Baby Needs A New Set of Rules: Using Adoption Doctrine to Regulate Embryo Donation

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INTRODUCTION

Last summer Congress authorized the distribution of nearly one million dollars to promote embryo donation: the donation of frozen embryos by one party to a recipient who intends to use the embryos to bear and raise a child.1 Abortion rights advocates raised concerns that the program had the potential to provide support for the legal argument that embryos are human beings with full legal rights.2 They believe that federal endorsement of embryo donation could be used by pro-life advocates to further efforts to reverse Roe v. Wade and result in abortion being declared illegal.3 Pro-life organizations, however, expressed excitement about the chance to promote "embryo adoption" programs with federal dollars.4 The terms "embryo donation" and "embryo adoption" are synonymous;5 however, pro-life advocates prefer the emotionally charged term embryo adoption because they believe all embryos are potential children.6 Once

2. See Meckler, supra note 1.
3. Id.
5. Fertility clinics use the terms embryo donation and embryo adoption interchangeably. See, e.g., Rotunda Fertility Clinic (Web site uses the terms interchangeably), at http://iwwanagetpregnant.com/embryo.asp (last visited Sept. 12, 2004); Malpani Infertility Clinic (Web site uses the terms interchangeably), at http://www.malpani.com/embryoadoption.htm (last visited Sept. 12, 2004); http://www.havingbabies.com/news/42_146_2808.cfm (last visited Oct. 19, 2004) (Web site uses the terms interchangeably); http://www.aiof.com/html/embryodon.htm (last visited Oct. 19, 2004) (Web site uses the terms interchangeably). Some commentators argue the term embryo adoption implies that the embryo is human, rather than property. See Meckler, supra note 1. I argue that the person or property distinction is irrelevant, because the parties' intents, rather than an initial determination that the embryo is person or property, should trigger when and how the embryo is regulated. Once the parties choose to donate the embryo with the intent to allow another person to use that embryo to create a child, adoption law should apply because the same policy interests are triggered. Additionally, social concerns that have propelled changes in adoption law with regard to knowledge of identity are equally applicable to embryo donation and should be considered in cases of embryo donation irrespective of whether the embryo is a person or property or some intermediate category. Therefore, for my purposes the terms embryo adoption and embryo donation have the same connotation.
6. See Meckler, supra note 1.
the parties choose to donate the embryo with the intent to allow another person to use that embryo to create a child, adoption law should apply because the same policy interests are triggered. Ironically, neither embryo donation nor embryo adoption provides any of the safeguards afforded by adoption law. Consequently, a number of social and legal problems which have already arisen in other assisted reproduction contexts, because of inadequate regulation and failure to consider the intended child’s interests, are likely to arise in the context of embryo donation. As is often the case with evolving technology, the law has been outpaced by medical developments.7

After decades of anonymity for sperm donors, the first generation of sperm donor children are beginning to reach the age of majority in large numbers and they have begun to demand information about their biological progenitors.8 Their desires echo those expressed by adoptees during the previous decade; they want to know who they look like and from where they came.9 Over the previous decade, lawmakers, social workers, birth mothers, adoptees, and their advocates, have worked hard to dismantle adoption laws that originally promoted secrecy and denied adoptees access to their own birth records.10 Many states have begun to recognize adoptees’ rights: to information about their genetic origins, to information about their birth parents’ past and continuing medical history, and to openness rather than secrecy and anonymity in the adoption process. Children created through collaborative reproduction, however, do not have the safeguards and protection of the adoption system; they will not be protected by longstanding adoption laws or the recent reforms. As egg and sperm donations increase, so do the number of children who will ultimately find they are missing important information about their genetic imprint.

In embryo donation, as in early adoptions, the entire genetic family tree is concealed. Furthermore, as with most other assisted reproduction technologies (“ART”), embryo donation is largely unregulated.11 There is neither legislative or judicial oversight of the donation process nor inquiry into the best interests of the

9. Bueckert, supra note 8; Worland, supra note 8.
10. See infra notes 275–80 and accompanying text.
11. See infra notes 30–45 and accompanying text.
intended child. One consequence of this lack of regulation is that thousands of children created through embryo donation and other collaborative and assisted reproduction, have no access to basic information about their origins because there are no state or federal requirements that the information be maintained.

In most other legal contexts involving children, for instance in determination of custody, the protection of the child’s interests is paramount. It is only in the collaborative reproduction context that children’s interests are relegated to the background or not considered at all. As a result, not only have intended children been deprived access to information about their origin, they have also been deprived of fit parents, stable determinations of parentage, and information about their medical history and genetic identity.

There are several reasons that could explain both the legislative and judicial failure to consider the interests of intended children conceived through collaborative reproduction. Adoptees’ rights to genetic identity have only recently been recognized, and sperm donor children have only recently begun to demand those same rights. Children of embryo donation have not yet reached the age of majority when they would demand these protections. Additionally, the focus in collaborative reproduction decisions has generally been on either the genetic progenitor’s interests in their genetic material or on determination of parentage.

12. In this article, the term intended child is used in place of the more popular term resulting child because it is the intending parents goal to use Assisted Reproductive Technology (ART) to produce a child. The term resulting child connotes an end consequence that occurs without design, rather than a conscious determination by the parties to create a child. This is not meant to imply that every donated gamete or embryo is an intended child, but rather it creates a distinction between those gametes and embryos that are intended to be used for child creation and those that are intended for some other purpose, including research, future implantation, or continued storage.

13. It is difficult for someone who has never faced these issues to imagine the constant frustrations that are a part of the experiences of those missing part or all of their genetic family history. Something as simple as a visit to the physician, with the required completion of the medical family history questionnaire dredges up emotional issues for many adoptees. Sherrie Eldridge, Twenty Things Adopted Kids Wish Their Adoptive Parents Knew 179–85 (1999). This information is taken for granted by most non-adoptees; it is part of our consciousness, as is our knowledge that we have grandfather’s smile, mother’s hands, father’s wit, or grandmother’s determination. See, e.g., Discovering the Biological Truth, London Times, May 30, 2002, available at 2002 WL 2158081. The adoptee is forced to wonder about those origins, and is told by the legal systems that deny him or her this information if it is unimportant. But these and other everyday reminders convince him or her otherwise. Eldridge, supra. Even popular music lyrics emphasize the importance of genetic connectedness. See, e.g., Jessica Andrews, Who I Am, on Who I Am (Dreamworks 2000) (containing these lyrics: “I am Rose Marie’s granddaughter, the spitting image of my father”).


15. See infra notes 185–217 and accompanying text.

16. See infra notes 296–300 and accompanying text.

17. See supra note 8.
The results are confusing and inconsistent; more importantly, they have failed to protect the interests of intended children. 18

Part I of this article describes the various methods of collaborative reproduction. An examination of the few regulations governing practices other than embryo donation (for which there are no regulations) reveals that existing regulations neither consider nor protect the intended child’s interests. Part II examines the cases and statutes that regulate frozen embryos. While these cases and statutes are intended to resolve disputes between the embryo “owners” (i.e., the embryo producers) regarding disposition of their frozen embryos, they do not provide any guidance to parties who agree to donate embryos. These cases and statutes fail to protect intended children because they focus exclusively on the rights of egg, sperm and embryo providers. Part III reviews the statutes covering parentage and judicial determinations of parentage in cases involving families created through means of collaborative reproduction other than embryo donation. A survey of these statutes and cases highlights the incongruity of the law and its inadequacy for addressing embryo donation issues. 19 The intended child’s interests are often an unspoken consideration in these cases, and although no court has expressly adopted a “best interests of the child” test to determine parentage in such cases, it is a hidden commonality that links the seemingly irreconcilable decisions and has been advocated as the appropriate test by the dissenters in some cases.

Part IV explains that adoption law reflects a set of policy choices that revolve around the overall goal of protecting the best interests of the child. The rights that have been granted to and demanded by adoptees include: the right to “fit” parents; the right to a complete identity, which encompasses knowledge of genetic origins; the right to stability through a clear determination of parentage; and the right to continuing information about medical history. Although components of adoption law are being applied in a limited fashion to some collaborative reproduction arrangements, the policy behind these laws, protecting the best interests of the child, should apply to all intended children. The current collaborative reproduction cases and statutes do not provide any protection to intended children. Therefore, Part V proposes that adoption doctrine should be applied to all collaborative reproduction, and in particular embryo donation, to prevent people from circumventing longstanding adoption protections through the use of collaborative reproduction.

This article suggests adoption doctrine would apply to regulate frozen embryos only when the parties’ intent makes it appropriate. For example, in embryo donation, the intent is clear: the parties intend to create a child who will be raised by genetically unrelated parents. Given that the intended use for the embryo in

19. This article is not intended to be an exhaustive look at either of these areas.
embryo donation is to create a genetically unrelated family – the same intent that exists in traditional adoption – adoption laws, which protect the needs and rights of the adoptee, should be applied to ensure the intended child has the same protections. Applying adoption laws to collaborative reproduction would require evaluations of parental fitness and the suitability of the intended home. It would also require the termination of the genetic parents' interests, in order to resolve parentage issues. More importantly, like recent trends in adoption law, the focus would shift from the donors’ and the intending parents’ interests to the intended child’s interests. This intended child centered approach would mandate openness in the donation process; record keeping by the IVF clinic, including records of the genetic parents’ identity, medical history and other pertinent information; and access by the intended child to that information.\(^{20}\)

I. COLLABORATIVE REPRODUCTION

Assisted Reproductive Technology (ART) is the umbrella term applied to the various medical technologies used to create children through means other than coital reproduction. Artificial insemination by donor sperm, one of the earliest forms of assisted reproduction, is used in the conception of approximately 30,000 children each year in the United States.\(^{21}\) Egg donation, a relative newcomer, is gaining popularity as well.\(^{22}\) Other ARTs include in vitro fertilization (IVF),\(^{23}\) gamete intrafallopian transfer (GIFT),\(^{24}\) zygote intrafallopian transfer (ZIFT),\(^{25}\)

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20. Although it is not the thrust of this article, as a necessary counterpart to this proposal, I also argue that the laws governing sperm and egg donation should be reexamined in light of this intended child centered approach.


22. Sherri A. Jayson, Comment, “Loving Infertile Couple Seeks Woman Age 18–31 to Help Have Baby. $6,500 plus Expenses and a Gift”: Should We Regulate the Use of Assisted Reproductive Technologies by Older Women?, 11 ALB. L.J. Sci. & Tech. 287, 329–30 (2001) (“In 1986, only one national egg donor program existed. In 1991, some 75 clinics were in operation. This number grew to 227 in 1996 and is currently over 300. Egg donation is in such demand that most clinics have a wait list varying from 3 months to a year”).

23. In vitro fertilization is performed by harvesting an ovum from a woman and combining it with sperm in a culture dish. Those eggs that become fertilized result in zygotes. If the zygotes divide and reach two to eight cells, they become preembryos. The preembryos that are implanted into a woman’s uterus, and that divide to reach sixteen or more cells, become embryos. The terms embryo and preembryo are used interchangeably by courts and commentators. In this article the term embryo includes both the preembryo and embryo. See John A. Robertson, In the Beginning: The Legal Status of Early Embryos, 76 Va. L. Rev. 437, 441–43 (1990).

24. Gamete intrafallopian transfer involves retrieving eggs and placing them directly into the fallopian tubes with large numbers of sperm shortly after the eggs are retrieved from the ovaries.

25. Zygote intrafallopian transfer is a combination of IVF and GIFT; eggs are retrieved and fertilized in a petri dish, like IVF, but they are transferred to the fallopian tubes, rather than the uterus, before they divide, like GIFT.
Intra Cytoplasmic Sperm Injection (ICSI), and Intrauterine Insemination (IUI). Since the first “test tube baby” was born in 1978, IVF has been used to produce somewhere between 114,000 and one million children. Children conceived through assisted reproduction are no longer a medical curiosity; their births have become commonplace. Since an estimated one in six couples in this country is infertile, it is likely the number of children created with assisted reproductive technologies will continue to increase.

The term collaborative reproduction applies to those arrangements where a third party who does not intend to parent, supplies the genetic material and/or performs the gestational function for the intending parents through the use of one or more of the ART methods. Collaborative reproduction may be accomplished through embryo donation, donor insemination, egg donation, and surrogacy.

A. EMBRYO DONATION

During the IVF process, a woman may produce as many as a few dozen eggs that can be combined with sperm to create multiple embryos. Generally, only a few of these embryos will be transferred into a woman’s uterus to decrease the possibility of multiple births and their associated risks. The embryos that are not implanted in the uterus may be cryopreserved for potential future use, decreasing the number of times a woman must undergo ovary stimulation and egg retrieval during her fertility treatment. An estimated 400,000 of these frozen embryos are stored in fertility clinic freezers.

If a couple or person no longer wants to use the remaining frozen embryos, they have one of four options: research, destruction, indefinite storage, or

26. Intra Cytoplasmic Sperm Injection involves holding an egg, retrieved with the same process used with IVF, in place with a glass pipette and injecting a single sperm into the cytoplasm of the egg to induce fertilization.
27. Intrauterine Insemination is the injection of sperm, that have been prepared in an embryology laboratory, directly into the uterus at the time of ovulation. Fertility drugs may be administered in small doses to increase the production of eggs.
30. SUSAN LEWIS COOPER & ELLEN SASKIN GLAZER, CHOOSING ASSISTED REPRODUCTION 71 (1998). This limits the number of times a woman must have eggs retrieved either laparoscopically or vaginally, which decreases the cost of the procedure and some of the risks associated with the egg retrieval.
32. Id. Cryopreservation allows embryos to be frozen using liquid nitrogen. Cryopreservation reduces the number of times a woman must undergo egg retrieval, an often painful and dangerous process. The frozen embryos can be stored and used at a later date.
33. Id.
34. The War Over Fetal Rights, NEWSWEEK, June 9, 2003, at 44.
donation. Embryo donation allows couples to donate their remaining embryos to another person or couple for the purpose of creating a child. This alternative is appealing for persons who do not wish to destroy these frozen embryos or donate them for research because of religious or other reasons, or who, because of their own struggles with infertility, may want to aid other persons in the same circumstances. This practice is not subject to any regulation; there is no oversight by courts or legislatures. There is no requirement that IVF clinics maintain records of the history or identity of the donor parties, or release any identifying information to the intending parents or intended child. IVF clinics generally provide donated embryos to their patients without any contact with the donors. The donation may be completed through a verbal promise or by having the donor parties sign a single-page document purporting to transfer the embryos to the recipient parties. Since the transaction generally involves anonymous donation, even if that document is given to the intending parents, the donor parties' signatures would be redacted. The embryo producers and the clinic must agree in order to release any identifying information. Since most couples using IVF are desperate to have children, they are unlikely to challenge the IVF clinic’s

35. All four options are not always available. For example, some clinics limit the number of years that embryos may be stored in their facility, and at least one state prohibits the destruction of the embryo. La. Rev. Stat. Ann. § 9:129 (West, WESTLAW through 2004 1st Extra Sess.).

36. Changing Realities of Parenthood: The Law’s Response to the Evolving American Family and Emerging Reproductive Technologies, 116 Harv. L. Rev. 2052, 2065, 2068 (2003) (Legislatures have left the field of medical reproductive technologies largely unregulated, and courts are reluctant to act on their own and “in vitro fertilization clinics remain free to regulate themselves”); see also Alexander N. Hechi, Comment and Note, The Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology, 1 Hous. J. Health L. & Pol’y 227, 252, 255–56 (2001) (the “near-absence of federal and state law combined with ineffective and unheeded industry guidelines leads to a lawless free-for-all” where “doctors fraudulently impregnate their patients,” use genetic samples without consent, and fail to safely screen donors).

37. Amnas, supra note 18, at D1 (“R[eords of genetic parents are destroyed or coded so the child can never know his or her genetic parents”). The laws in NY regulating preservation of ART records are generally concerned with maintaining records of the husbands’ consent to artificial insemination with donor sperm. See Task Force, supra note 31, at 372–73. But see Ohio Rev. Code Ann. § 3111.94(A) (2003) (West, WESTLAW through Aug. 14, 2003) (retention of “information concerning the donor that the physician possesses” required).

38. See, e.g., Rotunda Fertility Clinic’s Adoption Policies, http://iwannagetpregnant.com/embryo.asp (last visited Sept. 12, 2004) (clinic handles embryo “adoption” like a closed adoption, with no contact between the parties); see also Malpani Infertility Clinic’s policies, http://www.dralmalpani.com/embryoadoption.htm (last visited Sept. 12, 2004) (“There is no contact between the donation couple and the recipients, who never see each other. The recipient couple does not even need to inform their obstetrician that they achieved their pregnancy through embryo adoption”). Although each of these programs uses the term adoption, they do not subject the embryo adoption to any adoption procedures, i.e., there is no home study, determination of parentage, termination of the donor’s rights, or right to access information about the donors in the future.


40. Id.

41. Id.
policies regarding non-disclosure of identifying information. A child created with a donor embryo will therefore likely be unable to access any future information about his or her genetic progenitors.

Except for a few voluntary programs, embryo donation is not subjected to the same considerations as traditional adoption. It occurs without any legal guidance or framework, subject only to the IVF clinic’s institutional policies. There is no determination of parental fitness, no inquiry into the accuracy of information provided by the donor couple, and no assurance that the embryo has actually been donated. The intended child’s interests are neither represented nor considered by any of the parties involved in the procedure.

B. DONOR INSEMINATION

More than one million children worldwide have been conceived through donor insemination, the process of artificially inseminating a woman with the sperm of someone other than her partner or husband. The sperm may come from a donor known to the woman or may be donated anonymously. With a known donor, a woman may inseminate with or without the use of a physician. Persons who elect to use anonymous sperm generally purchase sperm from a sperm bank. For the most part, these banks keep donor information confidential and intending parents and children are not allowed access to identifying information. The banks provide profiles of the donors, describing their physical characteristics; ethnic, medical, and social background; personality traits; hobbies and interests;

42. Peter E. Malo, Deciding Custody of Frozen Embryos: Many Eggs are Frozen but Who is Chosen?, 3 DePaul J. Health Care L. 307, 333 (2000). See generally Justyn Lezin, (Mis)conceptions: Unjust Limitations on Legally Unmarried Women’s Access to Reproductive Technology and their Use of Known Donors, 14 Hastings Women’s L.J. 185, 213–14 (2003); IVF Fears, INDEPENDENT (London), Sept. 11, 2003, available at 2003 WL 62313446; COOPER, supra note 30, at 185 (couples who use donor insemination are “so eager to conceive--and to conceive quickly--that their judgment regarding medical, genetic, and social information may be eclipsed”).

43. Although several fertility clinics offer so-called “embryo adoption,” the only program that specifically requires prospective intending parents to comply with traditional adoption requirements is the snowflake embryo adoption program in Fullerton, California. See http://www.snowflakes.org for a description of the snowflake program. See also supra note 38 (listing clinics that have “embryo adoption” programs that are not conducted in accordance with adoption laws).

44. Changing Realities, supra note 36, at 2068.

45. See infra notes 28–44 and accompanying text; Annas, supra note 18 (decision making centers on the donor or infertile couple’s best interests, not the child’s, and desire and money serve as surrogates for child welfare).

46. Sperm donation statutes that confer fatherhood on the husband of the woman who is inseminated generally only apply to married couples who use a physician to inseminate. See infra notes 147–49 and accompanying text. Artificial insemination does not require the use of a physician. For example, kits are available on-line that make self-insemination possible; it has also been accomplished through the use of a readily available kitchen tool.

47. But see Johnson v. Superior Court, 95 Cal. Rptr. 2d 864, 879 (Cal. Ct. App. 2000) (parents of donor child were entitled to information about donor); see infra notes 288–90 and accompanying text.
educational background; and even the donor’s life philosophy.\textsuperscript{48} Some banks have counselors who will help a purchaser select a donor from the various profiles; others allow the purchaser to peruse the available profiles and make the selection without assistance.\textsuperscript{49} Purchasers may choose to visit the bank or in person or may even buy sperm online.\textsuperscript{50} Although the sperm providers are called donors, they are generally compensated.\textsuperscript{51} Once the sperm is selected, it is shipped from one of these banks to the purchaser for artificial insemination or IVF.\textsuperscript{52}

The process of banking and freezing sperm is virtually unregulated.\textsuperscript{53} The American Society of Reproductive Medicine (ASRM) maintains a list of sperm banks, but there is no requirement that sperm banks register with the ASRM or any other organization.\textsuperscript{54} Only two states, New York and California, require sperm banks to be licensed in order to operate.\textsuperscript{55} Furthermore, there is no requirement that sperm banks maintain records with personally-identifiable or non-personally-identifiable information about donors.\textsuperscript{56} Banks that do keep such records are not required to make them available to donor offspring.\textsuperscript{57} The ASRM has voluntary guidelines for record keeping, and access to those records, but even those guidelines promote secrecy and anonymity in the donation process.\textsuperscript{58} The guidelines provide: “It is highly desirable to maintain permanent confidential records of donors, including a genetic workup and other non-identifying information, and to make the anonymous record available on request to the recipient and/or any resulting offspring.”\textsuperscript{59} Thus, there is no requirement that records be maintained.

Although donor insemination has been widely available since the 1950s, no legislation aims at protecting the rights of intended donor children.\textsuperscript{60} As with embryo donation, there is no determination of parental fitness, no inquiry into the accuracy of information provided by the donor father, and generally no contact

\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Cooper, supra note 30, at 180.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 185–86.
\textsuperscript{57} Worfand, supra note 8.
\textsuperscript{59} Id.
\textsuperscript{60} The regulations that do exist have focused almost exclusively on determinations of parentage. See infra note 147 and accompanying text.
between the parties.\textsuperscript{61} A child created with donor sperm is usually unable to access any information about his or her donor father.\textsuperscript{62} Since those few states that have chosen to regulate egg donation have elected to use sperm donation regulation as the framework, these same problems also exist for children created with donor eggs.

C. EGG DONATION

Egg donation did not become an option until the development of IVF, and it was the concomitant procedure for maturing and removing eggs from a woman’s ovaries that made it possible to transfer eggs from one woman to another.\textsuperscript{63} The first confirmed pregnancy from an egg donation occurred in 1984.\textsuperscript{64} Like sperm donation, the donor may be known or anonymous, and the donor is paid for her contribution. The similarities end there.

While sperm is plentiful, eggs are scarce. Egg donation requires medical assistance, so the procedure for retrieving eggs is more costly than and has more potential risks to the donor than sperm donation.\textsuperscript{65} Further, unlike sperm, eggs do not freeze well unless they are fertilized,\textsuperscript{66} and cannot be stored in the same manner as sperm so women do not “bank” their eggs. As a result, egg donors are paid far more than sperm donors, which, in addition to the greater expenses associated with obtaining eggs, means donated eggs cost much more to recipients than donated sperm.\textsuperscript{67} Egg donors must be available to donate during the fertile periods of the intending mother’s IVF cycle.\textsuperscript{68} Because of the scarcity of donors, invasiveness of the egg retrieval procedure, and potential risks to the donor, couples and clinics often offer substantial sums of money through advertisements in newspapers, magazines, publications distributed at colleges and universities, and the Internet to entice anonymous donors.\textsuperscript{69}

Like sperm and embryo donation, no legislation aims at protecting the rights of intended egg donor children.\textsuperscript{70} There is no determination of parental fitness, no inquiry into the accuracy of information provided by the egg donor, and

\begin{footnotesize}
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\item[61.] Annas, supra note 18 (decision-making centers on the donor or infertile couple’s best interests, not the child’s, and desire and money serve as surrogates for child welfare).
\item[62.] See supra note 8.
\item[63.] COOPER, supra note 30, at 195.
\item[64.] Id. (citing Lutjen et al, The Establishment and Maintenance of a Pregnancy Using in Vitro Fertilization and Embryo Donation in a Patient with Ovarian Failure, NATURE, 1994, 207:174–76).
\item[65.] AMER. SOC’Y FOR REPROD. MED., GUIDELINES FOR OOCYTE DONATION, 77 FERTILITY & STERILITY S6 (June 2002).
\item[66.] COOPER, supra note 28, at 200; 77 AMER. SOC’Y FOR REPROD. MED. NO. 1, NEW TECHNIQUE DRAMATICALLY IMPROVES SURVIVAL RATES OF FROZEN EGGS (Jan. 2002).
\item[67.] COOPER, supra note 30 at 194–95.
\item[68.] Id. at 200–01.
\item[69.] AMER. SOC’Y FOR REPROD. MEDICINE, FINANCIAL INCENTIVES IN RECRUITMENT OF OOCYTE DONORS, 74 FERTILITY & STERILITY 216, 216–19 (Aug. 2000).
\item[70.] The few regulations that do exist have focused on determinations of parentage. See statutes cited infra notes 167, 170–72.
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generally, no contact between the parties. A child created with a donor egg is usually unable to access any information about his or her donor mother. According to one mother who had twins with donated eggs, all she knows about her egg donor are a few sentences scrawled on loose-leaf paper. Her twins will likely be unable to access any additional information, should they want it, because the birth mother’s clinic is neither obligated to maintain any information about the donor nor to disclose information to donor offspring.

D. Surrogacy

Surrogacy is the process by which people contract with a woman who agrees to become pregnant using assisted reproduction, which may or may not include the use of an egg from her own body, and to deliver the child she gestates to the contracting parties. These contracting parties are often referred to as the intending parents. In traditional surrogacy arrangements, the surrogate uses her own egg and is artificially inseminated with sperm from the intending father or a donor. In gestational surrogacy arrangements, the surrogate uses an embryo created from the egg of either the intending mother or an egg donor, and the sperm from the intending father or a sperm donor.

Surrogacy, like the other ART methods, is not subject to significant regulation. The regulations that do exist govern the amount and type of compensation that may be given to a surrogate, the class or type of women who may act as surrogates, and the circumstances under which surrogacy agreements are allowed. Courts have refused to uphold some traditional surrogacy agreements on the grounds that they contravened public policy. Although the purpose of surrogacy agreements is to create a child, courts do not consider the child’s interests evaluating surrogacy agreements under state law.

71. See infra notes 167, 170–72 and accompanying text; Anns, supra note 18 (maintaining that decision making centers on the donor or infertile couple’s best interests, not the child’s, and desire and money serve as surrogates for child welfare).


73. Only the American Society for Reproductive Medicine voluntary guidelines, published four years after the woman’s interview, suggest that information be retained “as a medical resource” for future offspring. However, these guidelines also explain that donor confidentiality should be protected to the extent permitted by local statutes. AM. SOC’Y FOR REPROD. MED., Guidelines for Oocyte Donation, 77 FERTILITY & STERILITY 86, 88 (June 2002).

74. Intending parents is the term that is applied to the parties in collaborative reproduction arrangements who initially set out to create a child through the use of assisted reproductive technology; it may be used to distinguish these parties from the genetic or gestational parents, although the intending parents may also be genetically or gestationally related to the intended child.

75. Changing Realities, supra note 36 at 2073–74.


77. See In re Baby M, 537 A.2d 1227, 1234 (N.J. 1988); Changing Realities, supra note 36, at n.153.

Similar to adoption, collaborative reproduction creates a family in which the child is genetically unrelated to one or both of the parents who will raise him or her. Whereas adoption is heavily regulated and supervised by the courts, collaborative reproduction is virtually unregulated and conducted with practically no oversight. No social worker or court inquires into the fitness of the parents or the suitability of their home. There is no legislative or judicial requirement that records be maintained until the child reaches the age of majority and, in most cases, any records that do exist are kept secret from the intending parents and the intended child. The law does not require any consideration of the intended child’s interests, and the parties to the collaborative reproduction arrangements — clinics, donors and intending parents — have done little to make sure that these interests are protected. The anonymity and secrecy that once surrounded adoption occurs in collaborative reproduction arrangements. Thus, in collaborative reproduction, intended children are not afforded the protections adoption law gives to adoptees.

II. FROZEN EMBRYO REGULATION

A few states, including Missouri and Louisiana, have attempted to characterize the status of the frozen embryo in their regulatory schemes, but most of the law regarding frozen embryos has arisen as a result of litigation between divorcing parties who disagree about the disposition of their embryos. Even where courts initially discussed the characterization of the frozen embryo as either person, property, or some interim category, the cases have focused almost entirely on the interests of the providers and recipients. Case law has centered largely on deciding a divorcing party’s right to determine the disposition of his or her embryos. To date courts have addressed neither the rights and responsibilities of parties who jointly choose to donate an embryo to another party to create a child nor the interests of that intended child. The existing cases and statutes provide no

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79. See statutes cited infra notes 84 and 86 and accompanying text.


81. See infra notes 103–130 and accompanying text.
direction for persons seeking to create children through embryo donation. 82

A. THE STATUS OF THE FROZEN EMBRYO

The frozen embryo’s status, as person, property or some interim category, is unsettled. 83 The few courts that have considered the disposition of embryos in disputes with fertility clinics, divorce proceedings, or other contexts, have side-stepped the issue of the embryo’s status, either by weighing the parties’ respective interests, or interpreting the parties’ agreements with each other or with their clinic, to resolve the dispute.

1. The Embryo as Person

Although Missouri law states that “the life of each human being begins at conception,” which implies a frozen embryo is a human being, 84 Louisiana is the only state to specifically characterize a frozen embryo 85 as a person, and even its relevant statute recognizes that the determination is subject to some prescribed limitations. 86 The Louisiana statute requires the fertility clinic to maintain records of the donors’ identification, 87 and it makes the facility responsible for the embryo’s safekeeping. 88 This regulation also prohibits intentional destruction of the embryo, 89 and use for research purposes or for anything other than implantation. 90 In any dispute between the parties, the court must resolve

82. Lori Andrews & Nanette Elster, Regulating Reproductive Technologies, 21 J. LEGAL MED. 35, 57 (2000)(discussing the embryos “uncertain legal and ethical status”). Only a few states provide that the intending husband and wife who consent to an embryo transfer are the parents of children born as a result of the embryo donation. See infra notes 167, 170–72 and accompanying text.

83. A comprehensive look at the treatment of frozen embryos is beyond the scope of this article. This section is intended only to (1) establish that the frozen embryo cases have not considered anything beyond the parties’ initial dispute over the embryos, and (2) illustrate that the law regarding embryos is muddled, both of which contribute to the lack of guidance for donors or fertility clinics and result in inadequate protection for an intended child. For a more thorough discussion of the treatment of frozen embryos, see Malo, supra note 40; see generally Carl H. Coleman, Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes, 84 MISS L. REV. 55, 55–59 (1999); Natalie K. Young, Frozen Embryos: New Technology Meets Family Law, 21 GOLDEN GATE U. L. REV. 559, 559–63 (1991); John A. Robertson, In the Beginning: The Legal Status of Early Embryos, 76 VA. L. REV. 437, 461–95 (1990).

84. MO. ANN. STAT. § 1.205 (West, WESTLAW through 2004 2d Reg. Sess.).

85. The statute applies to in vitro fertilized human ovums. A frozen embryo and an in vitro fertilized human ovum are analogous.

86. LA. REV. STAT. ANN. § 9:123 (West, WESTLAW through 2004 1st Extra. Sess.) (“An in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law”); §9:126 (“An in vitro fertilized human ovum is a biological human being which is not the property of the physician... the facility... or the donors of the sperm and ovum.”); §9:129 (“Any in vitro fertilized human ovum that fails to develop further over a thirty-six hour period except when the embryo is in a state of cryopreservation is considered non-viable and therefore not a juridical person.”).

87. Id. at § 9:124,
88. Id. at § 9:127,
89. Id. at § 9:129,
90. Id. at §§ 9:126, 9:129 & 9:130.
disputes using a "best interest of the in vitro fertilized ovum" standard. Although the regulatory scheme has not yet been challenged, there is some question as to whether it would withstand constitutional scrutiny. The Tennessee Supreme Court reversed a trial court decision that attempted to categorize embryos as persons. In Tennessee no statute similar to the Louisiana statute exists, however, so it is an open question whether a court would defer to legislative decision regarding the frozen embryo's status.

2. The Embryo as Property

In one case, York v. Jones, a federal district court in Virginia treated frozen embryos as property in a dispute between a couple and their fertility clinic over who had control over the couples' frozen embryos. The husband and wife sued the fertility clinic for refusing to transfer their frozen embryo to another fertility clinic. The court categorized the clinic's relationship with the couple as one of bailor-bailee and determined that contract principles should be applied to resolve the dispute. The court strictly construed the parties' written agreement against the clinic, because the clinic had drafted it. The court determined that because under the agreement the clinic recognized that the husband and wife had full property rights in the embryo, the clinic did not have the right to exercise dominion and control over the embryo. Further, the court found that because the agreement did not restrict the couple to procedures at that particular clinic, the husband and wife could direct the clinic to transfer the embryo.

The court in York determined the parties' initial intentions and then enforced their agreement, similar to the approach used by those courts that have resolved disputes between divorcing parties over the disposition of their embryos. By creating this bailor-bailee relationship between the husband and wife and the clinic, the decision assumes that the embryos were property, without articulating a basis for this assumption.

3. The Embryo as a Special Interim Category

The American Society for Reproductive Medicine (ASRM) and at least one

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91. Id. at § 9:131.
92. Kim Schaefer, Comment, In-Vitro Fertilization, Frozen Embryos and the Right to Privacy—Are Mandatory Donation Laws Constitutional?, 22 PAC. L.J. 87, 119–121 (1990). The constitutionality of these regulations is beyond the scope of this article. The proposed solution in this article does not raise those constitutional questions. See infra, section V.
93. See, e.g., Davis v. Davis, 842 S.W.2d 588, 594 (Tenn. 1992) (overruling trial judge's attempt to classify frozen embryos as persons).
95. York at 425.
96. Id. at 426.
97. Id. at 427–27.
98. Id. at 427.
99. See infra notes 103–138 and accompanying text.
court placed embryos in a special interim category.\footnote{See \textit{Davis v. Davis}, 842 S.W.2d 588 (Tenn. 1992). The ASRM was formerly known as the American Fertility Society; compliance with their guidelines is voluntary.} According to ASRM guidelines, embryos are entitled to "profound respect", but not the same moral and legal rights that are afforded human beings.\footnote{\textit{Ethics Comm. of the Am. Fertility Soc'Y}, \textit{Ethical Considerations of the New Reproductive Technologies}, 46 \textit{Fertility & Sterility} 3OS (Sept. 1986).} The guidelines provide: "while an embryo deserves greater respect than accorded other human tissue, since it has the potential to become a human person, it is not accorded the respect of an actual human being."\footnote{\textit{Id.} at 29S–3OS.} \footnote{\textit{Id. at 29S.}}

In \textit{Davis v. Davis},\footnote{842 S.W.2d 588 (Tenn. 1992).} the first case to consider the disposition of frozen embryos in a divorce proceeding, the Tennessee Supreme Court began its analysis by considering whether the embryo is a person or property.\footnote{\textit{Id.} at 594.} The court rejected the idea that embryos could be considered persons or property and concluded that they are instead part of a special interim category because of their potential for human life.\footnote{\textit{Id.} at 597.} This special interim category entitles the embryo to special respect,\footnote{\textit{Id.}} however this discussion was in dicta since the court chose to resolve the case based on the parties' intentions, not the embryo's special status.\footnote{\textit{Id.} at 604.} Although the parties in \textit{Davis} did not have a dispositional agreement, the court noted that such agreements should generally be binding on the parties.\footnote{\textit{Id. at 597.}} The court held that disputes over frozen embryos, in cases where there is no dispositional agreement, should be resolved by balancing the parties' interests. The wife in \textit{Davis} intended to donate the embryos to another infertile couple; the husband intended to have the embryos destroyed. The court determined that the husband's right not to procreate outweighed the wife's right to donate the embryos.\footnote{\textit{Id.} at 604.} The court pointed out that it would be a more difficult decision if the wife were infertile and intended to use the embryos to procreate, because then her procreational interests would be more significant.\footnote{\textit{Id.}} The \textit{Davis} decision was the beginning of a trend where courts decided disposition disputes based on the parties' intentions, agreements, and procreative rights, rather than on the status of the embryo as person, property, or some interim category.

\section*{B. DISPOSITION BY INTENTIONS, AGREEMENTS AND PROCREATIVE RIGHTS}

\subsection*{1. \textit{Kass v. Kass}}

Following \textit{Davis}, several courts rendered decisions without regard to the status
of the embryo, relying instead on the parties’ intentions, agreements, and procreative rights. For example, in *Kass v. Kass*, a New York state court resolved an embryo dispute by relying on the parties’ agreements. The parties in *Kass* signed two dispositional agreements, an initial agreement with the IVF clinic as part of the IVF medical consent forms, and a second agreement that was part of the couples’ divorce proceedings. Both agreements indicated that the couple’s frozen embryos should be donated to the IVF clinic for research. However, during the divorce proceedings, the wife sought custody of the embryos for implantation. The trial court awarded her custody and directed her to exercise her right to implant the embryos within a reasonable time, reasoning that a woman has decisional authority over embryos just as she would over a nonviable fetus. In reversing the lower court’s decision, the appellate court determined that the embryos were not persons, and declined to consider whether they were entitled to special respect, choosing instead to base its decision on the parties’ dispositional agreement. The court applied contract principles to determine both the validity of the dispositional agreement and whether it expressed the parties’ intent. The court held that frozen embryo dispositional agreements should generally be presumed valid and binding and should be enforced. The court concluded that the parties’ intent, as evidenced by the agreements, was to donate the embryos for research. The court then enforced this agreement and ordered that the embryos be donated for research.

2. *A.Z. v. B.Z.*

Courts do not always decide embryo custody disputes on the basis of the parties’ agreements, however. Courts have not been willing to enforce dispositional agreements where the parties’ agreement is to use the embryo for child creation, on the grounds that agreements to enter familial relationships should not be enforced against persons who have reconsidered. *A.Z. v. B.Z.* involved such an agreement. This dispute also arose in a divorce proceeding. Unlike the agreement in *Kass* however, the parties’ dispositional agreement in this case provided that if the parties separated, the embryos would be given to the wife for implantation. The Massachusetts court found that the agreement did not reflect the parties’ intentions for several reasons. First, the court determined the agreement was part of a consent form from the IVF clinic, which meant it was drafted by the clinic and not the parties. Second, because the agreement did not contain a duration provision and because the term “should we become separated”

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112. Id. at 177.
113. Id. at 179–80.
114. Id. at 182.
116. Id.
117. Id. at 1054.
118. Id. at 1056.
was not defined in the agreement, the court concluded it was unclear that the contract applied to the parties’ current situation.\footnote{Id. at 1057.} Third, the parties’ conduct created some doubt about the parties’ intent.\footnote{Id.} Fourth, the court found the form was not a valid separation agreement that would be binding in a divorce.\footnote{Id. at 1057–58.} Therefore, the court held the agreement was unenforceable.\footnote{Id.}

Rather than side-step a difficult issue and dispose of the matter through contract interpretation, the court also chose to consider the general validity of such agreements, and concluded such agreements were invalid.\footnote{Id.} The court averred that enforcing such an agreement would be forced procreation, which would be invalid because it contravened public policy.\footnote{783 A.2d 707 (N.J. 2001).} Under A.Z., therefore, any dispositional agreement that gives a party the right to implantation is invalid if the other party later wishes to avoid procreation. Given this result, if one party does not want to procreate, there appears to be no difference between the outcome in cases where the parties have executed agreements and where they have not. In either situation, the party wishing to avoid procreation will prevail.

3. \textit{J.B. v. M.B.}

\textit{J.B. v. M.B.}\footnote{Id. at 710–11.} provides a glimpse of a possible exception to this rule in New Jersey. In the case, another divorce proceeding, the wife claimed she had intended to use the embryos solely within her marriage and that the parties had never discussed the disposition of embryos in the event of their separation. The husband claimed that the couple had agreed that any unused embryos would not be destroyed, but would be used by his wife or donated to infertile couples.\footnote{Id. at 714–16.} The court determined that no written agreement existed and held that in the absence of a written agreement, the court had to weigh the parties’ respective rights.\footnote{Id. at 717, 719–20.} The court weighed the husband’s right to procreate against the wife’s right not to procreate.\footnote{Id. at 720.} Justices Veniero and Zazzali wrote separately stating that the outcome might change if an infertile party sought the use of the frozen embryos.
over the objections of the party who seeks to avoid procreation.

4. *Litowitz v. Litowitz*

Another twist in the frozen embryo disputes arose in *Litowitz v. Litowitz.*\(^ {131}\) In *Litowitz*, the wife was infertile; she had a hysterectomy and was unable to produce eggs or gestate a pregnancy. The couple contracted with an egg donor and created embryos using the husband's sperm. Some of the embryos were implanted into a surrogate who was not the egg donor and others were cryopreserved.\(^ {132}\) The couple executed a dispositional agreement indicating the embryos would be thawed and not allowed to undergo further development.\(^ {133}\) This decision would be binding, unless the parties jointly agreed, in writing, to some other disposition\(^ {134}\) During their divorce proceedings, the husband asked the court to order that the embryos be placed for adoption; the wife requested that they be implanted in a surrogate mother and carried to term.

The trial court awarded the embryos to the husband to place for adoption on the grounds that the other available choices were not in the best interests of the potential child.\(^ {135}\) The appellate court rejected the trial court's reasoning, but affirmed the result, holding that only the husband's right to procreate or not to procreate was at stake, because he was the only biological progenitor.\(^ {136}\) The Washington Supreme Court reversed and held that the dispositional agreement should govern the dispute; the court ordered that according to the agreement, the eggs were to be thawed and not allowed to undergo further development.\(^ {137}\) The dissent criticized the majority for ignoring language in the contract that suggested the need for court intervention. The dissent also praised the trial court for recognizing the interests of the potential child.\(^ {138}\)

By enforcing its own view of the dispositional agreement, the court avoided more complicated questions, including the status of the frozen embryo and whether either party should be allowed to use the embryos for procreation. Had the court considered the parties' current intentions as courts do when one of the parties wishes to avoid procreation, the court would have been required to resolve the case in one of two ways. Either the court would have had to decide that the wife had no standing because she was not a genetic progenitor, which would have resulted in the grant of "custody" of the embryos to the husband, or by deciding the parties had equal rights to the embryos, which would have resulted in a choice between the husband's desire to donate the embryos and the wife's desire to implant them into a surrogate. The latter choice would ultimately have required

\(^{131}\) 48 P.3d 261 (Wash. 2002).

\(^{132}\) *Id.* at 262.

\(^{133}\) *Id.* at 264.

\(^{134}\) *Id.*

\(^{135}\) *Id.* at 264.

\(^{136}\) *Id.* at 265.

\(^{137}\) *Id.* at 271.

\(^{138}\) *Id.* at 274.
the court to determine which of the proposed options was in the best interests of
the embryo. It was far easier to enforce the parties’ original agreement rather than
to tackle these more difficult questions.

5. Commonalities Among the Embryo Disposition Cases
The most striking commonality among these cases is that the court in each
avoids the challenging issue of the embryo’s status by claiming to base its
decision on the parties’ intentions. This assertion that the parties’ intentions
matter is somewhat disingenuous. State courts have only enforced agreements
that provide either for the destruction of the embryo or donation to research. Any
dispute between the parties over the disposition of frozen embryos necessarily
involves a choice between one party’s right to procreate and the other party’s
right not to procreate. If the parties agree, the court has no reason to intervene.
Absent some compelling reason, courts are not inclined to force a party to
procreate against his or her will. The parties’ original intentions are, in effect,
irrelevant. Notwithstanding the courts’ purported reliance on agreements and
intentions, courts have effectively adopted the position that despite any agreement
by the parties to the contrary, a party who wishes to avoid procreation will
generally prevail.

These decisions do not provide guidance for protecting the intended child
because in each case the court ruled in favor of the party wishing to avoid
procreation, thus the court held a child was not intended. In every embryo
donation case, however, there will be an intended child. Where there is an
intended child, his or her interests should be protected, just as children’s interests
are protected in adoption and family law cases.

Neither do the cases provide stability to parties who agree to donate their
embryo, because these cases only lend guidance when a dispute arises. The cases,
however, indicate support for regulating embryo donation based on the parties’
intended use. Based on these cases, embryos should be regulated in the manner
that the circumstances and parties’ intent dictates. If the issue is a contractual
dispute between the parties, or with the clinic, contract law should be applied. If
the issue is whether the embryos are freely transferable either to another clinic or
for research, property law would govern. If the issue is whether the parties may
donate the embryos to another person for the purpose of creating a child, who is
generically unrelated to his or her parents, it is similar to an adoption, and
adoption law should apply.

Although using the party’s intent to resolve collaborative reproduction
disputes in both frozen embryo and surrogacy parentage cases (discussed in
Section III.C., infra) has been criticized, the criticisms are not applicable to
donation cases. In embryo donation cases, the parties all have the same intent – to
use the donor parties’ embryos to create a child for the recipient parties. Since the
parties agree about their purpose, the court should not question the parties’
original intentions as courts do in disposition cases. In embryo donation, the
intended use is the creation of a genetically unrelated family, in effect, an
adoption; therefore adoption law and policy applies and should govern these collaborative reproduction arrangements.

III. PARENTAGE OF CHILDREN CREATED THROUGH ASSISTED REPRODUCTIVE TECHNOLOGIES

A child created through ART may have as many as eight "parents": the sperm and egg donors, their spouses, the gestational surrogate and her' spouse, and the intending parents. Some disputes involving technologically created families have arisen when the participants have attempted to determine their respective parental rights and responsibilities. Parentage statutes were not designed to apply to these technologically-created families; courts' efforts to apply these statutes have led to confusion about the implications of biological, including genetic and gestational, parentage. The statutes generally provide that a determination of parenthood may be based on genetics or gestation, and courts' selections have alternated among gestation, genetics, and intention. Cases and statutes that attempt to sort out these parentage issues do not offer clear or consistent standards. Few states have chosen to enact legislation aimed at determining parentage for children of assisted and collaborative reproduction. When one or more of the parties challenge parentage, it is not clear which party will prevail. Persons with a biological connection to the child have been classified as non-parents while other persons with no biological connection to the child have been classified as parents. Embryo donors cannot be certain they have terminated parental rights and intending parents cannot be certain they have acquired parental rights.

In addition, courts are not required to make any determination of the intended child's interest either prior to conception or at any point thereafter. When courts have protected the intended child's interest, it has been incidental to the court's determination. The parentage cases, therefore, do not offer any legal means to adequately protect the interests of intended children of embryo donation. They do, however, suggest that the intended child's needs require

142. See infra notes 147 and 167.
143. For example, sperm donors are considered non-parents. See infra notes 147–49 and accompanying text; see also McDonald v. McDonald, 608 N.Y.S.2d 477, 480 (1994) (holding egg donor not child's mother); Litowitz v. Litowitz, 10 P3d 1086, 1093 (Wash. Ct. App. 2000) (overruled on other grounds) (egg donor's interest in eggs expired when they were fertilized).
144. Husbands of wives who are artificially inseminated are classified as lawful parents. See infra note 138; see also In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 286 (Cal. Ct. App. 1998).
145. See infra notes 185–223 and accompanying text.
146. See infra notes 185–223 and accompanying text.
consideration and that the parties’ intentions may provide the basis for regulating technologically-created families.

A. SPERM DONATION

Most sperm donation statutes provide that the husband of a woman who is inseminated with donor sperm is the legal father of the child and that the sperm donor has no rights or obligations to the intended child.\(^{147}\) Artificial insemination statutes generally contemplate anonymous donors, who relinquish all parental rights.\(^{148}\) Under the Uniform Parentage Act, sperm donors are “eliminated from the parental equation.”\(^{149}\) Husbands whose wives are artificially inseminated are deemed legal fathers on the basis that they “caused” the birth and are therefore directly responsible for the existence of the child.\(^{150}\) This is true even when the sperm donor inseminates “naturally”, rather than artificially.\(^{151}\) Fatherhood in these circumstances is determined by consent and intent, rather than biology. These sperm donation statutes therefore suggest there is no intrinsic or essential

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150. See In re Marriage of Buzzanca, 72 Cal.Rptr.2d 280, 286-87 (citing People v. Sorensen, 437 P.2d 495 (1968) and cases from other jurisdictions holding that husbands who consent to their wives’ artificial insemination are the legal fathers of any resulting children).

151. In L.M.S. v. S.L.S., 312 N.W.2d 853 (Wis. Ct. App. 1981) (a sterile husband, who agreed to his wife having intercourse with another man, is obligated to support the child).
relationship between the person to be created and the genetic progenitor.

On the other hand, some courts have determined that sperm donors have rights and obligations because of their biological connection to the intended child. In *Thomas S. v. Robin Y*, a New York court refused to terminate the sperm donor father’s parental rights and granted him an order of filiation because the lesbian couple who conceived using his sperm had allowed him to have some contact with the children. Likewise, in *C.M. v. C.C.*, the court determined that it was in the best interests of the donor child to have two parents; therefore, the sperm donor father should have contact. The court reasoned that because the couple knew each other and had planned to maintain a relationship, it did not matter that the child was conceived artificially. It was also important to the court that the “man want[ed] to take upon himself the responsibility of being a father”, which led the court to conclude he was the “natural” father. In *Welborn v. Doe*, a Virginia court determined that although the relevant donor insemination statute provided that a husband of any married woman who conceives through artificial insemination was presumed to be the natural father of any resulting child for legal purposes, the statute did not terminate the rights of the sperm donor. Since most donor statutes contain a similar provision, under *Welborn* a sperm donor’s status is not entirely clear. Therefore, it is possible that under some circumstances a donor may be able to win the legal right to establish a relationship with the child.

Unlike sperm donors, casual inseminators cannot escape their parental

152. *See infra* notes 153–158; *see also* *Jordan C. v. Mary K.*, 179 Cal.App.3d 386, 396–98 (Cal. Ct. App. 1986) (sperm donor was son’s legal father because the insemination did not occur through a licensed physician and sperm donor was allowed to participate as part of the family). In each of these cases, the couple allowed the donor to have contact with the children. The disconcerting point suggested by these rulings is that persons who prefer openness to anonymity and secrecy may lose some of their parental autonomy. If the donation is open, courts may rely on the contact between donor and child to establish a relationship. A person who has concerns about their parental autonomy will therefore not choose to allow contact, and the child will be deprived of an important connection. Another commonality is that the cases generally involved lesbian or unmarried couples who self inseminated, without a physician, and were therefore not entitled to the protections of the donor statutes.


154. *Id.* The court did not resolve parenthood by using the artificial insemination statute, which terminates the donors rights, because that statute only applies to married women whose husbands consent to artificial insemination. *See id.* at 316, 368 (Ellerin, J., dissenting).


156. *Id.* at 825.

157. *Id.* at 824.

158. *Id.* at 825. This comment lends credence to the belief that single women and lesbian couples are treated differently than married couples in insemination disputes.


160. *Id.* at 734. The court determined that the husband needed to adopt the child in order to sever the sperm donor’s rights. *Id.*

161. *See supra* note 147.

obligations, even if the parties agree otherwise. An agreement between the parties that the inseminator will not have any responsibilities for a resulting child is unenforceable. Even where he believes that there is no possibility of impregnation, or where he has been deceived about his partner's birth control practices, he is still obligated to support any resulting child. So although his intent may be to avoid parentage, he is nonetheless deemed the legal father because of his biological connection.

The result of these legislative and judicial determinations is that different categories of biological fathers are treated differently. An intent to remain anonymous allows a person to abdicate legal fatherhood. An intent to engage in procreative conduct with a known party, either through casual insemination or artificial insemination with a known recipient; however, may establish legal fatherhood. With the former, no rights or responsibilities exist; with the latter, those same rights and responsibilities exist even if parties prefer or agree that they do not. Thus, it is not entirely clear from these cases and statutes what the relative importance of biology and intent are when determining whether the biological progenitor is obligated to fulfill parental responsibilities or is entitled to parentage.

**B. EGG DONATION**

Like the sperm donation statutes, egg donation parentage statutes suggest there is no presumed legal relationship based upon biology. Seven states, Florida, North Dakota, Oklahoma, Texas, Virginia, Washington, and Wyoming have legislation governing the parentage of children conceived with donor eggs. Four of these states simply provide that a donor is not the legal parent of a child conceived through assisted conception; this provision applies equally to egg.

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164. See id.


sperm, and embryo donation.\textsuperscript{168} Oklahoma's statute specifically applies to oocytes\textsuperscript{169} and provides that an oocyte donor has no rights with respect to a child born as a result of a donation.\textsuperscript{170} Florida's statute provides that an egg donor must relinquish all maternal rights and obligations with respect to both the donation and any resulting children.\textsuperscript{171}

In Virginia, in addition to a determination that a donor is not the parent of a resulting child, the statute also provides that a gestational mother is the legal mother when the intending mother is not genetically related to the child.\textsuperscript{172} Thus, if a gestational surrogate used a donated egg, she would be considered the legal mother, and the intending mother would be required to adopt the child in order to become the child's legal mother.\textsuperscript{173}

This is difficult to reconcile with the notion that eggs are freely transferable property. If eggs are considered freely transferable property, and the egg donor relinquishes all rights to the egg to the intending mother, then the intending mother, as the "owner" of the donated egg, should have the same interest in the resulting child as if she had contributed an egg from her own body. As a result, both the intending mother, with a donated egg, and the gestational surrogate should have the same stake in the resulting child because both should be considered to be contributing a piece of the biological formula. However, although eggs are generally treated as the freely transferable property of the donor, they are not necessarily treated as the property of the recipient in a challenge by either the intended gestational mother or an accidental one.\textsuperscript{174}

Intention and legal ownership of the egg is not sufficient, by itself, to establish parentage, although in conjunction with genetics, it will likely trump gestation. Regardless, the egg donation statutes allow women who are not genetically related to the intended child to be legal mothers, without requiring these genetically unrelated parents to meet standards of fitness that other adoptive parents are required to meet.

C. SURROGACY

In surrogacy, the relative importance of biology and intention to parent in determining legal parentage is even less clear. In traditional surrogacy cases, where one woman holds both parts of the biological formula, biology prevails.\textsuperscript{175}

\textsuperscript{168} See id.
\textsuperscript{169} A cell from which an egg or ovum develops; the female gametocyte.
\textsuperscript{171} Fla. Stat. Ann. § 742.14
\textsuperscript{172} Va. Code Ann. § 20-158
\textsuperscript{173} Id.
\textsuperscript{174} Id.; see also Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 790 (Cal. Ct. App. 2003) (woman who owned eggs that were wrongfully implanted into another woman had no standing to request custody of resulting child because her right to eggs ended once they were gestated by another woman).
\textsuperscript{175} Storrow, supra note 141, at 677; John Lawrence Hill, What Does It Mean To Be a "Parent"? The Claims of Biology as the Basis for Parental Rights, 66 N.Y.U. L. Rev. 353, 357–58 (1991).
The surrogate’s genetic and gestational connection trumps the parties’ intentions. In the words of one California Court, “For [the intending parents] and the child, biology is destiny.”

On the other hand, biology has been criticized as a basis upon which to determine parental rights and responsibilities. Sperm and egg donation statutes determine parentage based on the parties’ intentions, rather than biologic connection. This suggests that some jurisdictions view gestation, and not genetics, as the determinative biological component.

Several commentators have supported a third position—that intentions should prevail over genetic or gestational contributions. Professor John Hill argues intention should be the determinative factor, because: “What is essential to parenthood is not the biological tie between parent and child but the preconception intention to have a child, accompanied by the undertaking of whatever action is necessary to bring a child into the world.”

At times gestation has trumped both genetics and intentions. For example, in some states, a surrogate is given time after the child’s birth to reflect on her wishes concerning the child and to change her mind. This is true even where the intending mother donated the egg. In other states, the intending parents’ names cannot be placed on the birth certificate at the time of the child’s birth, even if they are the genetic parents. According to Professor Robert Storrow:

> The very history of the determination of parentage belies the notion that gestation is inessential enough to the determination of maternity that the law of assisted reproduction should make it give way to intentions. The UPA itself embodies the age-old wisdom that a woman who gives birth to a child is presumed the mother of that child.”

Storrow has also observed that despite its “fetishism for genetics” the law is

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177. Andrews, supra note 82, at 47 (reproductive technology requires rethinking societal constructs, including biology as the basis for family); Lehr v. Robertson, 463 U.S. 248, 250 (1983) (“Parental rights do not spring full blown from the biological connection between parent and child.”).

178. See Storrow, supra note 141, at 677.

179. Hill, supra note 175, at 414.


183. Storrow, supra note 141, at 614 (citing the Uniform Parentage Act) (The Uniform Parentage Act creates an exception for surrogacy, but warns that having the gestational and genetic components in one woman creates emotional and psychological problems in enforcing the surrogacy agreement.). Id.
“more comfortable” voiding parental rights of genetic donors then gestational carriers. It would seem then, that gestation is more important than biology; however, even this is unclear because gestational surrogates do not always prevail over intentional parents.

A review of the surrogacy cases highlights this incongruity because courts faced with the task of deciding between genetic, gestational and intending parents have not agreed on the relative importance of these three factors. The cases can be reconciled, however, by recognizing that in each of the cases the courts are covertly making a parentage determination based on the best interests of the intended child—even though they may not have explicitly framed the inquiry in that way.

In Johnson v. Calvert, a surrogate agreed to gestate an embryo created from the husband’s sperm and wife’s egg. The relationship between the couple and the surrogate deteriorated, and the parties sought a determination of parentage. The surrogate claimed maternity on the basis of gestation; the wife on the basis of genetics. Although it was not intended to resolve surrogacy disputes, the California court looked to the Uniform Parentage Act in its analysis when ruling on the parties’ rights. The Act recognizes both gestation and genetics as possible bases for maternity and so the court concluded that in cases where genetics and gestation do not coincide in one mother, intention should be the deciding factor. In reaching this decision, the court necessarily rejected both genetics and gestation as a sole basis for determining parentage. According to the majority, intention may establish parentage. The dissent criticized the majority for devaluing the role of the gestational mother. The dissent argued that the focus should be on the child’s best interests. The dissent acknowledged that the parties’ intentions, specifically the genetic mother’s intent to procreate, were relevant to determining the child’s best interests but should not be dispositive. Thus, when parties agree to create a child through embryo donation, under the Johnson standard, the parties’ initial agreement could break the genetic-gestational “tie” and a court would find the recipient the legal parent of the intended child because the parties’ original intent would be for the recipient to raise the child. However, if, as the dissent suggests, the case devalues the role

184. Id. at 622.
185. 851 P.2d 776 (Cal. 1993).
186. Id. at 778.
187. Id.
188. See id. at 778.
189. Id. at 779.
190. Id. at 782.
191. Id. at 782. (pointing out that gestation is not the essential element of motherhood and citing Hill, supra note 175, at 370, for the proposition that the genetic relationship should not be accorded priority).
192. Id. at 782.
193. Id. at 798 (Kennard, J., dissenting).
194. Id.
195. Id. at 800 (Kennard, J., dissenting).
of the gestational mother, the donating parties might be able to establish a parental relationship with the intended child on the grounds that genetics is more important than gestation. Johnson also does not address those cases where the parties' original intentions were based on misrepresentations or misunderstandings, including cases where the donating parties agreed to donate embryos to the recipient couple based on information contained in a profile that later turns out to contain false or embellished information. In those cases, the genetic parents could argue that the original intentions are not the determining factor because they were based upon false information. Johnson, therefore, does not provide clear guidance to recipient- or donating-parties who wish to establish parentage or donate embryos.

The Johnson court's decision to use intent to break the genetics-gestation tie was criticized in Belsito v. Clark, an Ohio gestational surrogacy case. The Belsito court held that parentage could not be determined based on intent because intent is difficult to determine, even where the parties have a written agreement, and an intent test would present problems in cases where multiple parties claimed they intended to parent the child. The court also condemned Johnson for ignoring the interests and concerns that adoption laws are designed to protect—including unpressured surrender, suitability of the parents, and stability of the parent-child relationship. Finally, the court criticized Johnson's failure to recognize or emphasize the genetic provider's right to consent to procreation and surrender potential parental rights. Despite these criticisms, the Belsito court reached the same conclusion, that the genetic contributors, who were also the intending parents, were the legal parents. The court first held that parties who provide the genes (who were the intending parents in Belsito) are the natural parents. According to the court, however, natural parentage is not the final inquiry, rather the question of legal parentage must be decided by determining whether the genetic parent consented to waive parental rights. The court ruled that where the genetic parents have decided to raise the child, they are the natural and legal parents. The court also explicitly held that birth is "subordinate and secondary to genetics."

Under Belsito, the donors of genetic material are a child's natural parents. A court next inquires whether the donor consented to waive parental rights. In an

196. 644 N.E.2d 760 (Ct. Com. Pl. of Ohio, 1994)
197. Id. at 764–65. The court notes that this is the problem in wrongful implantation cases. Both parties have the intent to parent. Id. In these cases, because intent resides in two parties, the court would need to select some other basis for determining parentage. This would necessitate open consideration of the best interests of the child, which should be the required test in all collaborative reproduction cases. See infra notes 225–34 and accompanying text.
198. Id. at 765–66. These are the same protections that are missing in embryo donation.
199. Id. at 766.
200. Id. at 768.
201. Id. at 767.
202. Id.
203. Id.
embryo donation situation, any donating parents who waived their parental rights, consented to have their embryos gestated and to the resulting child being raised by someone else, would relinquish their rights to parentage. However, because the *Belsito* court emphasized the importance of genetics and its supremacy over gestation, it is possible that genetic parents who withdraw their consent would prevail. *Belsito* also fails to address those cases where the donating parties claim their consent was based upon inaccurate information or misrepresentations; if the consent is invalid, the genetic parents would be the legal parents. Under both *Johnson* and *Belsito*, the intended child does not receive the same stability as that afforded an adoptee through a clear determination of parentage and adjudication of parental rights. The parties would be well advised to seek such a determination, and more importantly, to protect the interests of the intended child. The law should require it.

Even cases that reject genetics as the basis for parentage in favor of gestation and intention provide little security to recipients of donated embryos. In *McDonald v. McDonald*, a husband and wife used a donor egg and the husband’s sperm to create an embryo. The embryo was then implanted in the wife’s uterus and the wife gave birth to twin girls. The husband subsequently filed for divorce and requested that the court award him custody of the girls because he was the “only genetic and natural parent available.” The New York court, relying on *Johnson*, rejected the husband’s position. The court characterized the case as a “true ‘egg donation’ situation” because the donor made no claim to maternity. The court noted that the wife was the gestational mother and then concluded the wife was the natural mother. This case provides some support for legal parentage claims made by recipients of donated embryos, however, unless the donor makes no claim of parentage as in *Johnson*, the outcome is still unpredictable. Furthermore, the wife’s motherhood was predicated, at least in part, on gestation; thus, it is not clear from the opinion whether the court would have arrived at a different result if the wife had not been the gestational mother. A subsequent case, *In re Marriage of Buzzanca*, raised exactly that question.

In *In re Marriage of Buzzanca*, the husband and wife agreed to have an embryo that was not genetically related to either of them implanted in a surrogate. Following the birth of the child, the husband and wife petitioned to dissolve their marriage. The wife claimed that she and her husband were the lawful parents;

205. Id. at 478.
206. Id.
207. Id. at 479.
208. Id. at 480
209. Id.
211. Id. at 1412.
212. Id.
however the husband disclaimed responsibility, as did the surrogate. The trial
court concluded that the child had no lawful parents. The trial court accepted a
stipulation that neither the surrogate nor her husband were the lawful parents;
Mrs. Buzzanca was not the legal mother because under the relevant statutes, she
did not give birth or contribute an egg, and Mr. Buzzanca did not donate his
sperm. The husband argued that the California parentage statute applied, and
that under the statute, the surrogate was the mother and the surrogate’s husband
was the father.
The appellate court in Buzzanca rejected this argument because under the
language of the parenting statute, motherhood “may,” rather than “shall,” be
determined by birth or genetics. The appellate court chose instead to resolve
the case by analogizing the Buzzanca’s situation to artificial donor insemination.
According to the court, husbands in artificial insemination cases are
deemed lawful fathers of children biologically unrelated to them. By analogy,
courts should consider husbands and wives in surrogacy cases the lawful parents
of biologically unrelated children. The court rejected any potential claim by
the egg donor and did not recognize any parenting interest in the surrogate.
By acknowledging that a hypothetical dispute between the egg donor and the
wife would be broken in favor of the intending parent, the court established that
intention can bear equal weight to genetics in determining legal parentage.
The trial court’s determination that the child had no parent was absurd since
the court based its ruling on parentage statutes. Under the statute, either the
surrogate or the egg donor was considered the natural mother. Rather than having
no mothers, the Buzzanca child had two natural mothers; unfortunately, neither of
these “natural mothers” wanted the child. The court simply did not like the result
mandated by the statute it chose to apply. It could have rejected the statute as
inapplicable to ART cases or admitting the need for the legislature to amend the
statute accordingly, however it chose instead to ignore the parentage determina-
tion that would have been valid under the statute. The trial court was simply

213. Id.
214. Id.
215. Id.
216. Id. at 1413. In most states there is a presumption that the husband of a woman who gives birth to a
child during their marriage is the child’s legal father; this is often referred to as the marital presumption.
For a discussion of the marital presumption see Paula Roberts, Truth and Consequences: Part II.
217. Id. at 1415. The court failed to consider that “may” could refer exclusively to the fact that there
are two ways to establish motherhood, rather than indicate that the choices could be accepted or rejected.
218. Id. at 1413. (“The same rule which makes a husband the lawful father of a child born because of
his consent to artificial insemination should be applied here.”).
219. Id.
220. Id. at 1421–22.
221. Id. at 1421, n.2. Admittedly the result may have been different if the surrogate had claimed
parental rights; the court also specifically declined to address what might happen if only the surrogate
mother is available. Id.
222. See id. at 1422.
unwilling to recognize the limitations now present in a statute that was drafted before ART, since ART changed the way families are created.

The appellate court’s decision to apply the insemination statute at least partially acknowledges this problem. The appellate court noted that it applied the statute because it is the clearest expression of the legislature’s intent of how to determine parenthood “where a person who caused a child to come into being had no biological relationship to the child.” 223 Although this case provides precedent for determining that recipients of donor embryos are the child’s legal parents, the donors in did not challenge parenthood. Thus, it is not clear that the recipient parties would prevail in a challenge by the donor parents. This is especially likely where a challenge is based on allegations of misrepresentation by the clinic or the parties, or that the donors’ consent was based upon inaccurate information.

Given that the recipients of a donated embryo can not be assured they would prevail in a parenthood challenge by the donors, intended children do not have the same stability that courts and legislature afford an adoptee with a clear determination of parenthood and adjudication of parental rights. 224 This process in adoption law protects the interests of the child. If embryo donation were subjected to the same requirements as adoption, it would (i) provide stability to the intended child, (ii) assure recipient parents that donors could not prevail in a custody challenge, and (iii) provide donor parties with the knowledge and security that recipient parties, who will raise their genetic child, are fit. In protecting the interests of the intended child, all of the parties’ interests are served by defining their legal roles and rights.

D. WRONGFULLY IMPLANTED EMBRYOS

In wrongful implantation cases, the embryo is implanted into the “wrong” woman’s uterus. As the Belsito court recognized, courts face even more difficulty determining parenthood in these cases because the parties’ intentions are the same: to use the embryo to create a child. An inquiry into the parties’ intentions would not resolve the issue, and each of the parties will have a genetic or gestational tie to the child. Thus, in wrongful implantation cases courts cannot determine parenthood by considering genetics, gestation or intention. Wrongful implantation cases illustrate even more clearly than surrogacy cases that courts must make determinations of parenthood based on the best interests of the child.

1. Robert B. v. Susan B.

In Robert B. v. Susan B., 225 a husband and wife contracted to receive eggs from an anonymous donor and fertilized the eggs with the husband’s sperm. 226 The

223. Id. at 1418.
224. See infra notes 268–71 and accompanying text.
226. Id. at 786.
contract with the egg donor indicated the husband and wife would be the parents of any children produced from the resulting embryos; some of the resulting embryos were implanted in the wife’s uterus.\textsuperscript{227} Meanwhile, another woman contracted with the same fertility clinic for an embryo created with anonymously donated ova and sperm; she was mistakenly given embryos from the contracting husband and wife.\textsuperscript{228} Both women became pregnant and delivered roughly ten days apart.\textsuperscript{229} Approximately ten months after the births the fertility clinic informed the husband and wife that their embryos had been inadvertently implanted into another woman’s uterus and that the woman had given birth to a child.\textsuperscript{230} The husband and wife sought contact with the child and subsequently filed an action to determine parentage.\textsuperscript{231}

The trial court declared the husband to be the father of the child, but dismissed the wife, with prejudice, on the grounds that she had no standing because her claim was to the embryos, not a resulting child.\textsuperscript{232} The appellate court affirmed the decision, rejecting the wife’s argument that her parentage claim was based on her intent to be the mother of any children resulting from the embryos.\textsuperscript{233} The appellate court determined that intention did not become a consideration unless there was a “tie” to break between two women with equal claims to maternity.\textsuperscript{234} The court may have rejected intention as a basis for parentage because both parties had the intent to parent, so there would have been a “tie”. According to the appellate court, a party only has standing to challenge parentage in a wrongfully implanted embryo case if he or she has a genetic or gestational connection with the child.\textsuperscript{235} This case does not provide guidance in determining which party would prevail when there is a dispute between parties that both have a genetic or gestational connection to the child.

2. \textit{Perry-Rogers v. Fasano}

In another wrongful implantation case, \textit{Perry-Rogers v. Fasano}, Donna and Richard Fasano, a white couple from Staten Island, and Deborah Perry-Rogers and Richard Rogers, a black couple from New Jersey visited the same fertility clinic.\textsuperscript{236} The doctors at the clinic mistakenly implanted embryos from both

\begin{enumerate}
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} \textit{Id.}
\item \textsuperscript{229} \textit{Id.}
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} \textit{Id.}
\item \textsuperscript{232} \textit{Id.} at 786–87.
\item \textsuperscript{233} \textit{Id.} at 790.
\item \textsuperscript{234} \textit{Id.} at 789–90.
\item \textsuperscript{235} This is not reconcilable with the notion that a donated egg is property and that the recipient of the donated egg is its owner. If the egg is the property of the recipient, she cannot be denied standing simply because it has been converted into some other form. This case implies that gametes cannot be characterized as property in all circumstances.
\item \textsuperscript{236} \textit{See Perry-Rogers v. Fasano}, 715 N.Y.S.2d 19, 21–22 (2001).
\end{enumerate}
couples in Donna Fasano's uterus. Donna became pregnant, but Deborah did not. A month later the fertility clinic disclosed the mistake. Donna Fasano gave birth to twins, one black and one white. The Perry-Rogers filed suit against the Fasanos and the fertility clinic. After four and a half months, the Fasanos agreed to relinquish custody of the Perry-Rogers' biological child, under the condition that the Fasanos were granted visitation rights. The parties agreed to (i) a court order awarding sole custody to the Rogers, (ii) giving the Fasanos visitation rights, and (iii) changing the parents listed on the child's birth certificate to the Perry-Rogers. Two weeks later, the Perry-Rogers filed a new action in a New York state court to eliminate the Fasanos' visitation rights and sought a declaration that they were the child's parents and seeking sole and exclusive custody.

The trial court issued an order that allowed the Fasanos substantial visitation rights. The Rogers appealed. The appellate court first considered whether the Fasanos had standing, given that they were genetic strangers. It held that in light of current reproductive technology, questions of parentage cannot be determined based only on genetics, therefore gestational carriers have standing to sue. The New York appellate court then considered whether Donna Fasano, the gestational mother, had developed a bond with the infant and held that the suggested existence of such a bond in this case was insufficient. The Fasanos were precluded from establishing a relationship with the child. Although genetics prevailed over gestation, in this case the court left open the possibility that a gestational carrier could establish parental rights if she could establish there was a bond between her and the child. Apparently, the early discovery that there was a wrongfully-implanted embryo, was evidence indicating a bond did not exist.

3. University of California, Irvine Center for Reproductive Health

Couples who underwent fertility treatments at the University of California, Irvine's (UCI) now defunct Center for Reproductive Health did not discover that there embryos were misappropriated until the children were older. Doctors at the Center for Reproductive Health stole eggs from women undergoing fertility treatments and implanted them into other women without consent from any of the

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237. Id. at 21.
238. Id. at 22.
239. Id.
240. Id.
241. Id.
242. Id. at 22–23.
243. Id. at 23.
244. Id.
245. Id. at 26.
246. Id. at 27.
parties. At least three couples filed suits against the clinic alleging their embryos had been misappropriated and they were the genetic parents of children born to other couples. In all, sixty-eight lawsuits were filed alleging some form of misappropriation. Renee Ballou's eggs produced a boy who was born to another woman. She made contact with her son's birth mother and learned that he was a healthy, happy seven-year-old but made no other efforts to establish contact. John and Debbie Challender learned their embryos were mixed with those of two other couples and implanted into a woman who gave birth to twins. The Challenders decided not to pursue genetic testing. A second couple, Basilio and Loretta Jorge, learned that another couple had received their embryos and gave birth to twins believed to be the Jorges' genetic children. The twins were seven years old when the Jorges' discovered the possible mistake. They filed a parentage action to establish a relationship with their genetic children. The twins' gestational parents refused to allow the children to undergo genetic testing and, to the Jorges' dismay, the California statute authorizing court-compelled blood tests to determine parentage had expired. Left with no legal remedy under which to conclusively establish parentage, the Jorges relinquished their claim. None of the UCI fertility cases resulted in published decisions, and it is unclear what the result would have been, given the inconsistencies in parentage cases.

4. Covert consideration of the intended child's interests

Neither the surrogacy cases nor the wrongful implantation cases provide clear guidance to donors or to recipient parents. Even if parties agree initially about embryo donation, if biological progenitors bring a challenge based on fraud or misrepresentation, courts and legislatures offer no guarantee that the intending

251. Id.  
254. Interview with Ronald Stock, attorney for the unnamed parents of twins who were respondents in the Jorges' parentage action (September 23, 2003) (on file with author); see also id.  
255. Id.  
256. Id.
parents will be declared the legal parents. This deprives the intended child of the stability afforded adoptees where the genetic parents’ parental rights are terminated, and the adoptive parents’ rights and responsibilities are adjudicated.

In addition to failing to provide clear direction to donors and intending parents about their respective rights and responsibilities, the parentage cases do not require courts to consider the intended child’s interests. Implicit in those cases, however, is the recognition that courts should possibly consider those interests. Both McDonald and Buzzanca placed the child with the parent who had developed a relationship with the child, despite a lack of genetic connection. The Belsito and Johnson courts placed the child with the parents who intended their creation and provided their genetic imprint. In Robert B., the court ordered the child left with his gestational parent who was the only mother he had known, but allowed him to develop a relationship with his genetic father and siblings. Fasano looked to the gestational mother’s relationship with the child to determine whether there existed a relationship to protect. Although the court characterized the inquiry as a determination of whether there was a bond between gestational mother and child, it was actually a determination of whether removing the child would cause him harm; the court covertly considered what was in the child’s best interests.

Each case turned on the child’s interests although none required that future courts make any determination about those interests. The courts’ underlying desire to protect the intended child’s interests should be mandatory and should be conducted at the outset of any collaborative reproduction arrangement. Justice Kennard, the lone dissenter in Johnson specifically recognized the need to consider the child’s best interests in surrogacy cases, explaining that “the paramount concern must be the well-being of the child [whom] gestational surrogacy has made possible.”257 The child’s interests should, likewise, be the paramount concern in all collaborative reproduction arrangements. Thus, adoption laws, which explicitly intend to protect the child’s interests, should be applied to collaborative reproduction used to create genetically unrelated families. Requiring this assessment at the outset of collaborative reproduction would eliminate many parentage disputes and ensure stability for the intended child. It would also protect intended children from issues arising because of anonymous donation, lack of record keeping, and failure to investigate parental fitness.

IV. ADOPTION LAW

Before ART existed, adoption law allowed for the creation of genetically unrelated families, yet still managed to protect the child’s interests. The logical starting point for a discussion about regulating ART created families, therefore, is a review of adoption law, its policies and purposes, and the rights granted to

adoptees. Adoption laws protect the best interests of the child by requiring adoptive parents to be “fit” to parent; adjudicating the parental rights of all of the parties involved in the adoption; and providing access to both adoption records and continuing information about medical history. Some adoptions laws have already been applied to collaborative reproduction arrangements, recognizing that intended children’s interests should also be protected.

A. Protecting the Best Interests of the Child

Adoption laws reflect a set of policy choices that revolve around the overall goal of protecting the best interests of the child.\textsuperscript{258} Virtually all states require some form of home study to ensure both that the adoptive parents are “fit” and that their home is safe.\textsuperscript{259} During adoption proceedings, the birth parents’ rights are terminated and the adoptive parents are given legal responsibility for the child. This provides stability by making it clear that the adoptive parents, and not the birth parents, have all of the parental rights and responsibilities.\textsuperscript{260} In recent years, adoptees have legally established additional rights, including the right to a complete identity. The right to a complete identity includes access to complete information about genetic origin and the right to continuing information about medical history.\textsuperscript{261} As a result, some state legislatures have revised laws that prohibited adoptees from obtaining identifying information about their genetic parents.\textsuperscript{262} By changing adoption laws in this way, state legislatures have concluded that a child’s “best interests” include: (i) the right to “fit” parents; (ii) the right to stability through a clear determination of parentage; (iii) the right to a complete identity; and (iv) the right to continuing medical information.

1. The Right to “Fit” Parents

All states require a determination of the fitness of prospective adoptive parents.\textsuperscript{263} Some states require a home study, an evaluation conducted and

\textsuperscript{258} See, e.g., Carol Sanger, Separating from Children, 96 COLUM. L. REV. 375, 441–42 (1996).
\textsuperscript{259} See infra notes 263, 264 and accompanying text.
\textsuperscript{260} See infra notes 268–71 and accompanying text.
written by a licensed social worker to determine whether persons are suitable to become adoptive parents. The social worker interviews the prospective adoptive parents about their backgrounds, relationship, financial status, physical health and motives for pursuing adoption. The social worker also conducts a criminal background check, contacts the parties’ references, and conducts one or more visits to the home. The parties are required to provide the social worker with their birth certificates, marriage certificates, divorce decrees, letters from employers, insurance policies, and statements from their physicians verifying they are in good health. The entire process is designed to ensure that the home is safe and that the parents are fit.

2. The Right to Stability through a Clear Determination of Parentage

Adoption law promotes stability by ensuring clear adjudication of the rights and responsibilities of the biological and adopting parents. In adoption proceedings, the rights of the biological parents are terminated and the


265. Id.; see also, e.g., T E X. F A M. C O D E. § 162.0085 (Vernon, WESTLAW through 2004 4th Called Sess.).

266. Id., supra note 264.


268. See B e l s a t o v. C l a r k, 644 N.E.2d 760, 765 (Ct. Com. Pl. of Ohio 1994).

adoptive parents assume full and exclusive legal responsibility for the child.\textsuperscript{270} A new birth certificate is issued removing the names of the biological parents and substituting the names of the adoptive parents.\textsuperscript{271} These proceedings ensure the child’s familial stability.

3. The Right to a Complete Identity

Knowledge about one’s conception, birth, and parentage is part of the right to an identity.\textsuperscript{272} Respect for this right requires that each individual have access to information about his or her origins.\textsuperscript{273} “Children who have no identifiable origin, no identifiable human beginning to their personal narrative may have a sense of alienation in the world in which they find themselves.”\textsuperscript{274}

The practice of sealing adoption records to keep the identities of birth parents hidden from adoptive parents and adoptees has been criticized for ignoring the needs of many adoptees to know about their heritage and have a complete identity.\textsuperscript{275} It can be psychologically damaging when this information is


\textsuperscript{272} Shanley, supra note 148, at 268; Cahn, supra note 261, at 190 (“identity is a central aspect of personhood”).

\textsuperscript{273} Shanley, supra note 148, at 268 (“[K]nowledge of how and from whom one came to be is now being seen as part of the right to an identity.”); Hildebrand, supra note 261, at 528 (“The need to know one’s true identity and biological background is ‘an undeniable basic human need to know one’s true place in history.’”). I do not suggest that every child will want to access this information, but that every child should have the right to decide whether to access the information; if records are never kept or are not maintained, the intended child loses the right to choose.


\textsuperscript{275} LOS RUSSEAKE MELINA, MAKING SENSE OF ADOPTION 165–199 (1989) (the need for adoptees to have access to information about their genetic origins is needed and “‘[t]hose adopted through donor insemination or in vitro fertilization with a donor egg or donor embryo may have a particularly hard time believing they are descended from real human beings.’”); DAVID M. BRODINSKY, ET AL., THE LIFELONG SEARCH FOR SELF 186 (Anchors Books, 1993) (adoption records should be given to adoptee because they are “after all, about the adoptee, and we are troubled by the idea that some hospital clerk or agency social worker stands between those records and the person for whom they can do the most good”); JOYCE MAGUIRE PAVAO, THE FAMILY OF ADOPTION 65 (1998); Cahn, supra note 261, at 190–91 (“For adoptees, constructing an adult identity may involve processing information about more than one family and may entail establishing a relationship with biological, as well as adoptive parents.”); Storrow, supra note 141, at 619. An interesting point is that this need may have been partially recognized even when adoption records were sealed and parents were instructed not to tell children they were adopted, given that the focus of most agencies was to create adoptive families who appeared genetically related. See Cahn, supra note 261, at 190–91.
withheld, and expressions of many adult adoptees have motivated changes in adoption record keeping practices, and may be at least partially responsible for the movement towards open adoption. For roughly fifty years, most adoption records could only be opened if the adoptee demonstrated good cause; courts generally interpreted good cause to mean a compelling medical need, although at times, even a compelling medical need was insufficient. Some courts however, recognized the right to identity was a compelling psychological need, and concluded this need demonstrated the required good cause. As a growing number of adoptees have advanced claims that they have the right to know information, some states have dispensed with the good cause requirement and allow adoptees access to medical and other non-identifying information, at times without the birth parent’s consent. Two states have enacted legislation that

276. The Child Welfare League of America endorses access to adoption files because the “benefits of openness in adoption of the adopted individual, birth parents and adoptive parents have come to be recognized as having critical psychological importance... and is essential to adopted adults identity and health needs.” Child Welfare League of America, Standards for Excellence in Adoption Services (2000) http://adooption.about.com/library; Hildebrand, supra note 261, at 539 (“Keeping adoption records sealed perpetuates the stigma that adult adoptees and birth parents still feel.”); Silverman, supra note 235, at 96 (quoting ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 54, 59 (1993)); see also Stanley, supra note 148, at 273–74 n.32 (psychologists, counselors, social workers, and others have suggested that a child might have significant psychological needs or other interests in knowing his or her origin; this caused some gene pools providers to allow their names to be given to persons created with their gametes).


278. See Coleman v. Weiner, 528 N.Y.S.2d 480, 481 (Sup. Ct. 1985) (medical information); In re Baby Boy S.S., 719 N.Y.S.2d 311 (App. Div. 2001) (hereditary diseases). But see In re George, 630 S.W.2d 614, 620 (Mo. Ct. App. 1982) (denying access where adoptee needed bone marrow donor because alleged father refused to be tested and likelihood that biological sibling would match was slim); Golan v. Louise Wise Serv., 514 N.Y.S.2d 682, 684 (1987) (declining to give adoptee information to facilitate treatment of his heart condition because every child who reached middle age would have grounds to obtain information); In re Sandra L.G. v. Bouchey, 576 N.Y.S.2d 767 (Fam. Ct. 1991) (denying adoptees request for information that would identify genetic predisposition to medical problems).

279. See, e.g., Mills v. Atlantic City Dep’t of Vital Statistics, 372 A.2d 646, 655 (N.J. Super. Ct. App. Div., 1977) (the need to know one’s origins is a compelling psychological need that can constitute good cause required to open sealed records); In re Dixon, 323 N.W.2d 546, 552 (Mich. Ct. App. 1982) (psychological need may be sufficient cause to open sealed records). But see In re Assalone, 512 A.2d 1383, 1389 (R.I. 1986) (holding mere assertion of desire to know one’s origins is not a sufficient reason to open adoption records); see also In re Maples, 563 S.W.2d 760, 766 (Mo. 1978) (holding assertion of psychological need to know did not support finding of good cause).

280. See, e.g., ALA. CODE ANN. § 26-10A-31 (WESTLAW through 2003 Org. Sess., Reg. Sess., and 1st Spec. Sess) (allowing adoptee to obtain identifying information about birth parents); COLO. REV. STAT. ANN. § 19-5-305 (West, WESTLAW through 2004 2d Reg. Sess) (allowing access to records for an adoption finalized after Sept. 1, 1999); N.H. REV. STAT ANN. § 170-B:19 (WESTLAW through 2003 Reg. Sess) (allowing access to non-identifying information (medical history) without release by birth parents, but requiring consent for release of identifying information). See also, CAL. FAM. CODE § 9203 (West, WESTLAW through 2004 Reg. Sess) (allowing persons adopted after 1984 to obtain records, once they reach 21, if their birth parents have consented to the release of information); S.C. CODE ANN. § 20-7-1780 (2002) (allowing identifying information to be released without good cause if birth parents consent); In other countries, including Scotland, England, New Zealand and Australia adoptees have unrestricted
allow adoptees access to all adoption records, including identifying information, without the need to demonstrate good cause or to have the consent of their birth parents.  

4. The Right to Continuing Information about Medical History

New medical technologies make information about genetic diseases an important part of a person’s history. Genetic and medical history can lead to early detection of certain diseases and an increased chance of curing them. Cystic fibrosis, sickle cell anemia, muscular dystrophy, and some forms of cancer are some of the diseases that are thought to be genetically linked. Psychiatrists use family mental health history in diagnosing mental illnesses, including schizophrenia, bipolar disorder, bulimia, and alcoholism. Even those states that do not allow complete access to adoption records recognize the importance of access to genetic medical history and allow that limited access. In addition to access to medical information from the initial disclosures at the time of an adoption, many states also allow birth parents to update medical information, recognizing that many diseases may not appear until well after an adoption is final.
B. ADOPITION LAWS APPLIED TO COLLABORATIVE REPRODUCTION

In some states, adoption laws, or parts thereof, have already been applied to collaborative reproduction arrangements. At least one court has determined that a donor child's best interests require access to continuing medical information. In Johnson v. Superior Court,288 the parents of a child conceived using donor sperm sought disclosure of information about the sperm donor when the child was diagnosed with kidney disease. The court required document production as regarded documents in the control of the donor and required the apparent donor to submit to a deposition. The court held there are instances where a child conceived by artificial insemination may need his or her biological parent's genetic and medical history for important medical decisions.289 In rejecting the sperm banks' argument for anonymity, the court concluded that any agreement that "forecloses the opportunity of a child conceived by artificial insemination to discover the relevant and needed medical history of his or her genetic father is inconsistent with the best interests of the child."290

One tragic case illustrates the need for a determination of fitness in collaborative reproduction cases. In Huddleston v. Infertility Center of America,291 a sperm donor father contracted with a surrogate, who gave birth to a child the father murdered shortly after taking the child home from the hospital. The surrogate sued the fertility clinic for failing to properly screen prospective parents. The trial court dismissed the action for failure to state a claim, but the appellate court reversed, holding the surrogate was entitled to pursue a negligence action against the clinic because the clinic failed to exercise reasonable care in designing and implementing its surrogacy program.292 Although these suits may help ensure clinics conduct better background checks in the future, they do not require consideration of the child's interests.

Two states, Virginia and New Hampshire, have enacted legislation requiring a home study in connection with surrogacy arrangements.293 These states require determinations of parental fitness be made regarding both of the intending parents, the surrogate, and the surrogate's husband.294 The Uniform Parentage Act conditions gestational surrogacy on the intended parties meeting the

289. Id. The court also stated: "In some situations, a person's ability to locate his or her biological relative may be important in considering lifesaving transplant procedures." Id. at 875.
290. Id. at 875.
292. Id. at 462.
294. Id. New Hampshire requires that the determination be made by a licensed psychiatrist, psychologist, pastoral counselor or social worker. Id.
standards of fitness of adoptive parents. These approaches, like the adoption laws on which they are patterned, ensure the intended child will have a suitable home.

These examples indicate recognition by state legislatures and courts that the intended child’s interests are the same as the adopted child’s interests. Therefore, they should be protected in the same way. All intended children created by collaborative reproduction deserve the same protections as adoptees, including a fit and stable home, a clear determination of parentage, a complete identity, and access to continuing medical information.

V. AN INTENDED-CHILD-CENTERED APPROACH

Medical advances in reproductive technology allow parties to circumvent the safeguards afforded by the adoption process and deny intended children rights granted to adoptees. Intended children, however, deserve the same rights. Since gamete and embryo donation are largely unregulated, an entire generation of children of reproductive technology will go without the legal right to access basic genetic and medical information, and without the ability to learn about their origins. Assisted and collaborative reproduction results in the social equivalent of adoption. The same policies in adoption law that mandate protection of the adopted child apply equally to protection of the intended child and should therefore be applied to egg, sperm and embryo donation.

Neither the frozen embryo disputes nor the parentage cases, provide meaningful guidance to embryo donors or recipients of donated embryos about treatment of embryos or determination of parentage. Intending parents who use donated embryos have no assurances they would be awarded custody of the intended child in a challenge by the gamete donors or the surrogate. Moreover, they cannot be sure that the embryo was actually donated with the donor’s consent. The intended child also has no assurances that the intending parents are “fit,” that accurate and identifying information will be maintained, or that they can access information that is recorded. Thus, the frozen embryo cases offer no solution.

Situations where couples use gamete and embryo donation are especially problematic. Couples using ART are usually desperate to have a child and may therefore be psychologically disadvantaged; their desire to have children, coupled with the psychological and physical demands of infertility and IVF

295. UNIF. PARENTAGE ACT § 803.
298. Changing Realities, supra note 36, at 2065 (quoting BARTHOLET, FAMILY BONDS 220 (1993)).
299. Andrews, supra note 82, at 48 (“The laws pertaining to reproductive technologies are inconsistent, some guided by intent and others guided by biology”).
300. See, e.g., supra notes 225–56 and accompanying text; see also supra notes 147–49 and accompanying text.
301. See Malo, supra note 42 at 333.
procedures, make it less likely that they are in a position to carefully consider the child’s need for genetic information or ability to contact genetic providers.302 Furthermore, IVF clinics, who determine their own institutional policies,303 have no incentive to investigate the fitness of potential intending parents, to counsel the gamete providers,304 or to discuss with any party their intended child’s potential need to connect to their origins.305 The rights of the party who will ultimately be most affected by the donation, the intended child, are not protected a court nor by any of the parties involved.

Thousands of children fathered by sperm donors are now reaching the age of majority and demanding information about their biological progenitors. They have formed support groups and Internet communities. In response to their demands, at least one California clinic now offers “open” sperm donation, which allows parties to know one another’s identities and to maintain contact.306 This demand for information about sperm donor fathers is similar to the demands made by adoptees just a decade earlier. Children of egg and embryo donors, relatively new methods of ART compared to sperm donation will not reach the age of majority in large numbers for more than a decade. Like adoptees and sperm donor children, who have no connection to their genetic progenitors, they will most certainly demand the same information and courts and legislatures should give them access to it. It is foolish to wait until a generation of children is grown to handle problems that will undoubtedly present themselves; adoption laws should be applied to ensure access to information. Rather than depriving an entire generation of intended children of knowledge of their biological origins, the medical and legal communities must act now to create uniform legislation requiring fertility clinics to maintain records, allowing the parties and intended children access to information in those records and prohibiting donors from remaining anonymous. In addition, clinics must require a home study to ensure that the intending parents are fit. Finally, the donor’s rights should be terminated, while at the same time, there should be a conclusive determination of parentage, including a determination that the embryo was donated with the donor’s consent. This determination of parentage will protect intending parents from subsequent challenges by donors and will provide the child the same stability offered by adoption proceedings.

Regulating embryo donation in this way does not make the embryo human, in fact, this approach rejects the notion that the embryo’s status must be defined and instead regulates based upon the parties’ intended use. Parties would still have the

302. Id.
303. Id.
304. Id.
305. Annas, supra note 18 (“In most infertility clinics, desire and money serve as surrogates for child welfare”).
right to donate embryos for research, keep them in storage, or destroy them. Adoption laws would only be triggered once the parties' intended purpose for the embryos is to use them to create a genetically unrelated family. At that point, embryo donation is the functional equivalent of adoption and should be subject to the same regulations. The right to an abortion is not infringed upon by requiring parties who intend to create genetically unrelated families to meet the standards of fitness of adoptive parents. The embryos do not become persons because the intending parents are subject to adoption regulation. The intending parents' fitness is regulated, not the status of the embryo.

This would not be the only area of law with multiple, seemingly conflicting regulations dependent on the circumstances. "Many branches in the law abound in nice distinctions that may be troublesome but have been thought nonetheless necessary." For example, fetuses are characterized differently in different circumstances. Although they are not persons, for purposes of abortion, under Roe v. Wade, they may be treated as persons for purposes of wrongful death and murder statutes. In the same way that fetuses are characterized as persons under certain circumstances without undermining a woman's right to choose, embryos may be characterized as potential persons under certain circumstances, without undermining the donor's right to make choices. Gamete donors are still free to choose division, destruction or donation. It is only when the parties choose donation that the intended child's interests become paramount, and should be the foremost consideration, as they are in every other legal context where children are involved. Intended children's interests should not be relegated to the background, as they currently are in the surrogacy parentage cases.

The argument that this might limit the number of people willing to donate gametes is unpersuasive. Some countries already prohibit anonymous donation, and those policies have not led to a shortage of donors; clinics that have begun offering open donation programs have had no problems finding donors willing to


308. Compare Roe v. Wade, 410 U.S. 113, 158 (1973) holding that a fetus is not a person, with Commonwealth v. Cass, 467 N.E.2d 1324, 1330 (Mass. 1984) holding that a viable fetus falls within the definition of "person" as used in the state's vehicular homicide statute. See also Connor v. Monkm Co., 898 S.W.2d 89, 92 (Mo. 1995) (nonviable unborn child is a "person" and parent may state claim under wrongful death statute); State v. Holcomb, 956 S.W.2d 286, 290 (Mo. Ct. App. 1997) (unborn child is a "person for purposes of first degree murder statute."). See also People v. Kurr, 253 Mich. App. 317, 320–21 (Ct. App. 2002) (holding "defense of another" applies to the protection of a fetus); 720 I.L. COMP. STAT. ANN. 720 §59-1.2 (West, WESTLAW through 2004 Reg. Sess.) (homicide includes causing death of unborn child); MINN. STAT. ANN. § 609.2661 (life imprisonment for first degree murder of unborn); MO. ANN STAT. § 1.205 (West, WESTLAW through 2004 2d Reg. Sess.) ("life...begins at conception" and "unborn children have protectable interests in life, health and well-being."). The United States Supreme Court held this is a constitutional protection offered to children with regard to tort law. Webster v. Reproductive Health Servs. 492 U.S. 490, 506 (1989).


310. See supra note 308.
participate. Even if the lack of anonymity and secrecy were to discourage donors from coming forward, it is not a sufficient reason to ignore the interests of the intended child. It would be better to have fewer gamete donors who do recognize the potential need for future genetic children to make contact with them and who are capable of appreciating the long term ramifications of their donation on any resulting children than to retain the current regime of anonymity and secrecy. The right to donate eggs, sperm, and embryos anonymously should be given less important in court cases than the intended child’s right to genetic origins. More importantly, this argument focuses on the rights of the donor and ignores the consequences to the intended child. It is the intended child that the law should protect since she is the only unwilling participant in this scheme.

Applying adoption law to embryo donation protects the best interests of the intended child. It ensures that intended children have fit parents and a stable home. Current trends in adoption law would offer protections to intended children that adoptees have worked decades to achieve, namely, the right to a complete identity, the right to access genetic information, and the right to obtain continuing medical information. Without applying adoption law to embryo donation, intended children may well have to wait decades for courts to recognize and enforce the rights they deserve. They may have to wait until a substantial number reach the age of majority and challenge current practices because they find, as adoptees and sperm donor children have already discovered, that an important piece of their history is missing and potentially unattainable.

311. Buekert, supra note 8; Worland, supra note 8; The Oprah Winfrey Show: Secrets of Sperm Donation (ABC television broadcast, May 22, 2003) (transcript available at www.oprah.com and on file with Journal).