggs to another woman. *Id.*

⁷⁹ SHER ET AL., *supra* note 28, at xvii.

⁸⁰ LAUERSEN & BOUCHEZ, *supra* note 28, at 458.

⁸¹ *Id.*

⁸² SHER ET AL., *supra* note 28, at xvii.

⁸³ *Id.*

⁸⁴ *Id.* at 1.

⁸⁵ *Id.*

⁸⁶ *Id.*

treatment after such a year are extremely low.⁸⁷ Of the five million infertile couples, IVF is the best option for about 2.5 million to start a family.⁸⁸ As of 2005, there had been approximately 300,000 babies born using ART procedures in the United States.⁸⁹ Two hundred and fifty thousand infertile couples go through IVF annually in hopes of having a child.⁹⁰

Before beginning the IVF process, a couple will likely be required to undergo a complete medical evaluation.⁹¹ In some programs, the couple may also be required to undergo psychological counseling.⁹² The medical staff will then decide if the couple is eligible for IVF.⁹³ Once the couple has been accepted, the woman will begin taking fertility drugs to stimulate her ovaries.⁹⁴ The purpose behind the fertility drugs is to stimulate the production of as many mature eggs as possible.⁹⁵ Once the eggs are mature, a needle is inserted into the ovaries and the mature eggs are retrieved.⁹⁶ The eggs that were retrieved are fertilized with the woman's partner's sperm or a donor's sperm in the laboratory.⁹⁷ The fertilized eggs become embryos and are observed in the laboratory for three to six days.⁹⁸ After the three to six days, when they consist of about six to eight cells, the embryos are transferred into the woman's uterus.⁹⁹ Implantation may or may not occur for one or more embryos.¹⁰⁰

In a typical retrieval process, about five to fifteen eggs are retrieved.¹⁰¹ All of the eggs retrieved are fertilized with sperm.¹⁰² Not all of the fertilized eggs are implanted in the woman; the number of eggs implanted

⁸⁷ *Id.*

⁸⁸ *Id.* at 2.

⁸⁹ *Id.* at 5.

⁹⁰ *Id.* at 2.

⁹¹ Anderson Interview, *supra* note 28; SHER ET AL., *supra* note 28, at 43.

⁹² Anderson Interview, *supra* note 28; SHER ET AL., *supra* note 28, at 43.

⁹³ Anderson Interview, *supra* note 28; SHER ET AL., *supra* note 28, at 43.

⁹⁴ Inst. for Reproductive Health, *supra* note 28.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Georgia Reproductive Specialists, In Vitro Fertilization and Embryo Transfer, Overview for IVF Patients, <http://www.ivf.com/overview.html> (last visited Mar. 3, 2007).

¹⁰¹ Inst. for Reproductive Health, *supra* note 28.

¹⁰² *Id.*

depends on a variety of factors, including the age and health of the woman.¹⁰³ Women in their twenties have fewer embryos implanted while women in their thirties have more implanted.¹⁰⁴ The average number of fertilized embryos implanted is two to four, but this number can vary.¹⁰⁵ Surplus embryos that are not implanted are frozen for later use by the couple.¹⁰⁶

B. Gamete Donation

1. Sperm Donation

Sperm donation is an option for a couple when the man is unable to produce any or enough high quality sperm for the woman to get pregnant.¹⁰⁷ Sperm donation is also used if there is a fear of passing genetic defects to the child or for single women who want a child.¹⁰⁸ Sperm donation has been readily available since the 1950s.¹⁰⁹ The number of women actually using donor sperm to achieve pregnancy is unknown—physicians are not required to report this usage, nor are women required to see a physician to use donor sperm.¹¹⁰

Donor sperm are available through a number of clinics, but solicitations for donor sperm occur on college campuses and are also found on the Internet.¹¹¹ There is virtually no regulation of sperm donation because much of it is done privately.¹¹² Donors may be using more than one facility, and the facilities can be completely unaware of the donor's use of other methods of donation.¹¹³

Most children born of sperm donation will never know their genetic father.¹¹⁴ There are no registries available for children to search for their

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 8 (2003).

¹⁰⁸ *Id.*

¹⁰⁹ Manning, *supra* note 75, at 686.

¹¹⁰ Alvaré, *supra* note 107.

¹¹¹ *Id.* at 8–9.

¹¹² *See id.* at 27–28.

¹¹³ Stephen L. Corson & Andrea Mechanick-Braverman, *Why We Believe There Should Be a Gamete Registry*, 69 FERTILITY & STERILITY 809, 809 (1998).

¹¹⁴ *See* Alvaré, *supra* note 107, at 25.

genetic parent—sperm donation can be completely anonymous.¹¹⁵ The American Society of Reproductive Medicine (ASRM) provides guidelines to facilities offering sperm donation, but these guidelines emphasize the need for confidentiality.¹¹⁶ The ASRM suggests that the facilities maintain records of the donors, including genetic workups, but such recordkeeping is not mandatory.¹¹⁷ Even if this type of record is maintained by the facility, there are no requirements that the facility keep the records should it cease its operation.¹¹⁸

2. Egg (Ovum) Donation

Egg donation is an option when the woman is unable to produce healthy eggs but is able to carry and give birth to a child.¹¹⁹ The most common reason that couples choose egg donation is the advancing age of the woman.¹²⁰ Other reasons people could choose egg donation include poor quality eggs, genetic disorders that have a high likelihood of being transferred to the child, resistance to fertility drugs, and same-sex relationships where one partner provides the egg while the other carries the child.¹²¹ In the United States, approximately twelve thousand to fifteen thousand IVF cycles are performed annually with donated eggs.¹²²

The process of egg donation begins with the egg donor's placement on hormones to stimulate the production of mature eggs.¹²³ The recipient of the eggs is also placed on hormones to facilitate the implantation of the embryos.¹²⁴ The donor eggs are retrieved and fertilized in the lab with the chosen sperm.¹²⁵ The embryos are transferred into the recipient three to

¹¹⁵ See Corson & Mechanick-Braverman, *supra* note 113. For an argument in support of a national gamete registry, see *id.* Some countries do have national registries for sperm donors, allowing the children to contact them upon reaching the age of majority. *Id.* Sweden initiated such a registry in 1985, and Austria followed suit in 1992. *Id.*

¹¹⁶ Manning, *supra* note 75, at 686.

¹¹⁷ *Id.*

¹¹⁸ Corson & Mechanick-Braverman, *supra* note 113.

¹¹⁹ SHER ET AL., *supra* note 28, at 224.

¹²⁰ *Id.* at 226.

¹²¹ *Id.* at 227.

¹²² *Id.* at 236.

¹²³ *Id.* at 235.

¹²⁴ *Id.* at 234–35.

¹²⁵ *Id.* at 235. The chosen sperm may or may not be from the recipient's husband/partner. *Id.* Donor sperm may be used if any of the circumstances exist in which it would be preferable to the husband/partner's sperm. *Id.*

five days after fertilization.¹²⁶ Eggs can be frozen for later use, but this process is more difficult than freezing sperm or embryos.¹²⁷ Because of the difficulty in freezing eggs, only a few live births have been reported from cryoperserved eggs.¹²⁸

Like sperm donation, there is relatively little legal regulation of egg donation, except to declare that the birth/biological mother of the child is the legal mother of the child.¹²⁹ The Uniform Parentage Act, which contains this provision, has been adopted in most states.¹³⁰ Aside from this provision, however, there is no legal regulation.¹³¹ The clinics offering egg donation are not required to maintain records of the donors; they also are not obliged to provide any information maintained to the child produced from egg donation.¹³² The growing usage of egg donation has spurred some to argue for a national egg donor registry, much like the national adoption registries, but such a registry does not yet exist.¹³³ It would allow children to contact their genetic parent upon reaching the age of majority.¹³⁴

C. Embryo Donation/Embryo Adoption¹³⁵

Embryo donation is a process by which couples who have cryopreserved embryos give up any legal right to the embryos to another couple who have no genetic ties.¹³⁶ Embryos are frozen in liquid nitrogen at minus 196 degrees Celsius and are kept at the IVF clinic.¹³⁷ As of 2003, it was estimated that there were nearly 400,000 embryos in storage in the

¹²⁶ *Id.*

¹²⁷ *Id.* at 247–48.

¹²⁸ *Id.*

¹²⁹ *Id.* at 238.

¹³⁰ *Id.*

¹³¹ Manning, *supra* note 75, at 687.

¹³² *Id.* at 688.

¹³³ See Corson & Mechanick-Braverman, *supra* note 113.

¹³⁴ See *id.*

¹³⁵ Groups referring to it as embryo adoption typically are pro-life groups seeing each embryo as a life. See Paige C. Cunningham, *Embryo Adoption or Embryo Donation: The Distinction and Its Implications*, CENTER FOR BIOETHICS & HUM. DIGNITY, Apr. 17, 2003, http://www.cbhd.org/resources/reproductive/Cunningham_2003-04-17.htm. Those referring to it as donation are typically pro-choice, encouraging the use of embryos in scientific research. See *id.*; see also discussion *infra* Part II.C.

¹³⁶ SHER ET AL., *supra* note 28, at 239.

¹³⁷ Warrick, *supra* note 13.

United States.¹³⁸ As illustrated by the case studies in the Introduction to this Comment, couples have several options when they have surplus embryos in storage: keep the embryos in storage, donate them to research, donate them to another infertile woman, or thaw and discard them. Many couples continue to maintain the embryos in frozen storage.¹³⁹ Less than 3% of embryos in storage are being designated for research.¹⁴⁰ A survey done in 2003 by the American Society of Reproductive Medicine found that only 2% of all embryos in storage are being donated to other infertile women.¹⁴¹ Couples with embryos in storage are four times more likely to have their embryos destroyed than to donate them.¹⁴² Approximately nine out of ten frozen embryos are still in storage at IVF clinics for patients, because they either have chosen to try to have more children or have not decided what to do with the remaining embryos.¹⁴³

Fertility clinics allow couples with surplus embryos to donate them to other infertile women using the clinics' services.¹⁴⁴ A couple might consider embryo donation if neither the man nor the woman is able to produce healthy or viable gametes, but the woman is still able to carry the child to term and give birth.¹⁴⁵ A large demand for donor embryos is from older women whose eggs are no longer viable.¹⁴⁶ Other people who might

¹³⁸ David Hoffman et al., *Cryopreserved Embryos in the United States and Their Availability for Research*, 79 FERTILITY & STERILITY 1063, 1068 (2003).

¹³⁹ *Id.* at 1066. A couple in St. Paul spends \$340 per year to keep their three remaining embryos in storage. Jeremy Olson, *The Ethics of In Vitro*, ST. PAUL PIONEER PRESS, June 12, 2005, at A1. At the Institute for Reproductive Health in Cincinnati, Ohio, the initial freezing of the embryos costs \$450, and there is an annual fee of \$360 to keep the embryos in storage regardless of the number of embryos in storage. Anderson Interview, *supra* note 28. At the Christ Hospital in Cincinnati, Ohio, a couple pays \$37 monthly, regardless of the number of embryos, to keep them in storage. *Id.*

¹⁴⁰ *Embryonic Stem Cell Research: Hearing Before the Subcomm. on Commerce, Science & Transportation*, 108th Cong. (2004) (statement of Richard Doerflinger, Deputy Director, United States Conference of Catholic Bishops), http://commerce.senate.gov/hearings/testimony.cfm?id=1323&wit_id=1821.

¹⁴¹ Pam Belluck, *It's Not So Easy to Adopt an Embryo*, N.Y. TIMES, June 12, 2005, § 4, at 5.

¹⁴² Catherine V. Hounshell & Ryszard J. Chetkowski, *Donation of Frozen Embryos After In Vitro Fertilization is Uncommon*, 66 FERTILITY & STERILITY 837, 838 (1996).

¹⁴³ Olson, *supra* note 139.

¹⁴⁴ Hoffman et al., *supra* note 138, at 1063.

¹⁴⁵ Robertson, *supra* note 67, at 885.

¹⁴⁶ Alvaré, *supra* note 107, at 17. Many fertility problems appear as women age. SHER ET AL., *supra* note 28, at 4–5. Women over thirty-five who decide to have children might be

(continued)

use embryo donation include couples who would use IVF or egg donation, but who lack the money needed for IVF; lesbian couples for whom donor insemination has failed; or couples able to carry a child who prefer postnatal adoption, but who do not have the means to adopt a child.¹⁴⁷

D. Legal Status of Embryos

The legal status of embryos is not clear: they are either property, human beings, human tissue, or an intermediate category of potential life deserving some protection.¹⁴⁸ Courts have held that embryos are property of the couple that provided the egg and sperm.¹⁴⁹ Courts have also held that embryos are potential lives deserving some protection, but without the same rights as a person.¹⁵⁰ Some legal scholars consider embryos to be human tissue, which may be donated, but not sold.¹⁵¹ Some state statutes also view embryos as human beings, or “persons,” with independent rights.¹⁵²

1. The Embryo as Property

In *York v. Jones*, the court was asked to determine whether a couple could require embryos to be transferred from a fertility clinic in one state to a clinic in another state when the facility storing the embryos refused to do so.¹⁵³ The court characterized the relationship between the donors and the clinic as a bailor-bailee relationship, thus implicitly holding that the embryos were the property of the donors.¹⁵⁴ Because the embryos were the property of the donors, the donors had the right to decide their disposition.¹⁵⁵

infertile due to hormonal problems, pelvic disease, or benign fibroid tumors. *Id.* The ability to produce healthy eggs and create a hormonal environment that can support pregnancy is more difficult as a woman ages. *Id.* at 5.

¹⁴⁷ Robertson, *supra* note 67, at 886.

¹⁴⁸ Cunningham, *supra* note 135.

¹⁴⁹ *E.g.*, *York v. Jones*, 717 F. Supp. 421, 425 (E.D. Va. 1989).

¹⁵⁰ *E.g.*, *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992).

¹⁵¹ *E.g.*, Cunningham, *supra* note 135.

¹⁵² *See, e.g.*, FLA. STAT. ANN. § 63.213 (West 2005); LA. REV. STAT. ANN. § 9:126 (West 2000); MO. REV. STAT. § 1.205 (West 2000).

¹⁵³ *York*, 717 F. Supp. at 422.

¹⁵⁴ *Id.* at 425.

¹⁵⁵ *Id.* at 427.

Other courts have implicitly held that embryos are property by their use of contract law to determine disputes.¹⁵⁶ *Kass v. Kass* was a divorce proceeding in New York where the court was asked to determine custody of pre-zygotes¹⁵⁷ in a divorce proceeding.¹⁵⁸ Although the trial court awarded custody to the mother, thus implying that the embryos were “persons,”¹⁵⁹ the appellate court held that pre-zygotes were not considered “persons.”¹⁶⁰ Instead of determining the disposition of the embryos based on a family law analysis, the court used contract law.¹⁶¹ It determined the contract’s validity and looked to the intent of the parties to determine the disposition of the embryos, thus implying that the embryos were “property” to be transferred by contract.¹⁶²

2. *The Embryo as Deserving of Special Respect and Protection*

Davis v. Davis,¹⁶³ one of the first cases to consider the disposition of frozen embryos,¹⁶⁴ began as a divorce dispute in which the wife wanted custody of stored embryos to have them implanted, but the husband wanted them to remain frozen.¹⁶⁵ The Tennessee Supreme Court held that frozen embryos are not considered “persons” under Tennessee law.¹⁶⁶ The court also noted that embryos are not considered persons under federal law.¹⁶⁷ The court held that embryos are not strictly persons or property; rather, they should be considered part of an interim category, which entitles them to special respect because of the potential life they could become.¹⁶⁸

¹⁵⁶ *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998).

¹⁵⁷ “We use the parties’ term ‘pre-zygotes,’ which are defined in the record as ‘eggs which have been penetrated by sperm but have not yet joined genetic material.’” *Id.* at 175 n.1.

¹⁵⁸ *Id.* at 175.

¹⁵⁹ *See id.* at 177.

¹⁶⁰ *Id.* at 179.

¹⁶¹ *Id.* at 180.

¹⁶² *Id.*

¹⁶³ 842 S.W.2d 588 (Tenn. 1992).

¹⁶⁴ *See Manning*, *supra* note 75, at 692; *Crockin*, *supra* note 69, at 1180.

¹⁶⁵ *Davis*, 842 S.W.2d at 589.

¹⁶⁶ *Id.* at 594–95.

¹⁶⁷ *Id.* at 595.

¹⁶⁸ *Id.* at 597.

3. *The Embryo as Human Tissue that May Be Donated, But Not Sold*

At least one legal scholar has suggested that embryos could simply be considered human tissue.¹⁶⁹ This allows the embryo to be donated, but, like human organs, the embryo cannot be sold.¹⁷⁰ The basis of this theory is that embryos cannot be considered true property if their disposition is so limited.¹⁷¹ Likewise, an embryo cannot be considered a person, because it is owned by the parents, and ownership of persons is prohibited by the Thirteenth Amendment.¹⁷² By equating embryos with human organs, this theory allows them to be donated or discarded based on the intentions of those who created them.

4. *The Embryo as a Person*

Three states have enacted statutes that either specifically or impliedly characterize the legal status of an embryo as a person. Missouri has enacted a statute defining life as beginning with conception; thus, an embryo is a person under Missouri law.¹⁷³ Louisiana has specifically addressed the legal status of embryos, defining them as “biological human being[s].”¹⁷⁴ Florida’s definition of a child includes a “child . . . conceived by means of an insemination that is part of a preplanned adoption arrangement,”¹⁷⁵ thus classifying the embryo as a person.

President George W. Bush has indicated that embryos should be considered “persons” under the law.¹⁷⁶ When discussing stem cell research utilizing embryos, he stated that one important aspect to remember is that “real human lives are involved[:] . . . the lives of the embryos that will be destroyed.”¹⁷⁷ He has advocated the position that all of the current frozen embryos should be implanted or donated to research rather than destroyed, saying, “[T]here is no such thing as a spare embryo.”¹⁷⁸ He supported Congress’s designation of \$1 million annually to a campaign to raise

¹⁶⁹ See Cunningham, *supra* note 135.

¹⁷⁰ *Id.*

¹⁷¹ See *id.*

¹⁷² *Id.*

¹⁷³ MO. REV. STAT. ANN. § 1.205 (West 2000).

¹⁷⁴ LA. REV. STAT. ANN. § 9:126 (West 2000).

¹⁷⁵ FLA. STAT. ANN. § 63.213 (West 2005).

¹⁷⁶ President’s Remarks on Bioethics, 41 WEEKLY COMP. PRES. DOC. 875, 875 (May 30, 2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_presidential_documents&docid=pd30my05_txt-11.pdf [hereinafter Remarks on Bioethics].

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 876.

public awareness of embryo adoption.¹⁷⁹ Five hundred thousand dollars of this fund was earmarked for the Snowflake Embryo Adoption Program, part of Nightlight Christian Adoptions, which promotes the adoption of surplus frozen embryos rather than their donation to research.¹⁸⁰ The remaining money was distributed to other Christian organizations that support embryo adoption.¹⁸¹

II. THE NEED FOR LEGISLATIVE REGULATION OF EMBRYO DONATION

A. *The Need for Uniform Legal Classification of Embryos*

Unlike the few cases cited above,¹⁸² most courts have declined to answer the question about the legal status of embryos. Instead, they resolve disputes over the disposition of frozen embryos by considering the intentions of the parties involved.¹⁸³ These cases typically reach the courts in the guise of divorce disputes over custody of the couple's frozen embryos.¹⁸⁴

In *Litowitz v. Litowitz*, a Washington court was asked to determine custody of embryos during a divorce proceeding.¹⁸⁵ The wife wanted custody of the embryos in order to implant them in a surrogate in hopes of a child.¹⁸⁶ The husband wanted to give the embryos to an out-of-state couple.¹⁸⁷ The court held that it would not enforce an agreement that would require one party to become a parent when that party did not want to do so.¹⁸⁸ A party wanting to avoid procreation should usually prevail, assuming that the other party has a reasonable possibility of becoming a

¹⁷⁹ Press Release, Office of the Press Secretary, Fact Sheet: Valuing Life through Embryo Adoption and Ethical Stem Cell Research (May 24, 2005), available at <http://www.whitehouse.gov/news/releases/2005/05/20050524-10.html> [hereinafter Valuing Life].

¹⁸⁰ Charles Laurence, *Childless Couples "Adopt" America's Leftover Embryos*, TELEGRAPH (London), Mar. 30, 2003, <http://news.telegraph.co.uk/news/main.jhtml?xml=/news/2003/03/30/wembry30.xml>.

¹⁸¹ *Id.*

¹⁸² See discussion *supra* Part I.D.1–2.

¹⁸³ *Litowitz v. Litowitz*, 10 P.3d 1086 (Wash. Ct. App. 2000); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001).

¹⁸⁴ *Litowitz*, 10 P.3d at 1088; *A.Z.*, 725 N.E.2d at 1054; *J.B.*, 783 A.2d at 710.

¹⁸⁵ *Litowitz*, 10 P.3d at 1088.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1092–93.

parent by means other than using the couple's stored embryos.¹⁸⁹ The court was unwilling to compel biological parenthood.¹⁹⁰

The Massachusetts Supreme Court has also refused to compel biological parenthood.¹⁹¹ In *A.Z. v. B.Z.*,¹⁹² another dispute over the custody of embryos after divorce, the court examined the contract between the divorcing couple, which purported to give custody of the embryos to the wife in the event of separation.¹⁹³ The agreement specified that the wife would have them for the purpose of implantation.¹⁹⁴ The court held that such agreements were generally invalid, because enforcing them in this manner would force one party to become a parent against his or her will.¹⁹⁵ The court held that "forced procreation is not an area amenable to judicial enforcement."¹⁹⁶

Similarly, in *J.B. v. M.B.*,¹⁹⁷ the New Jersey Supreme Court also refused to compel biological parenthood.¹⁹⁸ The case again involved a divorce proceeding where the parties disagreed over the disposition of their frozen embryos.¹⁹⁹ The husband wanted the embryos implanted, but the wife argued that she never intended to use the embryos outside of their marriage.²⁰⁰ The court used the same theory that was used by the Massachusetts and New Jersey courts and held that it would not force the wife to become a biological parent against her will.²⁰¹

As these cases illustrate, courts are unwilling to designate specifically the status of embryos as persons or property. However, the holdings, focusing on the interests of the party seeking to avoid parenthood, seem to imply that courts do not view embryos as "persons." Unfortunately, this implication does not firmly establish embryos' status under the law. Instead, such cases could lead to unequal treatment under the law, depending upon the court and the judges hearing the disputes. Therefore,

¹⁸⁹ *Id.* at 1092 (citing *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992)).

¹⁹⁰ *See id.* at 1092–93.

¹⁹¹ Katz, *supra* note 18, at 201.

¹⁹² 725 N.E.2d 1051 (Mass. 2000).

¹⁹³ *Id.* at 1054.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1057–58.

¹⁹⁶ *Id.* at 1058.

¹⁹⁷ 783 A.2d 707 (N.J. 2001).

¹⁹⁸ *Id.* at 719–20.

¹⁹⁹ *Id.* at 714–15.

²⁰⁰ *Id.* at 710.

²⁰¹ *Id.* at 719–20.

uniform legislation that clearly establishes the legal status of embryos needs to be enacted in every state.

B. Protecting the Child's Interests in the Future

As shown, embryo donation, like gamete donation, is largely unregulated, forcing scholars and courts to analogize the embryo to an entity with a more concrete legal status.²⁰² In order to ensure that the best interests of the children involved are protected, governmental regulation is needed. Many commentators feel that adoption law will provide the safeguards that are needed to protect the best interests of the children.²⁰³ Traditional adoption laws protect the children by ensuring that they have certain rights: the right to “fit” parents; the right to a clear determination of legal rights and responsibilities of the parties involved in the adoption; the right to complete identity information; and the right to a complete medical history.²⁰⁴

1. The Right to “Fit” Parents

The adopted child's right to fit parents is protected by adoption statutes, which generally require preplacement evaluations of the prospective adoptive parents to ensure stable home environments.²⁰⁵ In addition to the fitness of the prospective parents and the stability of the home environment, many adoption statutes have further restrictions on prospective adoptive parents. Many statutes restrict adoption to persons between certain ages: the prospective parent must be of a statutorily mandated minimum age to adopt.²⁰⁶ Many statutes also set a certain age difference between the prospective parent and the child that cannot be exceeded.²⁰⁷ This prevents people over a certain age from adopting young children.

²⁰² See discussion *supra* Part I.D.

²⁰³ See, e.g., Katz, *supra* note 18, at 210.

²⁰⁴ Manning, *supra* note 75, at 712.

²⁰⁵ James B. Boskey & Joan Heifetz Hollinger, *Placing Children for Adoption*, in 1 ADOPTION LAW AND PRACTICE § 3.01[2] (Joan Heifetz Hollinger et al. eds., 2005).

²⁰⁶ *Id.* § 3.06[2]; see, e.g., N.J. STAT. ANN. § 9:3-43(b) (West 2002) (requiring that a prospective parent be at least eighteen years old to pursue an action for adoption); WASH. REV. CODE ANN. § 26.33.140(2) (West 2005) (requiring that a prospective parent be at least eighteen years old).

²⁰⁷ Boskey & Hollinger, *supra* note 205, § 3.06[2]; N.J. STAT. ANN. § 9:3-43(b) (West 2002) (requiring that a prospective parent be at least ten years older than the child to be adopted).

Courts may also look to religion to determine whether a certain adoption placement will be in the best interests of the child.²⁰⁸ It is not statutorily mandated in any state that the child and the prospective parent be of the same religion, but many statutes provide that religion should be a controlling factor when practicable.²⁰⁹ One court has allowed race to be another factor considered when determining the best interests of the child.²¹⁰ Again, this is not statutorily mandated,²¹¹ but courts will look to this factor when determining the suitability of a particular set of prospective parents.²¹² Courts may also consider such factors as the marital status²¹³ and sexual orientation²¹⁴ of the prospective adoptive parents, although these factors have become controversial in recent years.²¹⁵

With embryo donation, there are no such statutes regulating who may receive the surplus embryos.²¹⁶ Clinics offering this service typically offer psychological counseling to both couples, but there is no preplacement evaluation to determine the fitness of the recipient couple.²¹⁷ Clinics do match ethnic characteristics between the donor and recipient couples, but typically no other characteristics are matched.²¹⁸ The ASRM has issued guidelines that recommend screening for various health problems, psychological problems, and certain characteristics of the recipient

²⁰⁸ Boskey & Hollinger, *supra* note 205, § 3.06[3].

²⁰⁹ *Id.*; *see, e.g.*, N.Y. FAM. CT. ACT § 116(b) (McKinney 1999) (requiring that the adoptive parents be of the same religious persuasion as the child “when practicable”); WIS. STAT. ANN. § 48.82(3) (West 2003) (requiring that the adoptive parents be of the same religious faith as the birth parent “when practicable”).

²¹⁰ Drummond v. Fulton County Dep’t of Family & Children’s Servs., 563 F.2d 1200, 1205 (5th Cir. 1977).

²¹¹ *See id.*

²¹² *See, e.g., id.*; *In re R.M.G.*, 454 A.2d 776, 779–80 (D.C. App. 1982).

²¹³ Boskey & Hollinger, *supra* note 205, § 3.06[5].

²¹⁴ *Id.* § 3.06[6].

²¹⁵ *See id.* § 3.06[5]–[6]. For a discussion of the controversy surrounding the adoption of children by same-sex parents, see Mark Strasser, *Adoption, Best Interests, and the Constitution: On Rational Basis Scrutiny and the Avoidance of Absurd Results*, 5 J.L. FAM. STUD. 297 (2003).

²¹⁶ Manning, *supra* note 75, at 689.

²¹⁷ *Id.*; *see also* Anderson Interview, *supra* note 28.

²¹⁸ IVF-Infertility.com, Egg Donation: Matching of Donor with Recipient, <http://www.ivf-infertility.com/donation/egg/egg8.php> (last visited Mar. 3, 2007); *see also* Anderson Interview, *supra* note 28.

couple;²¹⁹ however, these guidelines are not mandatory,²²⁰ and some facilities do not offer such a screening process.²²¹

Various religious groups have initiated programs whose goals are to have all of the frozen embryos in storage implanted.²²² These groups want to avoid the donation of embryos to research or the destruction of the embryos.²²³ One such program recently gained national attention when President Bush invited its spokesperson, along with families who had used the program, to the White House.²²⁴ The Snowflake Embryo Adoption Program uses a process much like that used with typical adoption placements to regulate the use of donor embryos by nongenetic parents, calling it “embryo adoption.”²²⁵ The process includes matching certain characteristics, such as that typically done with adoption, along with evaluating the suitability of the prospective parents’ home environment before placement.²²⁶

One problem with programs like Snowflake is that most infertile couples receive their donated embryos through a fertility clinic, so the programs in reality affect only a very small number of the surplus embryos available.²²⁷ Another problem with these programs is that their perception of the embryo as a human life²²⁸ implicates the legal issues surrounding stem cell research and abortion.²²⁹ Governmental regulations could

²¹⁹ Am. Soc’y for Reprod. Med., *Psychological Guidelines for Embryo Donation*, 77 FERTILITY & STERILITY S13, S13–S14 (Supp. 5 2002) [hereinafter *Psychological Guidelines*].

²²⁰ Am. Soc’y for Reprod. Med., *2002 Guidelines for Gamete and Embryo Donation: A Practice Committee Report, Guidelines and Minimum Standards*, 77 FERTILITY & STERILITY S1, S1 (Supp. 5 2002) [hereinafter *2002 Guidelines*].

²²¹ See DANIEL I. WALLANCE, CENTER FOR ADOPTION POLICY STUDIES, DEFROSTING EMBRYO ADOPTION 12 (2003), http://www.adoptionpolicy.org/pdf/embryo_adoption.pdf; see also Anderson Interview, *supra* note 28.

²²² See Laurence, *supra* note 180.

²²³ *Id.*

²²⁴ Remarks on Bioethics, *supra* note 176, at 875–76.

²²⁵ Snowflake Embryo Adoption FAQs, Nightlight Christian Adoptions, <http://www.nightlight.org/snowflakefaqs.htm> (last visited Mar. 3, 2007) [hereinafter Snowflake FAQs].

²²⁶ *Id.*

²²⁷ Shared Journey: Your Path to Fertility, Getting Pregnant through Embryo Donation, http://sharedjourney.com/3rd/embryo_donation.html (last visited Mar. 3, 2007).

²²⁸ Snowflake FAQs, *supra* note 225.

²²⁹ See discussion *infra* Part III.B.

provide the same type of screening process, but they could do so in a way that does not implicate these legal issues.

2. *The Right to a Clear Determination of Parental Rights and Responsibilities*

Adoption statutes are very clear regarding the termination of birth parents' legal rights and responsibilities.²³⁰ All legal ties between the birth parent and the child are severed and the adoptive parents assume full legal responsibility for the child.²³¹ The child receives a new birth certificate, listing only the adoptive parents.²³² Such procedures ensure that the child's family is clearly established with regard to legal rights and responsibilities.²³³

The law in most states has not kept up with the technological advances in human reproduction. Very few states have legislation acknowledging the existence of embryo donation.²³⁴ Some states are attempting to remedy this problem, including Ohio, which currently has a bill in the senate that delineates the legal parentage of children born through embryo donation.²³⁵ Presently, though, when a child is born through embryo donation, there is no certainty that the donor parents' legal rights and responsibilities have been terminated, nor is there certainty that the recipient parents have any legal rights and responsibilities concerning the child.²³⁶ Legislation specific to embryo donation needs to be enacted uniformly in every state to

²³⁰ Boskey & Hollinger, *supra* note 205, § 3.01[1].

²³¹ *Id.*

²³² *Id.* § 1.01[2].

²³³ *See id.* §§ 1.01[2], 3.01[1].

²³⁴ Crockin, *supra* note 69 (stating that only eight states have embryo donation statutes).

²³⁵ H.R. 102, 126th Gen. Assem. (Ohio 2006) (to be codified as amended at OHIO REV. CODE § 3111.97). The proposed bill states, "A woman who gives birth to a child born as a result of embryo donation shall be treated in law and regarded as the natural mother of the child, and the child shall be treated in law and regarded as the natural child of the woman." *Id.* It also clearly defines the paternity of children born through embryo donation to married couples, stating:

If a married woman gives birth to a child born as a result of embryo donation to which her husband consented, the husband shall be treated in law and regarded as the natural father of the child, and the child shall be treated in law and regarded as the natural child of the husband.

Id. The fact that this bill does not address the legal paternity of children born through embryo donation to unmarried couples is beyond the scope of this Comment.

²³⁶ Manning, *supra* note 75, at 697.

ensure that legal parentage rights and responsibilities are clearly established.

3. *The Right to Complete Identity Information and a Complete Medical History*

As more and more adopted children seek information about their birth parents, state courts and legislatures are making it easier for the children to access this information.²³⁷ In the past, adopted children seeking information about their birth parents were required to demonstrate “good cause” or a compelling need for the information.²³⁸ The courts typically viewed good cause as requiring a showing of compelling medical need,²³⁹ but even this was sometimes insufficient.²⁴⁰ Now, however, courts seem to be recognizing that the psychological need for information is as compelling as any medical need for the information.²⁴¹ They are thus finding good cause in this psychological need for a complete identity.²⁴² State legislatures are also enacting statutes allowing adopted children to access their adoption records, including identification information about the birth parents, without showing the good cause that was previously required.²⁴³

Unfortunately, for children born of embryo donation, no such legislation exists—embryo donation is largely unregulated.²⁴⁴ There are no national registries of donors.²⁴⁵ This makes it difficult, if not impossible, for a child born of such reproductive technology to find information about his or her genetic parents. This has not been an issue in the past, because children born of gamete donation are only now reaching the age of majority.²⁴⁶ Many of them are expressing an interest in finding their genetic parents; however, they are finding that this is almost impossible.²⁴⁷

²³⁷ *Id.* at 715–16.

²³⁸ *Id.* at 715.

²³⁹ *See, e.g., In re Baby Boy S.S.*, 719 N.Y.S.2d 311, 312 (App. Div. 2001); *Coleman v. Weiner*, 528 N.Y.S.2d 480, 481 (Sup. Ct. 1988).

²⁴⁰ *See, e.g., Golan v. Louise Wise Serv.*, 514 N.Y.S.2d 682, 684 (1987); *In re George*, 630 S.W.2d 614, 620 (Mo. Ct. App. 1982).

²⁴¹ *See, e.g., In re Dixon*, 323 N.W.2d 549, 552 (Mich. Ct. App. 1982); *Mills v. Atlantic City Dep’t of Vital Statistics*, 372 A.2d 646, 655 (N.J. Super. Ct. App. Ch. Div. 1977).

²⁴² *Dixon*, 323 N.W.2d at 552–53; *Mills*, 372 A.2d at 655.

²⁴³ OR. REV. STAT. § 109.502 (2005); TENN. CODE ANN. § 36-1-127 (2005).

²⁴⁴ *See discussion supra* Part I.D.

²⁴⁵ Corson & Mechanick-Braverman, *supra* note 113.

²⁴⁶ Manning, *supra* note 75, at 679.

²⁴⁷ *Id.* at 679–80.

Even if the facility did keep records about the gamete donation, the information does not have to be disclosed to any child seeking it.²⁴⁸

Like adoption, though, children born of embryo donation will have the same psychological need for information about their genetic parents.²⁴⁹ Mental health professionals who work closely with ART programs feel that embryo donation more closely resembles adoption than gamete donation.²⁵⁰ These professionals feel that extra precautions must be taken when programs make embryos available to couples with no genetic link to them.²⁵¹ They think that there needs to be a different level of responsibility, which requires special protection.²⁵² Connections between children and their genetic parents are powerful and lasting, and the children have a strong need for information.²⁵³ Children resulting from embryo donation may feel that they are surplus goods and have the same need for information as an adopted child.²⁵⁴ Even though the children born as a result of embryo donation are not abandoned, they may feel that way.²⁵⁵ The transfer from genetic parents to nongenetic parents is the most successful when everyone involved is prepared with information and counseling, and allowed time for deliberation.²⁵⁶

Mental health professionals base this opinion on information learned from adoptive families, gamete donors, and gamete recipients.²⁵⁷ They want donated embryos to have the same safeguards found with adoption because the “*quality of life is as important as life itself.*”²⁵⁸ The main focus here seems to be the interests of the children born of embryo donation, rather than the interests of either the donating couple or the recipient couple. Like adopted children, children born of embryo donation will have psychological and emotional needs that children born of their own genetic

²⁴⁸ *Id.* at 686–87.

²⁴⁹ See Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 661 (1991); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 898 (2000).

²⁵⁰ Bernstein et al., *supra* note 66.

²⁵¹ *Id.* at 1262–63.

²⁵² *Id.* at 1262.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* (emphasis added).

parents will not have.²⁵⁹ Creating national registries for the children born of embryo (and gamete) donation will allow these children to satisfy that psychological and emotional need for a complete identity.

Like adoption, children of embryo donation may also encounter the need for medical information from their genetic parents.²⁶⁰ Many diseases are genetically linked, and many people who donate embryos may not know at the time of the donation that they will eventually have a disease.²⁶¹ Children born of embryo donation may eventually encounter a need to know whether their genetic parents have a predisposition for heart disease, cancer, or any number of other diseases.²⁶² Without a national registry or some other way of maintaining the records, there will be no way for them to obtain this information.²⁶³

C. Encouraging the Donation of Surplus Embryos to Infertile Couples

No one really knows why people decide whether or not to donate their extra embryos. There are many factors that could influence a couple's decision. One important factor is the couple's success or failure in meeting their own reproductive goals.²⁶⁴ Couples who have not become pregnant or who want more children are unlikely to donate their extra embryos.²⁶⁵ However, a couple that has completed their family is in a position to donate surplus embryos.²⁶⁶

A second factor that could affect a couple's decision is their view of the status of the embryos.²⁶⁷ If the couple views the embryos as new human life, they will be more willing to donate the excess embryos rather than to discard them, store them, or donate them to research.²⁶⁸ However, this could make some couples less likely to donate because of the emotional connection they feel toward the embryos.²⁶⁹ The couple's feelings about the possibility of having genetic offspring with whom they

²⁵⁹ *See id.*

²⁶⁰ *Id.*

²⁶¹ *See 2002 Guidelines, supra* note 220, at S9 (recommending embryo donor blood tests for infectious diseases).

²⁶² *See* Bernstein et al., *supra* note 66.

²⁶³ *See supra* note 245 and accompanying text.

²⁶⁴ Robertson, *supra* note 76, at 886.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

will have no contact are factors that must be considered.²⁷⁰ A couple that can accept the fact that they may have genetic offspring that they will not know may donate their extra embryos.²⁷¹ If a couple could not accept this, then they are not likely to donate.²⁷²

Finally, a factor affecting a couple's likelihood to donate is their willingness to help other infertile couples.²⁷³ Couples that have successfully had children after going through the infertility process might have sympathy for other couples who are still struggling unsuccessfully; this may make them more inclined to donate.²⁷⁴ Still, many couples do not donate their frozen embryos, even if they originally indicated a willingness to do so when they started the fertility treatment program.²⁷⁵

Mandatory screening procedures, such as those employed by the Snowflake Embryo Adoption Program, should help some of the couples with surplus embryos reach a decision about their disposition.²⁷⁶ As illustrated by the case scenarios in the Introduction, many couples feel reluctant to donate their surplus embryos to other infertile couples because they want to control the type of home in which the child will be raised. Some aspects they can control include the marital status, religious views, education level, age, careers, and income of the recipient couple.²⁷⁷ These factors are among those typically considered by a court in determining the suitability of particular prospective adoptive parents.²⁷⁸ The consideration of these factors should be extended to embryo donation. The process should not involve the courts, but this information should be made available to the donor couple for them to have a choice of recipient parents for their genetic child. This would make them more willing to donate their surplus embryos, thus enabling more infertile couples to start a family.

²⁷⁰ *Id.* at 886–87.

²⁷¹ *Id.* at 887.

²⁷² *Id.*

²⁷³ *Id.* at 886.

²⁷⁴ *Id.*

²⁷⁵ Hounshell & Chetkowski, *supra* note 142. Approximately thirty-five percent of couples expressing a willingness to donate embryos to other couples ultimately decided to discard them. *Id.*

²⁷⁶ *See supra* notes 225–26 and accompanying text.

²⁷⁷ Snowflake FAQs, *supra* note 225.

²⁷⁸ *See generally* Boskey & Hollinger, *supra* note 205, § 3.06.

III. EXTENDING EXISTING ADOPTION LAW TO EMBRYO DONATION

A. *The Inherent Incompatibilities Between Adoption Law and Embryo Donation*

Although some legal scholars feel that adoption law should be used to regulate embryo donation,²⁷⁹ many of the procedures involved do not apply to embryo donation, thus making adoption law inappropriate for the regulation of embryo donation.²⁸⁰ “Simply calling embryo donation ‘embryo adoption’ does not, and cannot, make it fit within those legal constructs”²⁸¹ One basic assumption of adoption law is that a child has only one set of biological parents²⁸²—the ties to these parents must be severed by the adoption process to create a new familial relationship.²⁸³ The difficulty in extending adoption laws to ART involving donated genetic material (whether sperm, egg, or embryo) is that a child born of this technology necessarily has at least three biological parents: the donors of the genetic material, the mother who gestates the child (the birth mother in adoption statutes), and the gestating mother’s husband.²⁸⁴ In the case of ART, the gestating mother does not need her parentage terminated—she is the intended mother of the child.²⁸⁵ This negates the entire purpose of adoption statutes, which is the termination of birth parents’ rights and responsibilities.²⁸⁶

Adoption law is also not suitable for the regulation of embryo donation for the primary reason that “there is no ‘child’ to be adopted because in most legal systems embryos are not legal persons.”²⁸⁷ A logical explanation for this is that only a small number of embryo donations actually result in the birth of a child, because the success rates are

²⁷⁹ Katz, *supra* note 18, at 212.

²⁸⁰ Crockin, *supra* note 69, at 1184.

²⁸¹ *Id.*

²⁸² See Boskey & Hollinger, *supra* note 205, § 3.01[1].

²⁸³ *Id.*

²⁸⁴ See Alissa Johnson, *Reproductive Genetics*, GENETICS BRIEF, June 2002, <http://www.ncsl.org/programs/health/genetics/Geneticshealthins.pdf>.

²⁸⁵ See Scott B. Rae, *Parental Rights and the Definition of Motherhood in Surrogate Motherhood*, 3 S. CAL. REV. L. & WOMEN’S STUD., 219, 242–44 (arguing that because of bonding between the fetus and the gestational mother, “the claim to motherhood resides in the gestational mother rather than the egg donor”).

²⁸⁶ Boskey & Hollinger, *supra* note 205, § 3.01[1].

²⁸⁷ Robertson, *supra* note 67, at 891.

relatively low.²⁸⁸ Less than one-third of the embryo donation procedures actually result in live births.²⁸⁹ Applying the adoption statutes, with all of their preplacement requirements, would result in unnecessary procedures much of the time if no child is born of the embryo donation process.²⁹⁰

Adoption laws also have the primary concern of ensuring that the particular adoptive parents are suitable for the adopted child.²⁹¹ In every adoption proceeding, the judge must make a finding that the adoption is in the best interests of the child.²⁹² At the core of this concern is the idea that the child already exists and that there has been bonding with the birth mother (or with a family, in the case of older children).²⁹³ With children born of embryo donation, there is no child in existence when the relinquishment of the eggs takes place.²⁹⁴ The bonding that occurs during the pregnancy process is with the intended/biological mother, not with the genetic mother.²⁹⁵ Thus, the idea of “matching” prospective parents with a child does not correlate with the process of embryo donation.

Another glaring incompatibility between adoption law and embryo donation is that in most states, it is illegal to consent to the adoption before the child is born.²⁹⁶ In fact, all states have a period of time after the child is born during which the birth mother can rescind her consent to the adoption.²⁹⁷ With embryo donation, consent to the procedure necessarily takes place prior to birth because consent must take place prior to

²⁸⁸ *Id.*; SUCCESS RATES, *supra* note 6, at 54.

²⁸⁹ SUCCESS RATES, *supra* note 6, at 54.

²⁹⁰ Robertson, *supra* note 67, at 891.

²⁹¹ Boskey & Hollinger, *supra* note 205, § 3.01[1].

²⁹² *Id.* § 4.01[1].

²⁹³ *See* Rae, *supra* note 285.

²⁹⁴ *See id.* at 244 (“[B]ecause the bond of the egg and sperm donors is only anticipated and potential, it is qualitatively different from the bond currently experienced by the gestational mother.”). Use of the words “anticipated and potential” implies that there is no child when the relinquishment of the eggs takes place.

²⁹⁵ *Id.*

²⁹⁶ Katz, *supra* note 18, at 215.

²⁹⁷ *Id.* The period of time during which the birth mother may revoke her consent to the adoption varies from state to state. *Id.* In Illinois, the time period is one year. 750 ILL. COMP. STAT. ANN. 50/11 (West Supp. 2006); *see* Robertson, *supra* note 67, at 215 n.278 (citing *In re Adoption of Baby Girls Mandell*, 572 N.E.2d 359 (Ill. App. Ct. 1991)). In Kansas, the birth mother has only twelve hours to rescind the adoption agreement. KAN. STAT. ANN. § 59-2116 (2005); *see* Robertson, *supra* note 67, at 215 n.279 (citing *In re Baby Girl T.*, 21 P.3d 581 (Kan. Ct. App. 2001)).

implantation.²⁹⁸ Applying existing adoption laws to embryo donation would imply that the donor couple could rescind their consent to the “adoption” once the child is born—nine months after consent was given and after the birth mother has gestated the child.²⁹⁹

Adoption statutes generally require preplacement screening of the potential adoptive parents to determine their suitability for the process.³⁰⁰ Programs such as the Snowflake Embryo Adoption Program require this as a prerequisite to embryo adoption through their program.³⁰¹ Such screening, however, when applied to infertile couples who have been unsuccessful with ART procedures using their own genetic materials (i.e., eggs and sperm), is discriminatory. If they were otherwise acceptable under the program’s requirements, then requiring them to pass parental fitness tests would discriminate against them. This is especially obvious when there is a lack of such fitness tests with sperm and egg donation.³⁰² ART procedures also utilize genetic material of unrelated persons.³⁰³ No one is suggesting that couples using sperm and egg donation pass parental fitness tests in order to undergo the IVF processes. The only possible justification for requiring screening tests in embryo donation is the view that the embryo is a human life, which is incompatible with the laws of the United States.³⁰⁴

Finally, the adoption laws are incompatible with embryo donation because many of the adoption procedures are unnecessary in the context of embryo donation. In order to support the legal fiction of adoption, the prospective adoptive parents and the child appear before the court, having a “rebirth,” including the issuance of a new birth certificate.³⁰⁵ The court then issues an adoption decree, which states that the adoptive parents are now the legal parents of the child.³⁰⁶ This process is simply not necessary with embryo donation, because the birth parents’ names would already be

²⁹⁸ See Naomi D. Johnson, *Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?*, 68 BROOK. L. REV. 853, 878 (2003).

²⁹⁹ See *supra* note 297 and accompanying text.

³⁰⁰ Boskey & Hollinger, *supra* note 205.

³⁰¹ Snowflake FAQs, *supra* note 225.

³⁰² Robertson, *supra* note 67, at 887.

³⁰³ AM. SOC’Y FOR REPROD., THIRD PARTY REPRODUCTION: A GUIDE FOR PATIENTS 3–4 (2006), <http://www.asrm.org/Patients/patientbooklets/thirdparty.pdf>.

³⁰⁴ See discussion *infra* Part III.B.1.–2.

³⁰⁵ Boskey & Hollinger, *supra* note 205, § 4.03[1].

³⁰⁶ *Id.*

on the birth certificate.³⁰⁷ Most state laws about gamete donation provide that the birth parents are the legal parents of the child.³⁰⁸ Extending this to embryo donation would imply that the birth parents for donated embryos are already the legal parents of the child.

B. Establishing the Procedure as Embryo Donation, Not Embryo Adoption

“A rose by any other name”³⁰⁹

Labels are important, especially in the law. Although the terms “embryo adoption” and “embryo donation” refer to the same procedure, they are used in such a way to reveal the user’s motivations. President Bush, for example, uses only the term embryo adoption, because one of his ultimate goals is to eliminate the use of frozen embryos in stem cell research.³¹⁰ IVF professionals, on the other hand, refer to the procedure as embryo donation.³¹¹ Pro-life advocates use the term embryo adoption because they feel that any non-implantation use of an embryo amounts to the taking of a human life.³¹² Pro-choice advocates, on the other hand, use the term embryo donation, because embryos are not human lives in their view.³¹³

1. The Right to an Abortion

In 1973, in the landmark case of *Roe v. Wade*,³¹⁴ the Supreme Court first established a woman’s right to an abortion.³¹⁵ The Court held that the constitutional right to privacy was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy” and held that abortion

³⁰⁷ National Embryo Donation Center, Embryo Adoption Information, <http://www.embryodonation.org/adoptions.php> (last visited Mar. 3 2007).

³⁰⁸ Manning, *supra* note 75, at 701.

³⁰⁹ See Cunningham, *supra* note 135; see also WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2 (“A rose by any other word . . .”).

³¹⁰ Remarks on Bioethics, *supra* note 176, at 875–76; Valuing Life, *supra* note 179.

³¹¹ See Cunningham, *supra* note 135. “The IVF industry is worried that references to ‘adoption’ will enhance the legal status of the early embryo, thereby leading to restrictions on its currently unregulated, multi-million dollar business.” *Id.*

³¹² Susan Frelich Appleton, *The Public and Private Faces of Family Law: Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 439 (2004).

³¹³ *Id.* & n.283; Michael J. Sandel, *The Anti-Cloning Conundrum*, N.Y. TIMES, May 28, 2002, at A19.

³¹⁴ 410 U.S. 113 (1973).

³¹⁵ *Id.* at 164–66.

was a fundamental right.³¹⁶ The Court set up a strict scrutiny trimester analysis that used a determination of both the woman's right to personal privacy and the state's compelling interest in protecting the life of the fetus.³¹⁷

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³¹⁸ the Court upheld the legality of abortions, but the Court modified the trimester analysis from *Roe* and revoked its determination of abortion as a fundamental right.³¹⁹ The Court constructed a new standard of review that allowed restrictions on abortion only if they did not impose an undue burden on the woman.³²⁰

A woman's right to an abortion in this country has thus been firmly established by the Supreme Court. This right to an abortion necessarily implies that a fetus is not a person under the law; otherwise every abortion would be murder. Designating the embryo donation procedure as embryo adoption could have far-reaching legal effects. "The problem with this label (adoption) is it elevates embryos to the status of a child in many people's minds, and then you end up on a slippery slope."³²¹ Naming the procedure "adoption" implies that a child is involved, which indicates that the embryo (and thus the fetus) is a human life. By implication, then, abortion is the taking of a human life, and thus it is murder. Designating the procedure "embryo adoption" implicitly rejects *Roe v. Wade*.

2. Stem Cell Research

Designating the procedure as embryo adoption would also virtually eliminate any possibility of stem cell research on surplus embryos, because such testing destroys the embryo.³²² Such destruction, if the embryo were considered a human life, would obviously be objectionable—tests that involve human death are not permitted.³²³ "If you can adopt embryos, how

³¹⁶ See *id.* at 153.

³¹⁷ See *id.* at 163–65.

³¹⁸ 505 U.S. 833 (1992).

³¹⁹ See *id.* at 878–79.

³²⁰ *Id.* at 846.

³²¹ Suzanne Smalley, *A New Baby Debate*, NEWSWEEK, Mar. 24, 2003, at 53 (quoting Susan Crockin, a specialist in reproductive law).

³²² Valuing Life, *supra* note 179.

³²³ See Remarks on Bioethics, *supra* note 176 ("I believe America must pursue the tremendous possibilities of science, and I believe we can do so while still fostering and encouraging respect for human life in all its stages. In the complex debate over embryonic stem cell research, we must remember that real human lives are involved—both the lives of
(continued)

can you do stem-cell research on them or discard them?”³²⁴ Stem cell research involves the embryonic cells, which have the capacity to differentiate into any type of cell in the body.³²⁵ Scientists are hopeful that research on these cells will lead to medical breakthroughs with Parkinson’s disease, Alzheimer’s disease, heart disease, arthritis, and diabetes.³²⁶

Designating embryo donation as embryo adoption would curtail stem cell research in a way that could postpone medical breakthroughs for decades. The House of Representatives has passed a bill specifically limiting federal funding for stem cell research to only cell lines already existing or embryos that have already been destroyed.³²⁷ The donation of surplus embryos for stem cell research is discouraged by the lack of federal funding for such research.

By embracing the term embryo donation instead of embryo adoption, fewer emotional responses arise. Rather than calling to mind the adoption of a child, it implies a more scientific or technical process. Calling the process embryo adoption, as urged by such organizations as the Snowflake Embryo Adoption Program,³²⁸ implies that the embryo is a child and that this child should have all of the benefits and protections of the laws of the United States. This would eliminate the possibility of stem cell research on any surplus embryos.

IV. PROPOSED REQUIREMENTS IN EMBRYO DONATION LEGISLATION

A. *Suggested Requirements for Parties Undergoing Embryo Donation*

Few states have enacted laws regulating embryo donation, and those that have done so have incomplete statutes.³²⁹ They fail to delineate

those with diseases that might find cures from this research and the lives of the embryos that will be destroyed in the process. The children here today are reminders that every human life is a precious gift of matchless value.”).

³²⁴ Smalley, *supra* note 321.

³²⁵ National Institutes of Health, Stem Cells and Diseases (Oct. 28, 2006), <http://stemcells.nih.gov/info/health.asp>.

³²⁶ *Id.*

³²⁷ Stem Cell Research Enhancement Act of 2005, H.R. 810, 109th Cong. (2005). The bill passed the Senate as well, but was vetoed by the President on July 19, 2006. Office of Legislative Policy and Analysis, Bill Tracking, H.R. 810—The Stem Cell Research Enhancement Act of 2005, http://olpa.od.nih.gov/tracking/109/house_bills/session1/hr-810.asp (last visited Mar. 3, 2007).

³²⁸ Snowflake FAQs, *supra* note 225.

³²⁹ See discussion *supra* Part I.D.

guidelines for any pre-procedure screening.³³⁰ A complete statute on embryo donation will not only specify the legal rights and responsibilities of all of the parties involved, but also contain mandatory procedures to be followed by all those undergoing the process.

1. Guidelines for Donors

Proposed legislation regulating embryo donation should contain language mandating certain pre-donation procedures that must be provided by all fertility centers to those couples donating their surplus embryos to another couple. The pre-donation procedures should include:

- medical and genetic history;
- medical testing for infectious diseases;
- psychological screening and counseling;
- legal counseling; and
- informed consent to the procedure.³³¹

The psychological screening and counseling should include a discussion of the different ways surplus embryos can be used. A psychological interview with the donor couple should focus on ascertaining their values to help them determine which option would be best for them. The psychologist should focus on the couple's motivation to donate, current life stressors, and any history of psychological disorders.³³² Those wishing to pursue embryo donation should be provided counseling on the social issues involved, including the possibility of having genetic children being raised by someone else. Adequate time for deliberation must be permitted, so that the couple may make an informed decision.

The legal counseling should include information about the possibility of open or closed donation procedures. The center should also offer the donor couple the option of selecting a potential recipient couple, based on non-identifying characteristics such as age, religion, marital status, education, and occupation. This will help reassure the donating couple that their genetic child will be raised in a home of which they would approve. The legal counseling must also ensure that the donor couple understands

³³⁰ See discussion *supra* Part I.D.

³³¹ Am. Soc'y for Reprod. Med., *Guidelines for Cryopreserved Embryo Donation*, 77 FERTILITY & STERILITY S9, S9–S10 (Supp. 5 2002) [hereinafter *Cryopreserved Guidelines*].

³³² Am. Soc'y for Reprod. Med., *Psychological Assessment of Gamete Donors and Recipients*, 77 FERTILITY & STERILITY S11, S11 (Supp. 5 2002) [hereinafter *Psychological Assessment*]; see also Anderson Interview, *supra* note 28.

the consequences of donation, including the inability to ever seek legal parentage rights to any children born of the procedure.

2. *Guidelines for Recipients*

Proposed legislation regulating embryo donation should also contain language mandating certain pre-transfer procedures that must be provided by all fertility centers to recipients of donor embryos. The pre-transfer procedures should include:

- medical screening of the recipient mother;
- psychological screening and counseling;
- legal counseling; and
- informed consent to the procedure.³³³

All fertility centers will screen the recipient mother for medical conditions that will affect the potential pregnancy.³³⁴

The psychological screening and counseling should include a discussion of the emotions involved in carrying and raising a child genetically unrelated to the recipients.³³⁵ The possibility that the procedure will not be successful should also be addressed and examined thoroughly.³³⁶ Many couples undergoing embryo donation will have already experienced failures of traditional ART procedures. However, this is the last option before traditional adoption, and the possibility of failure must be addressed.

The legal counseling should include information about the possibility of open or closed donation procedures.³³⁷ Some couples, both donor and recipient, may desire an open arrangement. The counseling should also include a discussion of the parental rights and responsibilities that will attach at the moment of transfer.³³⁸ The recipient mother must understand that her status as legal mother is established immediately. Unlike traditional adoption, there will be no waiting period while someone else gestates the fetus.

³³³ See *Psychological Assessment*, *supra* note 332, at S11–S12.

³³⁴ See *id.*; see also Anderson Interview, *supra* note 28.

³³⁵ See *Psychological Assessment*, *supra* note 332.

³³⁶ *Id.*

³³⁷ See *id.* at S11.

³³⁸ See *id.* at S11–S12.

B. Creation of National Registries for Embryo Donation

Every state currently requires adoption records to be maintained so that the information is accessible to the parties involved.³³⁹ Most states require mutual consent of both the birth parent(s) and the adopted child before the adoption records may be unsealed and the information provided to the requesting party.³⁴⁰ Many states allow intermediaries to obtain consent from the other party upon the request of the party seeking the information.³⁴¹ Eleven states allow the adoptee access to his or her original birth certificate upon reaching the age of majority.³⁴² None of this would be possible, of course, without the maintenance of adoption records.

Children born of embryo donation will have the same need for information about their genetic parents that adopted children have for information about their birth parents.³⁴³ “Genetic connections are powerful and lasting”³⁴⁴ The children born of embryo donation should be accorded the same opportunities to access their genetic history as traditionally adopted children are accorded. The major hurdle here is the lack of mandatory maintenance of embryo donation records.³⁴⁵ Clinics may not maintain such records at all; if they do, they may close and destroy them before children reach the age of majority.³⁴⁶ Having a national registry will allow the legal parents of children born of embryo donation to decide upon an appropriate time to inform the child of the circumstances of his or her birth.³⁴⁷ The legal parents will not have to worry about the unavailability of the information about the donor.³⁴⁸

³³⁹ See U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD WELFARE INFORMATION GATEWAY, ACCESS TO ADOPTION RECORDS: SUMMARY OF STATE LAWS 1 (2006), http://childwelfare.gov/systemwide/laws_policies/statutes/infoaccessapall.pdf.

³⁴⁰ *State Procedures for Obtaining Identifying Information from Sealed Adoption Records*, 3 ADOPTION L. & PRAC. § 13-A.01 (2005).

³⁴¹ *Id.* § 13-A.03.

³⁴² *Id.* § 13-A.04.

³⁴³ Bernstein et al., *supra* note 66.

³⁴⁴ *Id.*

³⁴⁵ See discussion *supra* Part II.B.3.

³⁴⁶ See Corson & Mechanick-Braverman, *supra* note 113; see also discussion *supra* Part II.B.3.

³⁴⁷ Corson & Mechanick-Braverman, *supra* note 113, at 810.

³⁴⁸ *Id.*

C. Uniform Designation of Legal Rights and Responsibilities Associated with Parentage

Using the word “adoption” when referring to embryo donation may give both donor and recipient couples a false sense of security about their legal parental rights and responsibilities. Presently, no court has resolved a case involving a dispute over the legal parentage of children born of donated embryos.³⁴⁹ Because the vast majority of states lack any legislation that delineates the legal parentage of such children,³⁵⁰ the potential outcome of a dispute such as this is unknown. If the donor couple is able to convince the court that they did not intend to donate their embryos, or that they regret their decision—much like a birth mother in the context of adoption—then that court could hold that the donor parents are the legal parents of the child. This would come as a shock to the recipient mother, who gestated and delivered the child. Because of this potential situation, legislatures carefully need to delineate the legal parentage of children born as a result of embryo donation.³⁵¹

Proposed legislation should be initially formatted similar to Ohio’s House Bill 102, which clearly designates the biological/birth mother as the legal mother of the child.³⁵² The bill states, “A woman who gives birth to a child born as a result of embryo donation shall be treated in law and regarded as the natural mother of the child, and the child shall be treated in law and regarded as the natural child of the woman.”³⁵³ Similar language should be included in any legislation on embryo donation. However, Ohio’s designation of a legal mother is incomplete, because it fails to consider gestational surrogacy. Any legislation must provide an exception for those situations where the intended legal mother of the child is neither the birth mother nor the genetic mother. The law must allow a surrogacy

³⁴⁹ Charles P. Kindegran, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169, 174 (2004).

³⁵⁰ See discussion *supra* Part II.A.

³⁵¹ Any such legislation should also encompass egg donation, which carries with it a similar potential for parentage disputes.

³⁵² H.R. 102, 126th Gen. Assem. (Ohio 2005) (to be codified as amended at OHIO REV. CODE § 3111.97).

³⁵³ *Id.*

contract involving embryo donation to establish legal motherhood in the intended mother rather than in the surrogate.³⁵⁴

Unlike the Ohio bill, though, any legislation regulating embryo donation should apply to all situations of embryo donation. Ohio's bill establishes legal fatherhood only in cases where the couple is married and the husband consents to the embryo donation.³⁵⁵ It neglects to account for unmarried heterosexual couples, married women who have the procedure performed without the husband's consent, single women, or lesbian couples.³⁵⁶

For cases where there is no clear legal father, the legislation needs to establish clearly the termination of legal fatherhood in the genetic father, which Ohio's bill neglects to do.³⁵⁷ In cases of unmarried heterosexual couples, legislation should establish legal fatherhood in the biological mother's partner, if he consents to the procedure. In cases involving single women or lesbian couples, there will be no legal father. The legislation needs to be clear, however, that the genetic father cannot later sue for his parental rights or be sued for child support.

The following is an example of proposed legislative language establishing legal fatherhood, complete with all state-mandated rights and responsibilities:

The husband or male partner of the recipient mother of embryo donation, if he consents to the procedure, shall be in law and regarded as the legal father of the child, and the child shall be treated in law and regarded as the legal child of the husband or male partner.

This language clearly encompasses one situation that Ohio's bill fails to consider—that of unmarried heterosexual couples.

Language clearly terminating the parental rights and responsibilities of the genetic parents must also be included in any legislation on embryo donation. An example of such language is as follows:

³⁵⁴ Although beyond the scope of this Comment, it should be noted that surrogacy contracts are currently unenforceable in several states, forcing even genetic mothers to adopt their own children. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-218(A), (D) (2007) (specifically including surrogate mothers of unrelated embryos); LA. REV. STAT. ANN. § 9:2713(A) (2000); MICH. COMP. LAWS ANN. § 722.855 (West 2002).

³⁵⁵ *Id.*

³⁵⁶ *See id.*

³⁵⁷ *See id.*

Any donor of genetic material used in embryo donation, egg donation, sperm donation, or other type of assisted reproduction shall not be treated in law or regarded as the legal parent of any child born as a result of the assisted reproduction. Suits for parental rights or child support are prohibited in these situations.

This language will reassure donors (whether of sperm, eggs, or embryos) that they need not worry about future litigation attempting to establish parentage for child support purposes. It also reassures the recipient party that the donor will not succeed in any attempt to establish legal parentage in the future.

CONCLUSION

Technology is progressing faster and faster every day, but the law is not keeping up. ART procedures result in surplus embryos for many couples, and these couples are faced with the decision of how to treat the embryos once they no longer need them. Their decision is impacted by the lack of legal regulation of embryos. Many courts have refused to create case law determining the legal status of embryos, and very few states have addressed the problem legislatively. The lack of a uniform legal status has led to legal uncertainty about the ethics of stem cell research and abortion rights.

The lack of legal regulation of embryos and ART procedures involving them also creates uncertainty of parental rights and responsibilities. Legislatures must address the legal issues surrounding embryo donation and other ART procedures to prevent potentially unfair results in paternity and custody disputes.

The lack of regulation will also create a generation of children born from these procedures who will be unable to fulfill the compelling psychological need to know their complete genetic identity. Legislatures need to address embryo donation and fulfill their duty to future generations of ART children by mandating the maintenance of records. None of these children should have to ask, "Are you my mother?"