

# ADOPTION AIN'T AN OPTION: THE NEED FOR EMBRYO TRANSFER LAWS IN MISSISSIPPI

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## INTRODUCTION

Jenny and Mark had always dreamed of adoption. Their dreams, however, did not include going to the hospital to pick up their new baby only to be told the biological mother had decided not to move forward with the adoption. After two failed adoptions, Jenny and Mark decided to look into a more cost-effective and lesser-known form of adoption, embryo adoption. With between 700,000 and 1,000,000 cryopreserved embryos in the United States, this was an option that almost guaranteed them a child.<sup>1</sup> While looking into the process, a feeling of uncertainty developed for Mark and Jenny, as several legal questions arose as to whether courts in Mississippi would apply contract law or adoption law should an issue arise.<sup>2</sup>

<sup>1</sup> About NEDC, NATIONAL EMBRYO DONATION CENTER, <https://www.embryo-donation.org/about/> [<https://perma.cc/5JJA-4BDR>] (last visited on Nov. 13, 2019).

<sup>2</sup> Alexia M. Baiman, *Cryopreserved Embryos as America's Prospective Adoptees: Are Couples Truly "Adopting" or Merely Transferring Property Rights?*, 16 WM. & MARY J. WOMEN & L. 133, 134-35 (2009) ("Although the popularity of transferring embryos

Embryo “adoption” is a bit of a misnomer and is sometimes referred to as a gift or donation. Often adoption agencies dealing with embryo adoptions follow traditional adoption procedures, however, embryo adoptions are not regulated. “In most states it is illegal to consent to adoption before the child is born, and all states recognize a period after a child is born during which the birth mother can rescind her consent to the adoption.”<sup>3</sup> Further, a Mississippi statute provides that “any *person* may be adopted.”<sup>4</sup>

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left over from IVF treatments has increased, the majority of American state legislatures and courts have remained silent, reluctant to definitively resolve the question of whether the transfer is an adoption, thus governed by adoption law, or whether it is merely a transfer of property interests in the embryos, thus subject to contract law. Genetic parents and prospective adoptive parents across the country are thus left uncertain over both the finality and scope of their transfer agreements.”).

<sup>3</sup> Polina M. Dostalík, *Embryo “Adoption”? The Rhetoric, the Law, and the Legal Consequences*, 55 N.Y.L. SCH. L. REV. 867, 885-86 (2010/11).

<sup>4</sup> MISS. CODE ANN. § 93-17-3(4) (West 2019) (emphasis added). The entire statutory scheme provides:

(1) Except as otherwise provided in this section, a court of this state has jurisdiction over a proceeding for the adoption or readoption of a minor commenced under this chapter if:

(a) Immediately before commencement of the proceeding, the minor lived in this state with a parent, a guardian, a prospective adoptive parent or another person acting as parent, for at least six (6) consecutive months, excluding periods of temporary absence, or, in the case of a minor under six (6) months of age, lived in this state from soon after birth with any of those individuals and there is available in this state substantial evidence concerning the minor's present or future care;

(b) Immediately before commencement of the proceeding, the prospective adoptive parent lived in this state for at least six (6) consecutive months, excluding periods of temporary absence, and there is available in this state substantial evidence concerning the minor's present or future care;

(c) The agency that placed the minor for adoption is licensed in this state and it is in the best interest of the minor that a court of this state assume jurisdiction because:

(i) The minor and the minor's parents, or the minor and the prospective adoptive parent, have a significant connection with this state; and

(ii) There is available in this state substantial evidence concerning the minor's present or future care;

(d) The minor and the prospective adoptive parent are physically present in this state and the minor has been abandoned or it is necessary in an emergency to protect the minor because the minor has

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been subjected to or threatened with mistreatment or abuse or is otherwise neglected;

(e) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a) through (d), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to hear a petition for adoption of the minor, and it is in the best interest of the minor that a court of this state assume jurisdiction; or

(f) The child has been adopted in a foreign country, the agency that placed the minor for adoption is licensed in this state, and it is in the best interest of the child to be readopted in a court of this state having jurisdiction.

(2) A court of this state may not exercise jurisdiction over a proceeding for adoption of a minor if, at the time the petition for adoption is filed, a proceeding concerning the custody or adoption of the minor is pending in a court of another state exercising jurisdiction substantially in conformity with the Uniform Child Custody Jurisdiction Act or this section unless the proceeding is stayed by the court of the other state.

(3) If a court of another state has issued a decree or order concerning the custody of a minor who may be the subject of a proceeding for adoption in this state, a court of this state may not exercise jurisdiction over a proceeding for adoption of the minor unless:

(a) The court of this state finds that the court of the state which issued the decree or order:

(i) Does not have continuing jurisdiction to modify the decree or order under jurisdictional prerequisites substantially in accordance with the Uniform Child Custody Jurisdiction Act or has declined to assume jurisdiction to modify the decree or order; or

(ii) Does not have jurisdiction over a proceeding for adoption substantially in conformity with subsection (1)(a) through (d) or has declined to assume jurisdiction over a proceeding for adoption; and

(b) The court of this state has jurisdiction over the proceeding.

(4) Any person may be adopted in accordance with the provisions of this chapter in termtime or in vacation by an unmarried adult or by a married person whose spouse joins in the petition. The adoption shall be by sworn petition filed in the chancery court of the county in which the adopting petitioner or petitioners reside or in which the child to be adopted resides or was born, or was found when it was abandoned or deserted, or in which the home is located to which the child has been surrendered by a person authorized to so do. The petition shall be accompanied by a doctor's or nurse practitioner's certificate showing the physical and mental condition of the child to be adopted and a sworn statement of all property, if any, owned by the child. In addition, the petition shall be accompanied by affidavits of the petitioner or petitioners stating the amount of the service fees charged by any

Embryo adoption therefore does not fall squarely in line with the statutory parameters for adoption and could potentially result in the biological parents withdrawing their consent after an adoptive

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adoption agencies or adoption facilitators used by the petitioner or petitioners and any other expenses paid by the petitioner or petitioners in the adoption process as of the time of filing the petition. If the doctor's or nurse practitioner's certificate indicates any abnormal mental or physical condition or defect, the condition or defect shall not, in the discretion of the chancellor, bar the adoption of the child if the adopting parent or parents file an affidavit stating full and complete knowledge of the condition or defect and stating a desire to adopt the child, notwithstanding the condition or defect. The court shall have the power to change the name of the child as a part of the adoption proceedings. The word "child" in this section shall be construed to refer to the person to be adopted, though an adult.

(5) Adoption by couples of the same gender is prohibited.

(6) No person may be placed in the home of or adopted by the prospective adopting parties before a court-ordered or voluntary home study is satisfactorily completed by a licensed adoption agency, a licensed, experienced social worker approved by the chancery court or by the Department of Human Services on the prospective adoptive parties if required by Section 93-17-11.

(7) No person may be adopted by a person or persons who reside outside the State of Mississippi unless the provisions of the Interstate Compact for Placement of Children (Section 43-18-1 et seq.) have been complied with. In such cases Forms 100A, 100B (if applicable) and evidence of Interstate Compact for Placement of Children approval shall be added to the permanent adoption record file within one (1) month of the placement, and a minimum of two (2) post-placement reports conducted by a licensed child-placing agency shall be provided to the Mississippi Department of Human Services Interstate Compact for Placement of Children office.

(8) No person may be adopted unless the provisions of the Indian Child Welfare Act (ICWA) have been complied with, if applicable. When applicable, proof of compliance shall be included in the court adoption file prior to finalization of the adoption. If not applicable, a written statement or paragraph in the petition for adoption shall be included in the adoption petition stating that the provisions of ICWA do not apply before finalization.

(9) The readoption of a child who has automatically acquired United States citizenship following an adoption in a foreign country and who possesses a Certificate of Citizenship in accordance with the Child Citizenship Act, CAA, Public Law 106-395, may be given full force and effect in a readoption proceeding conducted by a court of competent jurisdiction in this state by compliance with the Mississippi Registration of Foreign Adoptions Act, Article 9 of this chapter.

*Id.* § 93-17-3.

parent has carried the child to term. Alabama,<sup>5</sup> Florida,<sup>6</sup> Georgia,<sup>7</sup> Maine,<sup>8</sup> Ohio,<sup>9</sup> Oklahoma,<sup>10</sup> Oregon,<sup>11</sup> Tennessee,<sup>12</sup> and Vermont<sup>13</sup> have all statutorily addressed the issue of parentage of embryos.

Contract law, while appearing to be a viable route, is inadequate because contracting for frozen embryos is “tacitly treating the embryos as property.”<sup>14</sup> Many adoption agencies employ the use of contracts, but there is no guarantee that these would be upheld in court if Mississippi does not recognize an embryo as property.<sup>15</sup>

Seeing that both adoption law and contract law are inadequate, the state of Mississippi needs to clarify how courts should handle these matters when they arise so parents can enter this process with certainty. This comment will discuss the need for a new set of laws to address embryo transfers.

## I. BACKGROUND

### A. Infertility

Infertility affects an estimated 6.1 million women in the United States.<sup>16</sup> Infertility is defined as not being able to conceive a child after one year of trying to conceive, or after six months if the woman is 35 or older.<sup>17</sup>

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<sup>5</sup> ALA. CODE § 26-17-702 (1975).

<sup>6</sup> FLA. STAT. ANN. § 742.14 (West 2019).

<sup>7</sup> GA. CODE ANN. § 19-8-41 (West 2019).

<sup>8</sup> ME. REV. STAT. ANN. tit. 19-A, §§ 1832, 1922 (2019).

<sup>9</sup> OHIO REV. CODE ANN. § 3111.97 (West 2019).

<sup>10</sup> OKLA. STAT. ANN. tit. 10, § 556(B) (West 2019).

<sup>11</sup> OR. REV. STAT. ANN. § 109.239 (West 2018).

<sup>12</sup> TENN. CODE ANN. § 36-2-401 (West 2019).

<sup>13</sup> VT. STAT. ANN. tit. 15C, § 702 (West 2019).

<sup>14</sup> Katheryn D. Katz, *The Legal Status of the Ex Utero Embryo: Implications for Adoption Law*, 35 CAP. U. L. REV. 303, 327 (2006).

<sup>15</sup> Baiman, *supra* note 2 at 134 n. 7 (“In order for genetic parents to lawfully contract away their ownership rights to their embryos, the excess cryopreserved embryos must first be deemed to be their property. If embryos are deemed to be property rather than legally recognized ‘persons,’ either contract or property law could govern the transfer.”); *see also* GA. CODE ANN. § 19-8-41(d) (West 2019).

<sup>16</sup> *What is infertility?*, OFFICE ON WOMEN’S HEALTH, <https://www.womenshealth.gov/a-z-topics/infertility> [https://perma.cc/7M7R-3SYN] (last visited Nov. 12, 2019).

<sup>17</sup> *Id.*

Infertile and same-sex couples alike often turn to assisted reproductive technology (“ART”) when they are unable to conceive a child on their own. According to the Centers for Disease Control and Prevention (the “CDC”):

ART includes all fertility treatments in which both eggs and embryos are handled. In general, ART procedures involve surgically removing eggs from a woman’s ovaries, combining them with sperm in the laboratory, and returning them to the woman’s body or donating them to another woman.<sup>18</sup>

The CDC emphasizes that ART “do[es not] include treatments in which only sperm are handled . . . or procedures in which a woman takes medicine only to stimulate egg production without the intention of having eggs retrieved.”<sup>19</sup>

The advancement in medical technology “offers a chance at parenthood to couples who until recently would have had no hope of having a ‘biologically related’ child.”<sup>20</sup> The most common and most effective form of ART is in vitro fertilization (IVF).<sup>21</sup>

Before beginning the IVF process there are various specialized tests to determine the quantity and quality of the woman’s eggs as well as various other factors that may contribute to infertility.<sup>22</sup>

In IVF, eggs are surgically removed from the ovary and mixed with sperm outside the body in a Petri dish (“in vitro” is Latin for “in glass”). After about 40 hours, the eggs are examined to see if they have become fertilized by the sperm and are dividing into cells. These fertilized eggs (embryos) are then

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<sup>18</sup> *Assisted Reproductive Technology (ART)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/art/whatis.html> [<https://perma.cc/F2XW-A4UE>] (last visited Nov. 12, 2019).

<sup>19</sup> *Id.*

<sup>20</sup> *What is In Vitro Fertilization?*, SOC’Y FOR ASSISTED REPRODUCTIVE TECH., [https://www.sart.org/SART\\_Frequent\\_Questions/](https://www.sart.org/SART_Frequent_Questions/) [<https://perma.cc/QD9N-KJFE>] (last visited Nov. 12, 2019).

<sup>21</sup> *What are the different types of assisted reproductive technology (ART)?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/reproductivehealth/infertility/index.htm> [<https://perma.cc/ZZ48-FXN3>] (last visited Dec. 10, 2018).

<sup>22</sup> *In vitro fertilization (IVF)*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716> [<https://perma.cc/K3L9-FA6G>] (last visited May 10, 2020).

placed in the women's uterus, thus bypassing the fallopian tubes.<sup>23</sup>

IVF can be performed using a woman's own eggs and her partner's sperm or it may involve donated eggs and/or sperm.<sup>24</sup> The process can be both time consuming and expensive, costing around \$12,000, not including fertility drugs, specialized testing, or delivery expenses.<sup>25</sup>

With an increase in IVF, there are an estimated 700,000 to 1,000,000 frozen embryos in the United States.<sup>26</sup> Once the eggs have been fertilized the couple has to make the choice of what should be done with the remaining embryos that are not inserted into the woman for pregnancy. Couples have four options, they can choose to cryopreserve<sup>27</sup> until a later date, discard the embryos, donate to science, or donate to another couple.

### B. Embryo Classification

The classification of embryos is a highly debated topic that often troubles many people. Should they be considered property or a person? This comment does not address whether an embryo should be classified as a person or property, but will view it as the third category, an interim state.<sup>28</sup>

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<sup>23</sup> SOC'Y FOR ASSISTED REPRODUCTIVE TECH, *supra* note 20.

<sup>24</sup> MAYO CLINIC, *supra* note 22.

<sup>25</sup> Nina Bahadur, *The Cost of Infertility: This is How Real People Pay for IVF*, SELF (Jan. 8, 2018), <https://www.self.com/story/the-cost-of-infertility> [<https://perma.cc/DW3Z-HPPC>].

<sup>26</sup> NATIONAL EMBRYO DONATION CENTER, *supra* note 1.

<sup>27</sup> See Ariana Eunjung Chang, *FAQ: Are my frozen embryos safe? Everything you need to know about the freezer malfunctions*, WASH. POST (Mar. 14, 2018), [https://www.washingtonpost.com/news/to-your-health/wp/2018/03/14/faq-are-my-frozen-embryos-safe-everything-you-need-to-know-given-two-fertility-clinics-recent-problems/?utm\\_term=.bec3e55dab4c](https://www.washingtonpost.com/news/to-your-health/wp/2018/03/14/faq-are-my-frozen-embryos-safe-everything-you-need-to-know-given-two-fertility-clinics-recent-problems/?utm_term=.bec3e55dab4c) [<https://perma.cc/3WV3-KZR5>]. During cryopreservation, “[e]ggs and embryos are kept in tanks of supercooled liquid nitrogen . . . . Inside the tanks is a combination of towers and canisters that can hold from roughly 5,000 to 30,000 ‘straws’ of material. They are usually in secure-access rooms with sensors and alarms that are monitored 24/7. If nitrogen levels get too low or temperatures begin to rise, an emergency signal goes out to fertility clinic personnel.” *Id.*

<sup>28</sup> As of the time of this comment, Mississippi case law is silent on this matter.



## 1. Personhood

While many states have proposed legislation to acknowledge an embryo as a person, Louisiana is the only state to legally recognize an embryo as a person.<sup>29</sup> The Thirteenth Amendment prohibits the selling, purchasing, and owning of another person.<sup>30</sup> Therefore, if an embryo is considered a person it cannot belong to the gamete providers. If the gamete providers do not own the embryo, then it could be argued that they do not have rights to determine the disposition of them without the help of the legal system. In 2011, Mississippi attempted to classify embryos as a person through Initiative 26, a proposed amendment to the state Constitution to define life “to include every human being from the moment of fertilization, cloning or the functional equivalent thereof.”<sup>31</sup> The proposed amendment did not pass.<sup>32</sup>

## 2. Property

Property is legally defined as “the ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others.”<sup>33</sup> “[I]f an embryo is considered property, it[] . . . can be contracted like goods and services.”<sup>34</sup> However, courts have treated embryos as marital property in instances where couples have signed informed consent documents contained language of intent to treat the embryos as property. For instance, the Second Department of the New York Supreme Court upheld an informed consent document signed by a married couple at the time of IVF with the following language:

We understand that our frozen pre-zygotes will be stored for a maximum of 5 years. We have the principal responsibility to

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<sup>29</sup> LA. STAT. ANN. § 9:126 (West 2019).

<sup>30</sup> U.S. CONST. amend. XIII, § 1.

<sup>31</sup> Katharine Q. Seelye, *Mississippi Voters Reject Anti-Abortion Measure*, N.Y. TIMES (Nov. 8, 2011), <https://www.nytimes.com/2011/11/09/us/politics/votes-across-the-nation-could-serve-as-a-political-barometer.html> [<https://perma.cc/P8YM-UZ2D>].

<sup>32</sup> If an embryo was declared a person, it could have serious implications on couples who choose to destroy their embryos or donate them for research.

<sup>33</sup> *Property*, THE LAW DICTIONARY, <https://thelawdictionary.org/property/> [<https://perma.cc/T2NP-QXRG>] (last visited Nov. 12, 2019).

<sup>34</sup> Jodi L. Bender, *Snowflakes in Texas? Enacting Legislation to Allow for Embryo Adoption*, 16 TEX. WESLEYAN L. REV. 413, 422 (2010).

decide the disposition of our frozen pre-zygotes. *Our frozen pre-zygotes will not be released from storage for any purpose without the written consent of both of us*, consistent with the policies of the IVF Program and applicable law. In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction. Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand that we may determine the disposition of our frozen pre-zygotes remaining in storage.<sup>35</sup>

The court found that the language in the informed consent document demonstrated the couple's "clear and unequivocal choice"<sup>36</sup> of their intent with regards to disposition in the event of a divorce.

Mississippi does allow for contracts to *donate* eyes, heart, kidney or other transplantable parts of a human body to medical science or for medical purposes.<sup>37</sup> It would logically follow that an embryo transfer could fall into this category. Further, Mississippi has adopted the Uniform Anatomical Gift Act, which regulates the donation of other body parts such as an organ, tissue, eye, bone, artery, blood, fluid, or other portion of a human body,<sup>38</sup> but Mississippi does not treat human body parts as mere property.<sup>39</sup> The statute does not specifically address embryos and there is no indication as to whether an embryo is considered as an organ or tissue. Thus, an embryo would not fall squarely under property law because it could be considered a body part, which brings us to

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<sup>35</sup> *Kass v. Kass*, 663 N.Y.S.2d 581, 583-84 (1997), *aff'd*, 696 N.E.2d 174 (1998) (emphasis omitted).

<sup>36</sup> *Id.* at 589.

<sup>37</sup> MISS. CODE ANN. § 41-39-9 (West 2019) ("It is hereby declared lawful for any person eighteen (18) years of age and over, having a sound and disposing mind, to enter into a written contract with a qualified hospital or medical school to donate his eyes, heart, kidney or other transplantable part of a human body to medical science or for medical purposes. Any contract entered into under the terms of this section is hereby declared to be binding upon the surviving spouse or other heirs of the deceased who have the right under general law to claim his body.").

<sup>38</sup> *Id.* § 41-39-103.

<sup>39</sup> *See id.* § 41-39-131(a). You therefore cannot purchase or sell human body parts, like you can other property. *Id.*

the third and more commonly recognized classification of an embryo as an interim state—or property of special character.

### 3. Interim State

In 1992, Junior Davis sought a divorce from Mary Sue Davis.<sup>40</sup> The court granted the divorce and granted Mary Sue custody of the couple's frozen embryos.<sup>41</sup> Mary Sue sought control of the embryos with the intent to become pregnant, while Junior Davis preferred that the embryos remain cryogenically frozen until he decided whether or not he wanted to become a parent outside the bounds of marriage.<sup>42</sup> The trial court treated the embryos as “human beings” from the moment of fertilization, awarded “custody” to Mary Sue and directed that she be allowed to proceed with her intent to carry the embryos to term.<sup>43</sup> The court of appeals reversed, finding that Junior Davis had a “constitutionally protected right not to beget a child where no pregnancy has taken place” and holding that “there is no compelling state interest to justify [ ] ordering implantation against the will of either party.”<sup>44</sup> The court of appeals further held that “the parties share an interest in the seven fertilized ova.”<sup>45</sup> *Davis v. Davis* was the first time a court discussed the special treatment of an embryo, holding:

We conclude that preembryos [sic] are not, strictly speaking, either “persons” or “property,” but occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest that Mary Sue Davis and Junior Davis have in the preembryos [sic] in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos [sic], within the scope of policy set by law.<sup>46</sup>

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<sup>40</sup> *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 597.

Missouri does not explicitly define an embryo as a person, but it does define life as beginning at conception.<sup>47</sup> While these may seem synonymous, the Missouri Court of Appeals illustrated the distinction. In a divorce proceeding, where Jalesia McQueen and Justin Gadberry dispute over frozen embryos – a product of an IVF procedure during the couple’s marriage – the Missouri Court of Appeals held that the embryo was not a child.<sup>48</sup>

Rather, the court declared that the embryos were marital property of a “special character” holding that the embryos shall remain cryogenically preserved and stored until both parties agree in writing as to another disposition and reasoned that applying the Missouri statute<sup>49</sup> to frozen embryos would violate Gadberry’s constitutional right to (1) privacy, (2) be free from governmental interference, and (3) not to procreate.<sup>50</sup> While not central to the court’s decision, the court noted the implications the of applying the Missouri statute<sup>51</sup> to embryos and frozen embryos could

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<sup>47</sup> MO. ANN. STAT. § 1.205(1)(1) (West 2019).

<sup>48</sup> *McQueen v. Gadberry*, 507 S.W.3d 127, 147-49 (Mo. Ct. App. 2016).

<sup>49</sup> Missouri’s statutory scheme provides:

1. The general assembly of this state finds that:

(1) The life of each human being begins at conception;

(2) Unborn children have protectable interests in life, health, and well-being;

(3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.

2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

3. As used in this section, the term “unborn children” or “unborn child” shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.

4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

MO. ANN. STAT. §1.205 (West 2019).

<sup>50</sup> *McQueen*, 507 S.W.3d at 147.

<sup>51</sup> MO. ANN. STAT. §1.205 (West 2019).

potentially lead to criminal<sup>52</sup> and civil<sup>53</sup> charges in various scenarios concerning the disposition of embryos.

#### 4. Differentiating Eggs and Sperm

Traditionally, eggs and sperm have been treated as property.<sup>54</sup> The difference between sperm (and eggs) and an embryo is the potential for life.<sup>55</sup> For example, if you take a cake mix and a stick of butter and you put either one of these ingredients in the oven alone, it would not make a cake. However, if you mix the stick of butter with the cake mix, it then has a potential to become a cake when placed in the hot oven. Similarly, an egg and sperm alone do not have the potential for life, but once the egg is fertilized by the sperm, it then has potential for life.

*Davis v. Davis* recognized this distinction. The court concluded “preembryos [sic] are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”<sup>56</sup> Because eggs and sperm are classified as property, they are often sold and purchased, while it is illegal in some states to sell

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<sup>52</sup> *McQueen*, 507 S.W.3d at 147 n. 21 (“In addition, in the area of criminal law, gamete providers or fertility workers could possibly be charged with and convicted of various forms of murder and manslaughter, assault, or child abuse for intentionally or unintentionally destroying or ‘injuring’ pre-embryos or frozen pre-embryos and for cryogenically preserving pre-embryos and placing them in long-term or indefinite storage.”).

<sup>53</sup> *Id.* (“And in the area of civil law, (1) gamete providers or fertility workers could be sued for wrongful death for destroying pre-embryos or frozen pre-embryos; and (2) there could be potential problems with a couple or individuals donating pre-embryos or frozen pre-embryos to others because donation would arguably have to be governed by Missouri’s adoption statutes, Chapter 453, which are currently unequipped to regulate such forms of adoption.”).

<sup>54</sup> See *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

<sup>55</sup> *In re Marriage of Witten*, 672 N.W.2d 768, 781 (Iowa 2003) (“Whether embryos are viewed as having life or simply as having the potential for life, this characteristic or potential renders embryos fundamentally distinct from the chattels, real estate, and money that are the subjects of antenuptial [sic] agreements.”).

<sup>56</sup> *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992).

embryos<sup>57</sup> because of their potential for life. Some states even view the sale of embryos as human trafficking.<sup>58</sup>

### C. Adoption

#### 1. Traditional Adoption

Adoption began in the mid-1800s as a way to ensure an heir for adopting parents, as English common law did not recognize adoption because it conflicted with the principles of inheritance.<sup>59</sup> “Adoption is the process of creating a permanent, legal relationship of parent and child between two individuals who are legal strangers. This process creates the same legal rights and obligations that exist between a biological parent and child.”<sup>60</sup> Today there are various reasons for adopting as well as various laws governing adoption. In the United States alone, 275,891 children were adopted between 1999-2017.<sup>61</sup> Adoption only applies to children or minors.<sup>62</sup> “In most states it is illegal to consent to adoption before the child is born, and all states recognize a period after a child is born during which the birth mother can rescind her consent to the adoption.”<sup>63</sup>

In Mississippi, adoption cannot be implemented until 72 hours after birth.<sup>64</sup> Even if a biological parent chooses to terminate parental rights before birth, under the Mississippi Termination of Parental Rights Act, a parent cannot terminate his

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<sup>57</sup> MASS. GEN. LAWS ANN. ch. 111L, § 8(c) (West 2019) (“No person shall knowingly and for valuable consideration purchase, sell, transfer or otherwise obtain human embryos, gametes or cadaveric tissue for research purposes.”); *see also* FLA. STAT. ANN. § 873.05 (West 2019).

<sup>58</sup> *See, e.g.*, OKLA. STAT. ANN. tit. 10, § 556(E) (West 2019).

<sup>59</sup> Amanda C. Pustilnik, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 YALE L. & POL’Y REV. 263, 266-67 (2002).

<sup>60</sup> Michael D. Ellis, Note, *A Need for Clarity: Assisted Reproduction and Embryo Adoption in Texas*, 66 BAYLOR L. REV. 164, 167 (2014) (footnote omitted).

<sup>61</sup> *Adoption Statistics*, U.S. DEP’T. OF STATE, BUREAU OF CONSULAR AFFAIRS, [https://web.archive.org/web/20181210214708/https://travel.state.gov/content/travel/en/International-Adoption/adopt\\_ref/adoption-statistics.html](https://web.archive.org/web/20181210214708/https://travel.state.gov/content/travel/en/International-Adoption/adopt_ref/adoption-statistics.html) [https://perma.cc/A7QY-WZJP] (last visited on Nov. 12, 2019).

<sup>62</sup> *See generally* MISS. CODE ANN. § 93-17 (West 2019).

<sup>63</sup> Dostalík, *supra* note 3, at 885-86.

<sup>64</sup> MISS. CODE ANN. § 93-17-5(1) (West 2019).

or her parental rights before 72 hours after the birth.<sup>65</sup> After the filing of the petition for adoption and before the adoption is final, adoptive parents must undergo an investigative period that includes a home study.<sup>66</sup>

The investigation and report shall give the material facts upon which the court may determine whether the child is a proper subject for adoption, whether the petitioner or petitioners are suitable parents for the child, whether the adoption is to its best interest, and any other facts or circumstances that may be material to the proposed adoption.<sup>67</sup>

In custody disputes the court looks to the *Albright* factors to determine whether it is in the best interest of the child. Likewise, in contested adoptions courts may apply the following *Albright* factors:

[W]hich has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a

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<sup>65</sup> MISS. CODE ANN. § 93-15-111(1)(a) (West 2019).

<sup>66</sup> The Code states, in relevant portion:

In any child custody matter hereafter filed in any chancery or county court in which temporary or permanent custody has already been placed with a parent or guardian and in all adoptions, the court shall impose a fee for any court-ordered home study performed by the Department of Human Services or any other entity. The fee shall be assessed upon either party or upon both parties in the court's discretion. The minimum fee imposed shall be not less than Three Hundred Fifty Dollars (\$350.00) for each household on which a home study is performed. The fee shall be paid directly to the Mississippi Department of Human Services prior to the home study being conducted by the department or to the entity if the study is performed by another entity. The judge may order the fee be paid by one or both of the parents or guardian. If the court determines that both parents or the guardian are unable to pay the fee, the judge shall waive the fee and the cost of the home study shall be defrayed by the Department of Human Services.

MISS. CODE ANN. § 93-17-12 (West 2019).

<sup>67</sup> MISS. CODE ANN. § 93-17-11 (West 2019).

preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship.<sup>68</sup>

## 2. Embryo Adoption

To understand the current laws pertaining to embryo adoption we must first understand the history, medical process, and the legal process pertaining to embryo adoptions.

### *a. History*

Because embryo adoption has remained completely unregulated, private agencies have developed their own approaches. In 1997, Nightlight Christian Adoptions performed the first embryo adoption which started the Snowflakes Embryo Adoption program.<sup>69</sup> Marlene and John Strege struggled with infertility problems for years before they turned to IVF.<sup>70</sup> The Streges quickly learned they would have to use donor eggs, an option they were not willing to entertain because they did not want to bring “a third person” into their marriage.<sup>71</sup>

Still, Marlene Strege longed to carry a child of her own. The couple also struggled with the thought of having excess embryos at the end of the IVF process.<sup>72</sup> She posed this thought to a coworker, who responded by saying “maybe another Christian couple” would take the remaining embryos.<sup>73</sup> This though sparked Marlene’s interest, so she approached her doctor to see if there were any frozen embryos available for adoption.<sup>74</sup> She also worked

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<sup>68</sup> Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983).

<sup>69</sup> *A look at the History of Adoption and Embryo Adoption*, EMBRYO ADOPTION AWARENESS CENTER (June 11, 2011), <https://www.embryooption.org/2012/06/a-look-at-the-history-of-adoption-and-embryo-adoption/> [https://perma.cc/NT9T-VYHD].

<sup>70</sup> Rick Monroe, *Family shares of incredible journey from frozen embryo to ‘snowflake teen’*, LIVE ACTION (Aug. 11, 2012), <https://www.liveaction.org/news/family-shares-of-incredible-journey-from-frozen-embryo-to-snowflake-teen/> [https://perma.cc/H5N6-C4DA].

<sup>71</sup> *Id.*

<sup>72</sup> Sandra T. Molina, *Biola student was the first-ever adopted frozen embryo*, WHITTIER DAILY NEWS (Jan. 15, 2018), <https://www.whittierdailynews.com/2018/01/15/biola-student-was-first-ever-adopted-frozen-embryo/> [https://perma.cc/FTC8-GZTE].

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*



with Ron Stoddart, a former Executive Director and current board member for Nightlight Christian Adoptions, who agreed to help them through the process.<sup>75</sup>

In 1998, Hannah Strege became known as Snowflake Baby #1, the first successful embryo “adoption.” Marlene coined the term Snowflake Adoption<sup>76</sup>—the alternative hybrid between adoption and pregnancy that allowed the Streges to experience pregnancy and adoption all at once.

Since 1997, Nightlight Christian Adoptions has been effectuating embryo “adoptions.” Nightlight Christian Adoptions along with other fertility clinics and adoption agencies have relied on the best interests standard (the standard used in traditional adoption proceedings) to prevent prospective parents from the adoption of an embryo, when it would not be in the best interest of the yet-to-be conceived offspring.<sup>77</sup> “Couples participating in this process have no legal protections beyond their contracts, which might not be enforceable depending on the state.”<sup>78</sup>

*b. Three Different Ways to Adopt an Embryo*

Embryo adoptions are often conducted through a fertility clinic or an adoption agency in connection with a fertility clinic and can be conducted in three different ways: open, anonymous, or approved. Once a couple has decided to go through the embryo adoption process, the first step is to meet with the woman’s reproduction endocrinologist to determine if she is able to carry a baby to term. Then the couple can choose which form of adoption is best for their needs.

Nightlight Christian Adoptions, like many other fertility clinics, set up its program similar to a traditional open adoption, where donors and adopting families have some form of contact

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<sup>75</sup> *Id.*

<sup>76</sup> *Celebrating a Family*, EMBRYO ADOPTION AWARENESS CTR. (Dec. 27, 2016), <https://www.embryooption.org/2016/12/celebrating-a-family/> [<https://perma.cc/56MY-RHXY>] (“The Snowflakes® Embryo Adoption Program developed cooperatively by Marlene Strege and Ronald Stoddart, Esq., is the first embryo adoption program in the world. The program was named Snowflakes because like a delicate snowflake each embryo is frozen, unique and a gift from God. The program was officially established in 1997 as a division of Nightlight® Christian Adoptions.”).

<sup>77</sup> Dostalík, *supra* note 3, at 870.

<sup>78</sup> *Id.* at 870-71.

with one another.<sup>79</sup> People wishing to adopt must go through an application and matching process, where they sign a contract or letter of intent memorializing their intent to adopt.<sup>80</sup> The application process entails background checks, home studies, and further investigations that resemble a traditional adoption. Once the application is approved, the embryos are then shipped to a local fertility clinic where, upon receipt, they are implanted in the woman within 3-5 days. Through Nightlight Christian's program alone, over 700 babies have been born to adoptive parents and nearly 1,600 families have donated their remaining embryos.<sup>81</sup>

The second form, anonymous adoption, is analogous to a traditional closed adoption, where the embryo donor and recipients have never met.<sup>82</sup> In a closed embryo adoption, embryo donors complete an application with detailed information about themselves and their embryos.<sup>83</sup> Once the application has been reviewed and accepted by the adoption agency, organizations may make donor and embryo information (without releasing identifying information) available online for potential recipients to view.<sup>84</sup> Likewise, recipients must also submit an application to ensure satisfaction of certain donor requirements.<sup>85</sup>

Once a recipient has been accepted and chosen the embryo(s) they wish to adopt, the embryos are placed on reserve while recipients complete the evaluation process before transferring the

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<sup>79</sup> In some scenarios couples choose to meet in person, while others choose to communicate via email or phone.

<sup>80</sup> *Why Choose Snowflakes?*, SNOWFLAKES EMBRYO ADOPTION PROGRAM, <https://www.nightlight.org/snowflakes-embryo-adoption-donation/embryo-adoption/why-choose-snowflakes/> [<https://perma.cc/UUY9-XD84>] (last visited on Dec. 10, 2018).

<sup>81</sup> *Id.*

<sup>82</sup> *See generally Open, Adoption, Closed, or Anonymous?*, EMBRYO ADOPTION AWARENESS CTR. (Sept. 18, 2018), <https://www.embryoadooption.org/2018/09/open-closed-anonymous/> [<https://perma.cc/49CJ-EA48>].

<sup>83</sup> *Anonymous Embryo Donation*, EMBRYO DONATION INTERNATIONAL, <https://www.embryodonation.com/embryo-donation-general-info.php> [<https://perma.cc/8MY8-KXV8>] (last visited Nov. 12, 2019) (based on Embryo Donation International's anonymous embryo adoption process).

<sup>84</sup> *See* Dr. Norbert Gleicher, *Embryo Donation: Listing of Available Embryos*, CTR. FOR HUMAN REPROD., (Sept. 30, 2019) <https://www.centerforhumanreprod.com/fertility/embryo-donation-at-chr/> [<https://perma.cc/8BCL-GXT8>]. The information available to potential recipients may contain, age, ethnicity, height, weight, eye color, build, blood type, education, medical history and genetic history of donors. *Id.*

<sup>85</sup> EMBRYO DONATION INTERNATIONAL, *supra* note 83.

embryos to the recipients fertility clinic.<sup>86</sup> Recipients often choose to adopt anonymously because there are a higher number of embryos placed anonymously, and may result in a faster match for recipients.<sup>87</sup> Although this is a popular choice, there is a downside: “It has been found that children born from an anonymous embryo donation (and sperm and egg donation) are more likely to have negative emotional consequences in the future. This usually stems from when questions concerning genetic origin and biology that cannot be answered.”<sup>88</sup>

Embryo Donation International (EDI) offers a third route – approved embryo donation – which provides the donor an increased level of screening of the recipients, while remaining anonymous.<sup>89</sup> Potential recipients must consent to and undergo an interview with a qualified Mental Health Professional (MHP) knowing that the results of the interview will be sent to the donors for approval.<sup>90</sup> Upon consent, EDI staff will recommend a MHP in the recipients’ area and generate a summary of the evaluation to exclude identifying information about the recipients.<sup>91</sup> After the MHP evaluates the potential embryo recipients, EDI generates a summary letter about the evaluation excluding any identifying information about the recipients or the MHP who performed the evaluation.<sup>92</sup> The summary is reviewed by the EDI staff for completeness and then forwarded to the embryo donors for review.<sup>93</sup> If the donors choose to move forward upon receiving the

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Approved Embryo Donation*, EMBRYO DONATION INTERNATIONAL, <https://www.embryodonation.com/embryo-donation-general-info.php> [<https://perma.cc/5FFW-W444>] (last visited on Nov. 12, 2019).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

MHP evaluation summary,<sup>94</sup> recipients will eventually undergo the embryo transfer.<sup>95</sup>

*c. Medical Process*

Once a recipient has arranged to receive the donated embryo(s), the next step is to perform the transfer. The medical process of an embryo adoption is similar to the second half of an IVF procedure. “The procedure is performed in a fertility clinic and can be done during an un-medicated/natural cycle, but medicated cycles are more common as they provide more control in the timing of the transfer.”<sup>96</sup> The procedure is often “performed under direct ultrasound guidance to ensure proper placement within the uterine cavity.”<sup>97</sup> Some physicians prefer to perform embryo transfers when the woman has a full bladder to get a better view of the uterine cavity.<sup>98</sup> A physician will then use a catheter<sup>99</sup> to inject the embryos into the uterine cavity.<sup>100</sup> After the injection is complete, the woman is often placed on bed rest for the following 24-72 hours and ordered to avoid strenuous activity for four days to prevent uterine contractions that could affect the

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<sup>94</sup> *Id.* (“The embryo recipients pay the costs for the MHP evaluation. If the donors reject three or more potential embryo recipients, EDI reserves the right to have the embryos transferred to another facility. The costs for transferring the embryos to the location of the donor’s choice will be equally divided between the donor and EDI. This assures that EDI does not store embryos indefinitely and encourages the donors to reasonable [sic] in approving embryo recipients.”).

<sup>95</sup> *Id.*

<sup>96</sup> *What is Involved In Frozen Embryo Transfer (FET)?*, EMBRYO ADOPTION AWARENESS CTR., <https://www.embryoadoption.org/faqs/what-is-involved-in-frozen-embryo-transfer-fet/> [<https://perma.cc/LGG6-DGHS>] (last visited on Nov. 12, 2018).

<sup>97</sup> *Embryo Transfer Process*, SHER FERTILITY, <https://haveababy.com/infertility-treatments/fertility-preservation/embryo-transfer> [<https://perma.cc/Q77E-YAYZ>] (last visited on Dec. 10, 2018).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*; see also *The In Vitro Fertilization (IVF) Process: The Embryo Transfer and Pregnancy Testing*, SHADY GROVE FERTILITY (Oct. 1, 2014), <https://www.shadygrovefertility.com/blog/treatments-and-success/in-vitro-fertilization-ivf-process-embryo-transfer-pregnancy-testing> [<https://perma.cc/L2FH-QU9D>] (providing additional in-depth information regarding the In Vitro Fertilization Process).

implantation process.<sup>101</sup> Two weeks after the transfer, a pregnancy test is taken to see if the embryo(s) implanted.<sup>102</sup>

A legal conflict can be analyzed under the following four available options: property, contracts, adoption, and interim status. The first option, property, is particularly problematic because embryos have the potential for life, and issues could fall within the realm of human trafficking. The second option is contracts. Generally, contracts may or may not be enforceable. Although contracting for children is permissible in scenarios like child custody, such contracts are typically unenforceable without court approval. The third option, adoption, presents its own issues. The issue with adoptions in most states, including Mississippi, is that adoptions cannot be implemented until 72 hours after birth, leaving the donating couple plenty of time to rescind. The interim status is a grey area, particularly where embryos are viewed as property of a special character.<sup>103</sup> Finally, some states address these issues by statute.

## II. HOW SOME STATES HAVE ADDRESSED EMBRYO TRANSFERS AND RIGHTS OF EMBRYO DONORS

Alabama, Florida, Georgia, Maine, Ohio, Oregon, and Vermont all have specific statutes that address embryo donations, while Oklahoma and Tennessee statutes specifically address embryo transfers. These statutes are organized differently in each state. While some fall under adoption laws, others fall under a separate category specifically for the transfer of embryos. Alternatively, some states have intended-parent statutes that do not specifically mention the transfer or adoption of embryos but serve a similar purpose.

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<sup>101</sup> SHADY GROVE FERTILITY, *supra* note 100; *see also Six Steps of the Embryo Adoption Process*, NATIONAL REGISTRY FOR ADOPTION, <https://www.nrfa.org/steps-of-embryo-adoption/> [<https://perma.cc/S6HM-NZCZ>](last visited Nov. 12, 2019).

<sup>102</sup> SHADY GROVE FERTILITY, *supra* note 100.

<sup>103</sup> *See Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (“We conclude that preembryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”).

*A. Rights of Embryo Donors*

## 1. Alabama

Alabama's statute does not mention adoption, but specifically addresses donors who donate embryos to a physician for use by a married woman. Here, the donor is not a parent of the child as a result of the assisted reproduction.<sup>104</sup> The married couple will be considered the sole natural and legal parents of the child, so long as the assisted reproduction was performed with donated gametes under the supervision of a licensed physician.<sup>105</sup>

## 2. Florida

In Florida, the statute states that the donor of an embryo shall relinquish all parental rights and obligation.<sup>106</sup> It also touches on the issue of compensation stating that “[o]nly reasonable compensation directly related to the donation . . . shall be permitted.”<sup>107</sup> However, the statute excludes preplanned adoptions.

## 3. Georgia

Georgia's statute addresses legal embryo custodians, not merely donors.<sup>108</sup> A legal embryo custodian may relinquish all rights and responsibilities to the intended parent prior to embryo transfer.<sup>109</sup> Further, a written contract shall be entered into between each legal embryo custodian and each intended parent prior to embryo transfer in order to transfer any legal rights, which may include a written waiver of notice and service in any legal adoption or other parental proceedings that may follow should a child result.<sup>110</sup> Donor who irrevocably relinquished their rights are not entitled to notice and their consent is not required

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<sup>104</sup> ALA. CODE § 26-17-702 (1975).

<sup>105</sup> *Id.*

<sup>106</sup> FLA. STAT. ANN. § 742.14 (West 2019).

<sup>107</sup> *Id.*

<sup>108</sup> GA. CODE ANN. § 19-8-40 (West 2019) (“Legal embryo custodian’ means the person or persons who hold the legal rights and responsibilities for a human embryo and who relinquishes said embryo to another person or persons.”).

<sup>109</sup> *Id.* § 19-8-41(a).

<sup>110</sup> *Id.*

in order for an embryo to be transferred.<sup>111</sup> Once a written contract for legal/parental rights has been entered, the legal transfer of rights to the embryo shall be considered complete.<sup>112</sup>

Either before or after the birth of a child, an embryo recipient may petition for an expedited order of adoption.<sup>113</sup> By allowing an expedited order of adoption the statute intends to promote embryo transfers and protect the interests of children born as a result of a transfer.<sup>114</sup> The expedited process allows a court to waive technical requirements.<sup>115</sup> Such order shall be final and terminate any future parental rights and responsibilities of any past or present legal embryo custodian or donors that result from the embryo transfer and such rights and responsibilities shall vest in the recipient intended parent.<sup>116</sup>

#### 4. Maine

The Maine statute very simply and explicitly states that a donor<sup>117</sup> is not a parent of a child when conceived through assisted reproduction.<sup>118</sup> However, the statute accounts for two exceptions. The first exception is for when a couple uses only one donor gamete, such as sperm, while using the mother's own egg—or vice versa.<sup>119</sup> Here, the birth mother is the biological parent, and she will remain the parent in this scenario. The second exception is for when a couple, who cannot carry a child on its own, contracts with another woman to carry a child for them (surrogacy).<sup>120</sup> In this scenario, the donors of the embryo are the intended parents and they do not give up their parental rights by allowing a surrogate to carry the embryo.

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<sup>111</sup> *Id.* § 19-8-41(b).

<sup>112</sup> *Id.* § 19-8-41(c).

<sup>113</sup> *Id.* § 19-8-42(a).

<sup>114</sup> *Id.* § 19-8-42(d).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* § 19-8-43.

<sup>117</sup> ME. REV. STAT. ANN. tit. 19-A, § 1832 (2019) (“Donor’ means a person who contributes a gamete or gametes or an embryo or embryos to another person for assisted reproduction or gestation, whether or not for consideration.”).

<sup>118</sup> *Id.* § 1922(1).

<sup>119</sup> *Id.* § 1922(2)(A).

<sup>120</sup> *Id.* § 1922(2)(B).

### 5. Ohio

In Ohio, the statute specifically addresses: (1) who shall be the legal mother and father; (2) the rights of a donor; and (3) the application of the statute to a woman who receives a donated embryo to which she herself intends to parent.<sup>121</sup> It is worth noting that this statute does not apply to surrogacy. A woman who gives birth to a child as a result of an embryo donation shall be the natural mother.<sup>122</sup> If the woman is married and her husband consented to the embryo adoption, then he will be regarded as the natural father of the child.<sup>123</sup> However, if the husband has not consented, he may rebut the presumption of paternity with clear and convincing evidence that shows a lack of consent.<sup>124</sup>

It is interesting that the definition of donor specifically mentions an individual who “at the time of the embryo donation does not intend to raise the resulting child as the individual’s own.”<sup>125</sup> The statute expressly states that “[a] donor shall not be treated in law or regarded as a parent of a child born as a result of embryo donation.”<sup>126</sup> The statute also addresses the issue of what happens if one donor dies.<sup>127</sup>

### 6. Oregon

In Oregon, embryo donors have no right, obligation, or interest in a child resulting from their donation, just as sperm donors lack such rights, obligations, or interests.<sup>128</sup>

### 7. Vermont

Vermont, the most recent state to implement parentage by assisted reproduction laws, appears to have modelled its statute after Maine’s statute. The statute simply and explicitly states that a donor is not a parent of a child when conceived through assisted

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<sup>121</sup> OHIO REV. CODE ANN. § 3111.97 (West 2019).

<sup>122</sup> *Id.* § 3111.97(A).

<sup>123</sup> *Id.* § 3111.97(B).

<sup>124</sup> *Id.* § 3111.97(C).

<sup>125</sup> *Id.* § 3111.97(D).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> OR. REV. STAT. ANN. § 109.239 (West 2018); *id.* § 109.247.



reproduction.<sup>129</sup> The statute accounts for two exceptions, just as Maine did.<sup>130</sup>

### B. Embryo Transfer Statutes

#### 1. Oklahoma

In Oklahoma, the licensed physician performing the transfer must obtain written consent from the couple receiving the embryo *and* the couple donating the embryo.<sup>131</sup> Consent by the husband and wife receiving the embryo transfer shall be executed by both the husband and the wife, the physician performing the transfer, and by a judge with adoption jurisdiction, then it shall be filed with the court.<sup>132</sup> Additionally, the original written consent of the husband and wife donating the embryo(s) shall be filed with the court by the physician performing the transfer.<sup>133</sup> The filed consents are not public record and shall only be released to persons with a legitimate interest by a specified court order.<sup>134</sup>

Any child born as a result of the embryo donation shall be considered a naturally conceived child of the husband and wife who consented to receive the embryo transfer.<sup>135</sup> The couple who donated the embryo shall be relieved of all parental responsibilities and shall have no right, obligation, or interest with respect to a child born as a result of the donation.<sup>136</sup>

The Oklahoma statute also addresses the concern of human trafficking. It does so by listing three scenarios where the transfer and donation of an embryo is not considered human trafficking.<sup>137</sup> It is not human trafficking so long as: 1) the embryo is donated by biological parents of the embryo; 2) the embryo is not offered for sale; and 3) the embryo transfer and donation is made pursuant to the statute.<sup>138</sup>

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<sup>129</sup> VT. STAT. ANN. tit. 15C, § 702 (West 2019).

<sup>130</sup> *See id.*; ME. REV. STAT. ANN. tit. 19-A, § 1922 (2019).

<sup>131</sup> OKLA. STAT. ANN. tit. 10, § 556(A)(1) (West 2019).

<sup>132</sup> *Id.* § 556 (A)(2).

<sup>133</sup> *Id.* § 556 (A)(3).

<sup>134</sup> *Id.* § 556 (A)(4).

<sup>135</sup> *Id.* § 556 (B)(1).

<sup>136</sup> *Id.* § 556 (B)(2)-(3).

<sup>137</sup> OKLA. STAT. ANN. tit. 10, § 556(E)(1)-(3) (West 2019).

<sup>138</sup> *Id.*

## 2. Tennessee

In Tennessee, adoption and title of parentage procedures are not required to create parentage when a child is resulting from an embryo transfer because they are the intended parent.<sup>139</sup> This differs from intended parent statutes in other states because it specifically addresses embryo transfers.

### C. *Intended Parent Statutes*

While some states may not specifically address embryo transfers, many have statutes that address surrogacy,<sup>140</sup> another form of ART. The statutes are drafted so as to protect the intended parent.<sup>141</sup> For example, if Jill and Mark have a surrogate carry their embryo because Jill is unable to do so, in a state with an intended parent statute the surrogate would be barred from asserting parental rights. Likewise, an intended parent statute could protect the rights of the intended parents in an embryo adoption.

## III. ARGUMENT

Currently, case law does not address disputes in the context of embryo adoptions. Rather, cases primarily focus on the question of a divorced party's right to determine the disposition of their embryos, but it is imperative to consider the ramifications in the context of increasing use of IVF.<sup>142</sup> I argue that neither contract

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<sup>139</sup> TENN. CODE ANN. § 36-2-401 (West 2019).

<sup>140</sup> *About Surrogacy*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/surrogacy-101/surrogacy-definition/> [<https://perma.cc/Y4RB-37NC>] (last visited Nov. 12, 2019). Surrogacy is the process where a woman carries a baby to term for the intended parents. *Id.* “Usually, she is between the ages of 21 and 35, has had a successful pregnancy and already has children. Surrogates are sometimes also called gestational carriers.” *Id.*

<sup>141</sup> *Id.* (“This is the person who cannot carry a baby to term and hires a surrogate instead. Their egg or sperm may be a part of the transferred embryo, and they may be a single parent or married.”).

<sup>142</sup> For cases discussing the issue of embryo ownership in a divorce context, *see, e.g.*, *J.B. v. M.B.* 783 A.2d 707 (N.J. 2001); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992). For cases in which a married couple and a fertility clinic disputed embryo ownership, *see, e.g.*, *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989); *Jeter v. Mayo Clinic*, 121 P.3d 1256 (Ariz. Ct. App. 2005). *See generally* Baiman, *supra* note 2, at 154.

nor adoption law adequately address how a court should handle embryo transfers. I also address three issues that the proposed statute should answer. Treating an embryo transfer as an adoption inherently treats the embryo as a person, just as contracting for it is treating it as property. Since an embryo is viewed as neither property nor a person in Mississippi, the legislature should tailor statutes to deal with the process of transferring embryos.<sup>143</sup> Many fertility clinics, adoption agencies, and states have chosen to view embryo transfers as an adoption or a subcategory of adoption. While there are great aspects of adoption law that should be incorporated into the statutes, Mississippi needs laws that specifically address embryo transfers.

#### A. *Far Reaching Effects*

Implementing embryo transfer laws clearly affects family law, but its reach would go beyond family law and into tax law, as well as criminal law. Some states go as far as criminalizing the sale of embryos.<sup>144</sup>

#### B. *Why Contracts Are Inadequate*

##### 1. Treated as Property

Mississippi has not explicitly defined an embryo as property or personhood, which is different from eggs and sperm. This is crucial to identify because the courts treat them differently. Eggs and sperm have been held as property and are often contracted for while many states have followed *Davis v. Davis*, where the court concluded “preembryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”<sup>145</sup> In contracting for embryos, we are treating embryos as if they are property. Unlike sperm and eggs, it is illegal to purchase embryos

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<sup>143</sup> For clarity, I have chosen to refer to the process as an embryo transfer rather than adoption for the remainder of the article.

<sup>144</sup> OKLA. STAT. ANN. tit. 10, § 556(E)(2) (West 2019); MASS. GEN. LAWS ANN. ch. 111L, § 8(c) (West 2019).

<sup>145</sup> *Davis*, 842 S.W.2d at 597.

in some states.<sup>146</sup> Oklahoma<sup>147</sup> and Massachusetts<sup>148</sup> have criminalized the sale of embryos, likening the sale to human trafficking. We may not view embryos as a person but the fact that some states have criminalized the sale of them demonstrates that we value embryos more than mere property.

There are instances where children are the subject of contracts, such as custody arrangements. This is different because, while the contracts are not void on their face, they are not enforceable without court approval.

## 2. LOI's Are Not Always Enforceable

Fertility clinics and adoption agencies often use letters of intent<sup>149</sup> when planning for embryo transfers. A letter of intent may appear to be a binding contract, but the Fifth Circuit has held that a letter of intent is not a contract.<sup>150</sup> Under Mississippi law, contracts to make a contract are not recognized unless the final agreement is to be a mere memorial of the agreement already reached. The Mississippi Supreme Court has highlighted:

In order [for a writing to be enforceable as a contract], it is necessary that agreement shall have been expressed on all essential terms . . . . If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; and the so called 'contract to make a contract' is not a contract at all.<sup>151</sup>

In *King's Daughters v. Delta Regional Medical Center*, the Court of Appeals of Mississippi held that letters of intent

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<sup>146</sup> *In re Marriage of Witten*, 672 N.W.2d 768, 781 (Iowa 2003) (“Whether embryos are viewed as having life or simply as having the potential for life, this characteristic or potential renders embryos fundamentally distinct from the chattels, real estate, and money that are the subjects of antenuptial agreements.”).

<sup>147</sup> OKLA. STAT. ANN. tit. 10, § 556(E)(2) (West 2019).

<sup>148</sup> MASS. GEN. LAWS ANN. ch. 111L, § 8(c) (West 2019).

<sup>149</sup> *Letter of Intent*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/letter%20of%20intent> [<https://perma.cc/S56M-3CXC>] (last visited on Nov. 12, 2019) (“A letter of intent is a non-binding document detailing a planned action on the part of an organization or individual.”) (emphasis omitted).

<sup>150</sup> *Knight v. Sharif*, 875 F.2d 516, 524 (5th Cir. 1989).

<sup>151</sup> *Etheridge v. Ramzy*, 276 So. 2d 451, 454 (Miss. 1973) (citing 1A Corbin, *Contracts* 29, at 84-85 (1963)).

regarding the purchase of a hospital were not a contract and thus, could not support a claim for tortious interference with contract where the document failed to include material terms, such as price.<sup>152</sup> If embryo recipients are entering into letters of intent<sup>153</sup> to adopt but the donating couple changes their mind during the pregnancy, we are still left with the dilemma of who should get the baby. Mississippi does not hold a letter of intent to be a valid contract, so in this hypothetical what would happen? Would the donating couple prevail?

### *C. Why Amending Adoption Statutes is Insufficient*

Adoption has traditionally applied to the adoption of a person, but an embryo does not currently fall within the parameters of the statute because Mississippi's statute says "[a]ny person may be adopted."<sup>154</sup> In order for this transfer process to fall under adoption law, Mississippi would either have to declare an embryo a person or incorporate embryos into the statute. Additionally, the 72-hour rule after birth under adoption law would still not protect the recipients of the embryos. Since adoptions cannot be completed before 72 hours after birth, there is a considerable amount of time (nine months plus the 72 hours) for the donating parents to rescind.

### *D. Proposal*

#### 1. Recipients' Rights

It is crucial that a statute addressing embryo transfers considers when the biological parents' rights are suspended, as this is the biggest threat that adoption law poses. "In most states it is illegal to consent to adoption before the child is born, and all states recognize a period after a child is born during which the birth mother can rescind her consent to the adoption."<sup>155</sup> In Mississippi, adoption cannot be executed until 72 hours after

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<sup>152</sup> *King's Daughters & Sons Circle No. Two of Greenville v. Delta Reg'l Med. Ctr.*, 856 So. 2d 600, 607 (Miss. Ct. App. 2003).

<sup>153</sup> A party may include a clause that says the LOI will be binding, if it is intended to be binding.

<sup>154</sup> MISS. CODE ANN. § 93-17-3(4) (West 2019).

<sup>155</sup> Dostalík, *supra* note 3, at 885-86.

birth.<sup>156</sup> In order for this to be adequately addressed, parental rights must vest with the “adoptive” parents upon implanting of the embryo(s). Courts often look to what is in the best interest of the child when parentage is contested.<sup>157</sup> In the scenario of an embryo transfer, the child’s best interest would be served by preventing a legal battle over parental rights, as this could be an unstable environment.<sup>158</sup> To prevent this from happening, I propose that Mississippi declare that parental rights immediately vest once the embryo has been implanted into the “adoptive” mother.

## 2. Aspects of Traditional Adoption

Additionally, it is important to consider pre-adoption steps that are in place for traditional adoptions. Before adopting, prospective parents must submit to an investigative process to determine whether they are suitable to adopt.<sup>159</sup> These same requirements should be met when transferring an embryo because, although the methods of obtaining the child are different, both share a common goal of seeking to become parents to a child that is not biologically their own.

Right now, embryo adoptees are not given certain rights, such as access to complete medical history and genetic origin information that traditionally adopted children have. Nearly every doctor visit involves a stack of paperwork with a large portion of questions devoted to family medical history. But what if you do not have access to your biological family medical history? Family medical history is important because “you are more likely to get the same disease as your parent or sibling and should consider earlier screening.”<sup>160</sup> Many states have granted adopted children

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<sup>156</sup> MISS. CODE ANN. § 93-17-5 (West 2019).

<sup>157</sup> See, e.g., *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983) (“[T]he polestar consideration in child custody cases is the best interest and welfare of the child.”).

<sup>158</sup> *Natural Mother v. Paternal Aunt*, 583 So. 2d 614, 619 (Miss. 1991) (“Factors to be considered in determining the child’s best interest are stability of environment, ties between prospective adopting parents and children, moral fitness of parents, home, school and community record of the child.”).

<sup>159</sup> MISS. CODE ANN. § 93-17-11 (West 2019).

<sup>160</sup> *Knowing Is Not Enough—Act on Your Family Health History*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/features/familyhealthhistory/index.html> [<https://perma.cc/2PZE-PB2H>] (last updated on Nov. 12, 2019).

certain rights to access medical history and genetic information from their biological parents. It is important to consider this factor when drafting a new statute so children born from an embryo transfer are afforded these same rights.<sup>161</sup>

### 3. Plan for Fraud

Other states have failed to address the ramifications for abuse of the statute such as fraud, but this is an oversight that should be taken into consideration. Mississippi should take proactive measures to protect the intended parents in the event of fraud. For example, if the donors were not actually the gamete providers or the embryo, what would happen? The state should also consider what measures should be taken when either the donors or the recipients falsify information in the process. A party should be able to seek relief under Mississippi Rule of Civil Procedure 60(b)<sup>162</sup> for fraud just as would be possible in the instance of fraud in a traditional adoption.

In 2016, the Mississippi Supreme Court held that a father may set aside an adoption under Rule 60(b) if the mother has committed fraud.<sup>163</sup> The plaintiff and the child's mother had one child together.<sup>164</sup> Shortly after they separated, she told him that she was pregnant with her new boyfriend's child, even though she knew the child was the plaintiff's.<sup>165</sup> She placed the child for adoption, testifying that she did not know who the father was.<sup>166</sup> After the adoption was finalized, the mother revealed to the plaintiff that the boy was his son and had been adopted.<sup>167</sup> He filed suit to set aside the adoption under Rule 60(b)(6).<sup>168</sup>

The court held that the mother's intentional deception regarding the father's identity was a fraud upon the court, permitting an independent action by a nonparty to set aside the judgment under Rule 60(b)(6).<sup>169</sup> The court rejected the adoptive

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<sup>161</sup> Baiman, *supra* note 2 at 153.

<sup>162</sup> MISS. R. CIV. P. 60(b).

<sup>163</sup> Doe v. Smith, 200 So. 3d 1028, 1030 (Miss. 2016).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 1031.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 1033-34.

parents' argument that the father was required to prove that he had made a full commitment to fatherhood within thirty days of the child's birth under sections 93-17-5 and 93-17-6.<sup>170</sup> The father was not trying to establish his right to object to adoption under the statutes.<sup>171</sup> Instead, he was arguing that a final judgment obtained by fraud should be set aside.<sup>172</sup>

#### CONCLUSION

It is only a matter of time before legal disputes arise over embryo transfers. Now is the time for Mississippi to recognize the movement in medical technology and look at the legal ramifications that come along with advancements in the medical field. As IVF, infertility issues, and same-sex marriages continue to increase, embryo transfers should similarly increase in popularity. Mississippi laws do not currently provide for protection of parents when they enter into an embryo transfer, which could easily turn one of their happiest moments into a treacherous legal battle. It is important that the state consider what will happen in these situations and lay out how a court should deal with these issues when they arise.

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<sup>170</sup> *Id.* at 1031, 1031 n. 11.

<sup>171</sup> *Id.* at 1034.

<sup>172</sup> *Id.*