

# A NEED FOR CLARITY: ASSISTED REPRODUCTION AND EMBRYO ADOPTION IN TEXAS

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## I. INTRODUCTION

On any given day, a family law practitioner can witness some of the greatest joys of the human experience, such as helping an infertile couple adopt a child. On the other hand, a family lawyer can also experience some of the most painful and bitter interactions in the practice of law, such as disputes between divorcing spouses, particularly those involving child conservatorship. Now, with advances in assisted-reproduction technology and techniques, these and similar issues are presented to the family attorney in new and uncertain contexts.

Consider the following scenario: an unmarried couple, Dave and Debbie, have many cryopreserved embryos. These embryos were created before Debbie was to undergo a medical procedure that had the potential to permanently damage her eggs, and thus render her unable to become pregnant naturally. The doctors believe, however, that she will likely still be able to become pregnant by implanting the cryopreserved embryos. After the procedure, Debbie is in fact unable to produce any more eggs, but she is also rendered incapable of becoming pregnant, even with the cryopreserved embryos.

Initially, Debbie and Dave want another couple to adopt the embryos and begin searching. They find a couple wanting to adopt the embryos, and all parties agree to the adoption. However, on the eve of the embryos' transfer to the adoptive parents, Dave changes his mind and insists on keeping the embryos. Dave wants a gestational carrier, or surrogate, to be implanted with the embryos and ultimately give birth to his biological child. He claims that, as the father of the embryos, he has parental rights and can

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stop the adoption. The prospective couple counters by claiming that Dave is a donor and, therefore, does not even have standing to adjudicate any claims concerning the embryos. While all parties originally proceeded as if this was a traditional adoption, it is now evident that most Texas adoption law is inapplicable, and that the attorneys and courts are unsure of how to proceed. Should this dispute be adjudicated under adoption principles, contract law, property law, or something else? The current body of Texas statutory and case law provides no clear answers.

The practice of adoption can be traced back as far as the ancient Babylonians, Egyptians, Hebrews, and Greeks.<sup>1</sup> Additionally, the Romans had relatively advanced laws covering adoption that primarily sought to benefit the adopter.<sup>2</sup> Conversely, the English common law does not provide for adoption, and thus there was no law covering adoption in early America.<sup>3</sup> Beginning in the mid-1800's, states began passing adoption statutes with the goal of providing for the welfare of the children.<sup>4</sup>

During the last half century, advances in science and medicine have changed the way parents can have children. Technologies such as alternative insemination and in vitro fertilization have allowed parents who were previously unable to have biological children, to become pregnant and give birth.<sup>5</sup> Furthermore, these advances have created new opportunities for couples or individuals who cannot have a biological child, including gestational surrogacy and embryo<sup>6</sup> adoption. These new options have created novel issues for the traditional adoption statutory structure.

As more parents choose these new methods of family creation, the deficiencies in the current laws become more readily apparent. This comment seeks to summarize the current state of adoption law in Texas and the unique issues that assisted reproduction creates with adoptions.

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<sup>1</sup> PETER CONN, *ADOPTION: A BRIEF SOCIAL AND CULTURAL HISTORY* 27–34 (2013).

<sup>2</sup> *Id.* at 34.

<sup>3</sup> *Id.* at 43.

<sup>4</sup> *Id.* at 73–75.

<sup>5</sup> MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY, Prefatory Note (2008), available at <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

<sup>6</sup> There is debate within both the scientific and legal communities surrounding the difference between preembryos and embryos. *See, e.g.*, *Davis v. Davis*, 842 S.W.2d 588, 592–93 (Tenn. 1992). However, this difference, if any, is not pertinent to the discussion in this comment. Furthermore, the relevant Texas statutes use the term embryo exclusively, and in the interest of consistency, this comment will use the term embryo throughout.

## II. BACKGROUND INFORMATION

### A. Assisted Reproduction

In 2008, the American Bar Association (ABA) defined assisted reproduction as “a method of causing pregnancy through means other than by sexual intercourse.”<sup>7</sup> While there are various forms of non-sexual reproduction, the oldest is believed to be intrauterine insemination, also known as artificial insemination.<sup>8</sup> The sperm, which is simply injected into the woman, can be provided by the spouse, or some other known or anonymous donor.<sup>9</sup> The egg is fertilized inside the womb, and with the exception of the sperm being introduced by non-sexual means, intrauterine insemination is fairly similar to traditional reproduction.<sup>10</sup>

Another common method of assisted reproduction is *in vitro* fertilization (IVF). This process involves a female egg becoming fertilized by male sperm outside of the womb.<sup>11</sup> The resulting fertilized egg is then implanted into either the intended mother or a surrogate.<sup>12</sup> With IVF, as opposed to intrauterine insemination, both the male and female gamete can be from a donor, from the biological parents, or a combination of the two.<sup>13</sup> This means that the resultant child can be biologically related to both parents, one parent, or neither parent.<sup>14</sup>

A typical IVF procedure will often result in embryos that are not implanted into the intended mother or surrogate.<sup>15</sup> Generally, these remaining embryos are frozen using a method known as cryopreservation.<sup>16</sup> This allows the remaining embryos to be preserved for future use, either by the parent or parents, or some other party.<sup>17</sup> Embryo donation and adoption,

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<sup>7</sup>MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY, *supra* note 5, § 102(1).

<sup>8</sup>CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPROD. TECH.: A LAWYER’S GUIDE TO EMERGING LAW & SCI., *in*, LEGAL STUDIES RESEARCH PAPER SERIES § 2.1, at 29 (2d ed. 2011).

<sup>9</sup>*Id.* §§ 2.1–2.3, at 39–42.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* § 3.1, at 91.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* § 4.1, at 122.

<sup>16</sup>*Id.*

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

the topic of this comment, are just some of the options for disposition of these remaining embryos.<sup>18</sup>

A surrogate generally refers to any woman who substitutes for another who is unable or unwilling to become pregnant.<sup>19</sup> The child can be related to the surrogate, which often referred to as a “traditional surrogate.”<sup>20</sup> However, a “gestational surrogate” involves the already-fertilized embryo being implanted into the surrogate, who is genetically unrelated to the child.<sup>21</sup>

### *B. Process of Effecting an Adoption in Texas*

Adoption is the process of creating a permanent, legal relationship of parent and child between two individuals who are legal strangers.<sup>22</sup> This process creates the same legal rights and obligations that exist between a biological parent and child.<sup>23</sup> The process of adoption has no basis in the common law and is entirely a statutory creation.<sup>24</sup> This means that an adoption may not occur in the absence of specific statutory authority.<sup>25</sup> However, Texas courts have long recognized that equitable adoption and adoption by estoppel are available in a certain limited circumstance.<sup>26</sup> This non-statutory adoption only applies in the situation when a party claiming under and through an intestate decedent is estopped from asserting that a child was not legally adopted or did not occupy the status of an adopted child because of the promises, acts, and conduct of the decedent to the

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* § 5.1, at 151.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *See In re Unnamed Child*, 584 S.W.2d 476, 479 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.).

<sup>23</sup> *See McDonald v. Tex. Emp'rs' Ins. Ass'n*, 267 S.W. 1074, 1075 (Tex. Civ. App.—Dallas 1924, writ ref'd).

<sup>24</sup> *See Grant v. Marshall*, 280 S.W.2d 559, 563 (Tex. 1955).

<sup>25</sup> *See id.*; *Newsom v. Camp*, 380 S.W.2d 692, 694 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.).

<sup>26</sup> *See, e.g., Cubley v. Barbee*, 73 S.W.2d 72, 79 (Tex. 1934); *Pope v. First Nat'l Bank in Dallas*, 658 S.W.2d 764, 765 (Tex. App.—Dallas 1983, no writ).

adopted child.<sup>27</sup> However, even this concept has a basis in the Texas Probate Code.<sup>28</sup>

For example, in *Luna v. Estate of Rodriguez*, the stepson, Christopher, alleged that he had been equitably adopted by his late stepfather and, therefore, was an heir under the stepfather's estate.<sup>29</sup> The other heirs to the stepfather's estate argued that Christopher was not adopted, and therefore, he was not an heir.<sup>30</sup> Although the late stepfather failed to properly effectuate a statutory adoption, Christopher argued that his stepfather intended to adopt him and that his stepfather acted as though he had adopted Christopher as his son.<sup>31</sup> In addition, Christopher argued that he acted as his stepfather's son and performed the "normal chores of a son, such as mowing the grass."<sup>32</sup> The court determined that there was evidence showing that Christopher had been equitably adopted by his stepfather but remanded the case for a full trial on the merits.<sup>33</sup>

There are multiple methods to adopt in Texas, such as through the Texas Department of Family and Protective Services (DFPS), using a licensed agency, working directly with the biological parents, or through an international agency.<sup>34</sup> The DFPS is the state agency that oversees adoptions.<sup>35</sup> Many of the children available through the DFPS were removed from their biological parents' custody because of either abuse, neglect, or both.<sup>36</sup> The Department operates the Texas Adoption Resource

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<sup>27</sup> See *Pope*, 658 S.W.2d at 765.

<sup>28</sup> Act of June 19, 1993, 73d Leg., R.S., ch. 957, 1993 Tex. Gen. Laws 4158, 4158, *repealed* by Act of June 19, 2009, 81st Leg. R.S., ch. 680, § 1, 2009 Tex. Gen. Laws 1512, 1516–18 (current version at TEX. ESTATES CODE § 22.004 (West 2014)) ("Child" includes an adopted child, whether adopted by any existing or former statutory procedure *or by acts of estoppel . . .*) (emphasis added).

<sup>29</sup> 906 S.W.2d 576, 578 (Tex. App.—Austin 1995, no writ).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See *id.* at 583.

<sup>34</sup> See TEXAS YOUNG LAWYERS ASSOCIATION, ADOPTION OPTIONS: A DIRECTORY OF ADOPTION AGENCIES IN TEXAS 3 (2010), available at [http://www.texasbar.com/AM/Template.cfm?Section=Family\\_Law2&Template=/CM/ContentDisplay.cfm&ContentID=23437](http://www.texasbar.com/AM/Template.cfm?Section=Family_Law2&Template=/CM/ContentDisplay.cfm&ContentID=23437).

<sup>35</sup> *Learn About DFPS*, TEX. DEP'T. OF FAMILY AND PROTECTIVE SERVS., [http://www.dfps.state.tx.us/About\\_DFPS/default.asp](http://www.dfps.state.tx.us/About_DFPS/default.asp) (last visited Mar. 12, 2013).

<sup>36</sup> TEXAS YOUNG LAWYERS ASSOCIATION, *supra* note 34, at 3.

Exchange to help match adoptive parents and children awaiting adoption.<sup>37</sup> Additionally, the DFPS works in partnership with private adoption agencies to place children in adoptive homes.<sup>38</sup> The prospective parents may be married or single and must meet the following requirements:

- be at least 21 years of age, financially stable, and responsible mature adults;
- complete an application;
- share information regarding their background and lifestyle;
- provide relative and non-relative references;
- show proof of marriage and/or divorce (if applicable);
- agree to a home study which includes visits with all household members;
- allow staff to complete a criminal history background check and an abuse/neglect check on all adults in the household; and
- attend free training to learn about issues of abused and neglected children.<sup>39</sup>

To begin the legal adoption process, an adoption proceeding is brought in a family district court, which has primary responsibility for all family law matters.<sup>40</sup> Any adult may petition to adopt, subject to the standing requirements in Chapter 102 of the Texas Family Code relating to termination and adoption.<sup>41</sup> However, Texas courts have held that there are no legal strangers in regards to petitions for adoptions.<sup>42</sup> A child residing in Texas may be adopted if the child comes under one of the categories set forth in § 162.001(b) of the Texas Family Code.<sup>43</sup> The suit is properly filed

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<sup>37</sup> *Find a Child to Adopt*, TEX. DEP'T. OF FAMILY AND PROTECTIVE SERVS., [http://www.dfps.state.tx.us/Adoption\\_and\\_Foster\\_Care/About\\_Adoption/TARE.asp](http://www.dfps.state.tx.us/Adoption_and_Foster_Care/About_Adoption/TARE.asp) (last visited Mar. 12, 2013).

<sup>38</sup> *Private Adoption Agencies*, TEXAS ADOPTION RESEARCH EXCHANGE, [http://www.dfps.state.tx.us/Adoption\\_and\\_Foster\\_Care/About\\_Adoption/TARE.asp](http://www.dfps.state.tx.us/Adoption_and_Foster_Care/About_Adoption/TARE.asp) (last visited Mar. 12, 2013).

<sup>39</sup> *Requirements for Foster/Adopt Families*, TEXAS ADOPTION RESEARCH EXCHANGE, [http://www.dfps.state.tx.us/Adoption\\_and\\_Foster\\_Care/Get\\_Started/requirements.asp](http://www.dfps.state.tx.us/Adoption_and_Foster_Care/Get_Started/requirements.asp) (last visited Mar. 12, 2013).

<sup>40</sup> TEX. GOV'T. CODE ANN. § 24.601 (West 2004).

<sup>41</sup> TEX. FAM. CODE ANN. § 162.001(a) (West 2008); *id.* § 102.005.

<sup>42</sup> *Herod v. Davidson*, 650 S.W.2d 501, 503 (Tex. App.—Houston [14th] 1983, no writ). There may be a limited exception to this statement. *See e.g., In re H.C.S.*, 219 S.W.3d 33 (Tex. App.—San Antonio 2006, no pet.).

<sup>43</sup> FAM. § 162.001(b).

in either the county where the child resides or in the county where the petitioners reside.<sup>44</sup> The court's jurisdiction attaches upon the filing of the suit, and once jurisdiction attaches, the court has exclusive jurisdiction of the parties and all matters relating to the child.<sup>45</sup>

By law, the best interest of the child is the primary consideration in any suit determining conservatorship, possession of, and access to the child, including adoption petitions.<sup>46</sup> Before any adoption can be granted, the parental rights of the biological parents are first terminated.<sup>47</sup> This is done either with the voluntary consent of the biological parents or involuntarily through a finding by the court.<sup>48</sup> Generally, a petition requesting the termination of the parental rights of the biological parents is joined with the petition requesting adoption.<sup>49</sup> When this occurs, the court must separately find that both the termination and the adoption are in the best interest of the child.<sup>50</sup>

### III. EMBRYO ADOPTION

As the use of ART, particularly IVF, spreads, a large number of unused embryos are cryopreserved at facilities throughout the country. This leaves the two people who created the embryos with a decision of what to do with the remaining embryos.<sup>51</sup> Two of the available options are: (1) to put the embryos up for adoption; or (2) to donate the embryos.<sup>52</sup> If the embryos are donated, this could either refer to donating the embryos for research, or to donating the embryos to a prospective parent who has the goal of having a child.

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<sup>44</sup> *Id.* § 103.001(b).

<sup>45</sup> *Cruz v. Scanlan*, 682 S.W.2d 422, 423 (Tex. App.—Houston [1st Dist.] 1984, no writ).

<sup>46</sup> FAM. § 153.002.

<sup>47</sup> *Id.* § 162.001(b)(1).

<sup>48</sup> *See id.* §§ 161.001, 161.103; *In re M.K.S.-V*, 301 S.W.3d 460, 466 (Tex. App.—Dallas 2009, pet. denied).

<sup>49</sup> FAM. § 162.016(a).

<sup>50</sup> *Id.*

<sup>51</sup> A 2003 study estimated that there were more than 400,000 cryopreserved embryos in the United States. Since that time, there are no reported studies providing a more current estimate. However, with the increased use of ART, especially IVF, the number is likely much higher. *See KINDREGAN & MCBRIEN, supra* note 8, § 4.1, at 121.

<sup>52</sup> *See KINDREGAN & MCBRIEN, supra* note 8, §§ 4.2–4.3, at 123–127.

Some commentators hold that there is no difference between embryo adoption and embryo donation.<sup>53</sup> However, others maintain that the processes are quite different and implicate a substantially different set of legal rights.<sup>54</sup> Embryo donations are often managed by fertility clinics, and the donors may be anonymous.<sup>55</sup> Conversely, an embryo adoption is managed by an adoption agency and the requirements of a traditional adoption, such as home studies, are applicable to the process.<sup>56</sup>

#### A. *Unique Issues Raised by Embryo Adoption*

Compared to adopting an already-born child, embryo adoption and donation present unique issues to the involved parties, the attorneys, and state legislatures. From a practical standpoint, the fact that the recipient mother is actually pregnant is a marked contrast from traditional adoption. This allows for a level of secrecy that is impossible with a post-birth adoption.

For an attorney, ethical issues can arise in the context of conflicts of interest when the attorney represents various parties in the process of matching interested parties.<sup>57</sup> An example of this is when the attorney functions as the agent for bringing gamete donors together with intended parents.<sup>58</sup> Further complications arise if the parties are located in different states or countries, and the jurisdictions have dissimilar laws governing assisted reproduction.<sup>59</sup>

Another potential complication arises as to whether there needs to be a waiver of parental rights. In a typical adoption, either the parental rights are terminated by the state, over the objection of the parent, or the parent decides to voluntarily relinquish his or her parental rights.<sup>60</sup> However, virtually all definitions of “parent” involve a relationship between a parent

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<sup>53</sup> See KINDREGAN & MCBRIEN, *supra* note 8, § 4.2, 123–24.

<sup>54</sup> See, e.g., *Adopter FAQs*, EMBRYOADOPTION.ORG, [http://www.embryooption.org/adopters/adopting\\_parent\\_faq.cfm](http://www.embryooption.org/adopters/adopting_parent_faq.cfm) (last visited June 4, 2013).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> KINDREGAN & MCBRIEN, *supra* note 8, § 1.1, at 2–3.

<sup>58</sup> See *id.*, § 1.1, at 2.

<sup>59</sup> See *id.*

<sup>60</sup> SUSAN FRELICH APPLETON & D. KELLY WEISBERG, *ADOPTION AND ASSISTED REPRODUCTION: FAMILIES UNDER CONSTRUCTION* 65 (2009).



and a child.<sup>61</sup> Thus, it appears that no parental rights are involved when giving up an embryo for adoption. However, some agencies still require potential embryo donors to waive their potential rights.<sup>62</sup>

### B. Characterization of the Embryo

At this point, the primary issue that needs addressing is how to classify the embryos. Some adoption agencies proceed through the entire process by treating the embryos as a child.<sup>63</sup> This has the advantage of merely continuing the process that is familiar to the agency, but raises other issues. For example, in the event of a suit affecting the parent-child relationship, is the “best-interests-of-the-child” standard applied, even though there is no child as defined by the Texas Family Code?<sup>64</sup>

Another option is to treat the embryos as personal property.<sup>65</sup> This, however, raises the issue of which party is the “owner” at each point in the proceeding. As opposed to a donation, where the donor retains no rights, an adoption requires a waiver of rights by the biological parent(s).<sup>66</sup> This begs the question of whether the biological parent was ever actually a parent with any rights that must be waived. Furthermore, when money is exchanged, even if just to cover expenses, classifying pre-embryos as personal property begins to look like the trafficking of human body parts and potential human life.<sup>67</sup>

Another proposed option is to create a special classification class, such as “property with special dignity.”<sup>68</sup> Under this proposal, the embryos are characterized as personal property generally, but each “owner” retains a

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<sup>61</sup> See, e.g., TEX. FAM. CODE ANN. §§ 160.102(11), 160.201.

<sup>62</sup> *Embryo Donation*, NATIONAL EMBRYO DONATION CENTER, <http://www.embryodonation.org/index.php?content=donation#q9> (last visited July 7, 2013).

<sup>63</sup> Alexia M. Baiman, *Cryopreserved Embryos As America's Prospective Adoptees: Are Couples Truly "Adopting" or Merely Transferring Property Rights?*, 16 WM. & MARY J. WOMEN & L. 133, 139–40 (2009).

<sup>64</sup> TEX. FAM. CODE ANN. § 153.002.

<sup>65</sup> Baiman, *supra* note 63, at 142.

<sup>66</sup> TEX. FAM. CODE ANN. § 162.001(b)(West 2008 & Supp. 2013).

<sup>67</sup> See The Ethics Committee of the American Society for Reproductive Medicine, *Financial Compensation of Oocyte Donors*, FERTILITY & STERILITY, Aug. 2007, at 305, 306.

<sup>68</sup> Bridget M. Fuselier, *The Trouble with Putting all of Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes Over Cryopreserved Pre-embryos*, 14 TEX. J. C.L. & C.R. 143, 175 (2009).

choice regarding the disposition.<sup>69</sup> Prior to implantation, either party has the power to change the agreement by informing the other party as well as the clinic.<sup>70</sup>

An extension of this concept is to treat the embryos as property in a tenancy by the entirety.<sup>71</sup> While tenancy by the entirety is currently disfavored in a majority of the states, the original reason for this aversion—the husband having considerably more power and control than the wife—is no longer an issue because enforcement of such an imbalance violates the Equal Protection Clause.<sup>72</sup> Under this theory, the characteristics of the interest in the embryos would include: (1) a non-severable right of survivorship; (2) no right to partition at any time; (3) no ability to transfer the pre-embryo for adoption or donation to research absent an agreement by both parties; and (4) property that is not devisable or inheritable at the death of either party.<sup>73</sup>

Significantly, this characterization provides a balance between respecting the original intent of the parties, while still allowing for a later change. For example, upon divorce, neither spouse could unilaterally decide to discard the embryo, nor could either spouse choose to implant the embryo and force the other to be responsible for the resultant child. Further, the embryos cannot be transferred, whether *inter vivos*, or at death, without the consent of both parties. This prevents the awkward situation of a biological parent sharing interest in the embryo with an unrelated party without the parent's consent.

### C. Potentially Relevant Texas Statutes

As discussed above, adoption is primarily a creature of state law. Thus, the first place to find relevant law is the Texas Family Code. Title 5 of the Texas Family Code addresses the “Parent-Child Relationship and the Suit Affecting the Parent-Child Relationship.”<sup>74</sup> Under this title, a child is defined as “a person under 18 years of age who is not and has not been

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<sup>69</sup> See *id.* at 182.

<sup>70</sup> *Id.*

<sup>71</sup> See Bridget M. Fuselier, *The Wisdom of Solomon: We Cannot Split the Pre-embryos*, 17 *CARDOZO J.L. & GENDER* 507, 514 (2011).

<sup>72</sup> *Id.* at 513.

<sup>73</sup> *Id.* at 513–14.

<sup>74</sup> See generally *TEX. FAM. CODE ANN.* §§ 101.001–266.011 (West 2008 & Supp. 2013).

married, or who has not had the disabilities of minority removed for general purposes.”<sup>75</sup> Title 5 goes on to define a parent as:

[T]he mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father. . . . [T]he term does not include a parent as to whom the parent-child relationship has been terminated.<sup>76</sup>

Texas adopted the Uniform Parentage Act as Chapter 160 of the Texas Family Code to help promote uniformity in the law between the states.<sup>77</sup> This Chapter contains the only statutory language addressing donors, embryos and ART generally. Chapter 160 defines “assisted reproduction” broadly, stating that it is a “method of causing pregnancy other than sexual intercourse.”<sup>78</sup> This chapter also provides an expanded definition of child, which is “an individual of any age whose parentage may be determined under this chapter.”<sup>79</sup>

Subchapter H, titled “Child of Assisted Reproduction,” contains several provisions potentially applicable to embryo adoption.<sup>80</sup> First, subsection 702 specifically states that “[a] donor is not a parent of a child conceived by means of assisted reproduction.”<sup>81</sup> However, this section would seem to be inapplicable unless the biological “parent” in an embryo adoption was considered a donor, which is not necessarily always true. Next, Subsection 706 addresses the effect of dissolution of a marriage on the parentage of the resulting child.<sup>82</sup> This section states that the former spouse is not considered a parent of a resulting child unless that spouse consents.<sup>83</sup> This provision would likely be applicable to divorcing spouses in possession of an adopted embryo that has not been implanted, but it is currently unclear.

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<sup>75</sup> *Id.* § 101.003(a).

<sup>76</sup> *Id.* § 101.024(a).

<sup>77</sup> *Id.* § 160.001.

<sup>78</sup> *Id.* § 160.102(2).

<sup>79</sup> *Id.* § 160.102(3).

<sup>80</sup> *See generally id.* §§ 160.701–707.

<sup>81</sup> *Id.* § 160.702.

<sup>82</sup> *Id.* § 160.706.

<sup>83</sup> *Id.*

Next, Subchapter I addresses gestational agreements.<sup>84</sup> A gestational agreement involves an agreement between a woman, often referred to as the surrogate, and the intended parents in whom the woman “relinquishes all rights as a parent of a child conceived by means of assisted reproduction and that provides that the intended parents become the parents of the child.”<sup>85</sup> This subchapter applies to gestational surrogacy, which means that the embryo is solely the product of the biological parents and is not genetically related to the surrogate mother.<sup>86</sup> This situation is nearly the reverse of an embryo adoption. In a gestational surrogacy, the surrogate mother carries the embryo, and has no parental rights, which are retained by the biological parents.<sup>87</sup> Conversely, in an embryo adoption, the adoptive mother carries the embryo, and the adoptive couple has the parental rights, while the biological parents do not have any parental rights, either because the rights have been waived or because they did not exist in the first place.<sup>88</sup> Thus, Texas statutes provide little guidance on how an embryo adoption should be properly effectuated under Texas law.

Chapter 162 sets forth adoption law for the state of Texas.<sup>89</sup> The first section defines who may adopt and who may be adopted.<sup>90</sup> This section specifically states that a child may be adopted, but does not provide a definition for child.<sup>91</sup> Instead, the definitions provided in other sections of Title 5 should be used, and neither of these appear to be applicable to embryos.<sup>92</sup> Furthermore, § 162.001(b) explains that a child may be placed for adoption only by a person who is a biological or adoptive parent, a legal guardian of the child, or by the Department of Family and Protective Services.<sup>93</sup> This again raises the question of whether the donors of the

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<sup>84</sup> See *id.* §§ 160.751–763.

<sup>85</sup> *Id.* § 160.752(a).

<sup>86</sup> *Surrogacy Services Orange County at West Coast Fertility Center*, WEST COAST FERTILITY CENTERS, <http://ivfbaby.com/surrogacy.php?page=surrogacy> (last visited Jan. 8, 2014).

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

<sup>88</sup> See Baiman, *supra* note 63, at 137–138.

<sup>89</sup> See FAM. §§ 162.001–.602.

<sup>90</sup> See *id.* § 162.001.

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

<sup>92</sup> *Id.* § 101.003(a) (“‘Child’ or ‘minor’ means a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes”); *Id.* at § 160.102(3) (“‘Child’ means an individual of any age whose parentage may be determined under this chapter”).

<sup>93</sup> *Id.* § 162.001; TEX. YOUNG LAWYERS ASSOC., *supra* note 34, at 4.

embryo are the biological “parents.” None of the statutory language appears to designate the embryo as a child, and therefore it would seem inappropriate to designate the donating couple as parents. Thus, the statutes addressing adoption do not appear applicable to persons seeking to adopt embryos.

Texas has also adopted the revised Uniform Anatomical Gift Act.<sup>94</sup> This Act, codified as Chapter 692A in the Texas Health and Safety Code applies to anatomical gifts made at any time.<sup>95</sup> An anatomical gift is a donation of all or part of the human body that takes effect after the donor’s death.<sup>96</sup> Potentially relevant to embryo donation and adoption is the fact that fetus is included as part of the anatomical tissue that may be donated.<sup>97</sup> However, by definition, a fetus is different than an embryo. There is nothing in the Anatomical Gift Act that permits an anatomical gift of an embryo. Thus, again, the current statutes do not provide help to a person seeking to adopt an embryo, or to an attorney seeking to assist them.

It must also be recognized that in some contexts, the state of Texas, along with many states, does provide protection to embryos. For example, there are statutes that provided for elevated punishment for a person that kills a mother and her embryo.<sup>98</sup> The Texas Penal Code includes “an unborn child at every stage of gestation from fertilization until birth” in its definition of “individual.”<sup>99</sup> Of particular note is the fact that the definition includes embryos beginning with fertilization. This is relevant because with IVF, which is the source of most donated and adopted embryos, the fertilization occurs prior to the donation or adoption. Thus, under the Penal Code, an *ex vivo* embryo could appear to qualify as an individual. However, the definition also states it only applies during gestation, which traditionally means the carrying of young in the uterus.<sup>100</sup> Thus, while the statute likely does not apply to embryos resulting from ART, it is another example of the issues created by the lack of applicable statutes.

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<sup>94</sup>TEX. HEALTH & SAFETY CODE ANN. §§ 692A.001–.023 (West 2010 & Supp. 2013).

<sup>95</sup>*Id.* § 692A.003.

<sup>96</sup>*Id.* § 692A.002(3).

<sup>97</sup>*Id.* § 692A.002(5).

<sup>98</sup>*See, e.g.,* Lawrence v. State, 240 S.W.3d 912, 912-15 (Tex. Crim. App. 2007).

<sup>99</sup>TEX. PENAL CODE ANN. § 1.07(a)(26) (West 2011 & Supp. 2013).

<sup>100</sup>MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 525 (11th ed. 2006).

*D. Relevant Texas Case Law*1. *Roman v. Roman*

Perhaps the most famous Texas case concerning the classification of embryos and the associated rights is *Roman v. Roman*, decided in 2006 by the First Court of Appeals in Houston.<sup>101</sup> In *Roman*, a husband and wife contracted with an IVF clinic to assist with having a child after many unsuccessful years of trying other methods.<sup>102</sup> The couple consented to an “embryo agreement,” which provided that the viable embryos would be cryogenically frozen until both parties agreed to transfer for implantation.<sup>103</sup> The agreement also provided that in the event of divorce, the embryos would be discarded.<sup>104</sup> On the night before the scheduled implantation, the husband withdrew his consent, and several months later, the couple divorced.<sup>105</sup> After a final binding agreement reached during mediation, the parties had divided all of the marital property except for the frozen embryos.<sup>106</sup> The dispute went to trial and the ex-husband asked the court to enforce the agreement, while the ex-wife wanted the opportunity to implant the embryos in order to have a biological child.<sup>107</sup> The ex-wife stipulated that the ex-husband would not have any parental rights or responsibilities.<sup>108</sup> The trial court ultimately awarded the frozen embryos to the ex-wife as part of a “just and right and fair and equitable division of the community property.”<sup>109</sup>

On appeal to the First Court of Appeals, the ex-husband argued that the trial court’s decision to award the embryos to his ex-wife violated the express terms of the embryo agreement.<sup>110</sup> The ex-husband essentially argued that this was a contract dispute involving an unambiguous

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<sup>101</sup> See generally *Roman v. Roman*, 193 S.W.3d 40 (Tex. App.—Houston [1st Dist.] 2006, pet. denied), cert. denied, 552 U.S. 1258 (2008).

<sup>102</sup> *Id.* at 42.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 42–43.

<sup>106</sup> *Id.* at 43.

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

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 44.

agreement that should be enforced.<sup>111</sup> The ex-wife, however, contested the validity of such agreements in general and argued that it was against public policy to enforce the embryo agreement.<sup>112</sup> The court acknowledged that this was a case of first impression in Texas and proceeded to survey the holdings in other jurisdictions as to the validity of this type of an agreement.<sup>113</sup> After surveying various opinions from other states, the court concluded that the majority view holds these embryo agreements valid and enforceable as long both parties had the opportunity to withdraw their consent to the agreement.<sup>114</sup>

The court then evaluated the statutory law and public policy of Texas.<sup>115</sup> The court explained that sections of the Uniform Parentage Act address assisted reproduction, including the effect of dissolution of the marriage.<sup>116</sup> For example, Section 160.706 of the Texas Family Code addresses paternity in the event of divorce, but does not address how to determine the disposition of any frozen embryos.<sup>117</sup> The court ultimately decided that when the parties voluntarily agreed to the disposition of the embryos, the public policy of the state would be to enforce such agreements.<sup>118</sup> The court then concluded that the embryo agreement was an unambiguous contract, made voluntarily, and was therefore valid and enforceable.<sup>119</sup> The court held that the trial court improperly awarded the embryos to the ex-wife, and that the frozen embryos should be discarded per the valid embryo agreement.<sup>120</sup> The ex-wife's petition for review to the Supreme Court of Texas, and her petition for a writ of certiorari to the Supreme Court of the United States, were both denied in the following months, and the frozen embryos were ultimately discarded.<sup>121</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 45.

<sup>113</sup> *Id.* at 45–48.

<sup>114</sup> *Id.* at 48.

<sup>115</sup> *Id.* at 48–50.

<sup>116</sup> TEX. FAM. CODE ANN. § 160.706 (West 2008); *Roman*, 193 S.W.3d at 49.

<sup>117</sup> FAM. § 160.706.

<sup>118</sup> *Roman*, 193 S.W.3d at 50.

<sup>119</sup> *Id.* at 53–54.

<sup>120</sup> *Id.* at 54–55.

<sup>121</sup> *See id.*

## 2. In re *O.G.M.*

In an earlier Texas case, the First Court of Appeals addressed the issue of paternity in the context of intrauterine insemination.<sup>122</sup> In the *In re O.G.M.* case, as in *Roman*, a husband and wife created embryos at an IVF clinic and then divorced prior to the embryos being implanted.<sup>123</sup> However, in *O.G.M.*, the wife had the embryos implanted, apparently with the consent of the ex-husband, and a child was subsequently born.<sup>124</sup> The dispute arose when the ex-husband asserted paternity while the ex-wife alleged that the embryos had been donated to her and that she was to raise the child as a single parent.<sup>125</sup>

In its opinion, the court acknowledged the complexity of the issue and narrowly framed the issues in order to give maximum deference to the legislature.<sup>126</sup> As an example of this narrow framing, the court refused to apply a now-repealed artificial insemination statute because of the scientific differences between artificial insemination and in-vitro fertilization.<sup>127</sup> Furthermore, the court stated that the parties' intent is not a factor in cases determining the parentage of children of assisted conception.<sup>128</sup> However, it is still unclear to what extent this concept of disregarding intent will continue to be applied.

Ultimately, the trial court granted summary judgment in favor of the ex-husband, establishing his parental rights, and a jury then appointed him the possessory conservator.<sup>129</sup> The court of appeals then affirmed both the grant of summary judgment and the ex-husband's appointment as possessory conservator.<sup>130</sup>

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<sup>122</sup> See *In re O.G.M.*, 988 S.W.2d 473, 473-75 (Tex. App.—Houston [1st Dist.] 1999, pet. dismissed).

<sup>123</sup> *Id.* at 474.

<sup>124</sup> *Id.* at 474-475.

<sup>125</sup> *Id.* at 475.

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

<sup>127</sup> *Id.* at 477; Former § 151.101 was repealed in 2001 when Texas adopted the Uniform Parentage Act. TEX. FAM. CODE ANN. § 151.101, repealed by Act of June 14, 2001, 77th Leg., R.S., ch. 821, § 2.13, 2001 Tex. Gen. Laws.

<sup>128</sup> *In re O.G.M.*, 988 S.W.2d at 478.

<sup>129</sup> *Id.* at 475.

<sup>130</sup> *Id.* at 478.



### 3. Donor's Standing

Another issue that arises in cases involving embryo adoption and donation is who has standing to adjudicate a claim involving the embryos. Currently, whether the embryo is being donated, given up for adoption, or kept by an unmarried couple can have significant implications on which parties have any rights. Two cases have addressed § 160.702 of the Texas Family Code, which states that a donor is not a parent of a child conceived by means of assisted reproduction, and both concerned standing.<sup>131</sup> Each case involved similar facts: an unmarried man and woman decide to conceive a child by artificially inseminating the woman with the man's donated sperm.<sup>132</sup> In both situations an agreement was made between the parties that the donor father would remain involved in the child's life.<sup>133</sup> Ultimately, the relationship between the man and the woman dissolved, and the man filed a suit to adjudicate his parental rights.<sup>134</sup> As often happens in emerging areas of law, the two courts rendered conflicting decisions.<sup>135</sup>

The first reported case, *In re Sullivan*, went before the Fourteenth District Court of Appeals in Houston in 2005.<sup>136</sup> In *Sullivan*, the parties signed a "Co-Parenting Agreement," but after a disagreement arose, the man filed a petition to adjudicate parentage.<sup>137</sup> At the trial court, the woman filed a plea to the jurisdiction, arguing that as a donor, the man did not have standing to bring a proceeding to adjudicate parentage.<sup>138</sup> She alleged that § 160.702 of the Family Code, which states that a donor is not a parent, controls and that therefore the man did not have standing to bring the suit.<sup>139</sup> In opposition, the man argued that § 160.602(a)(3), stating that a man whose paternity of the child is to be adjudicated may maintain a

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<sup>131</sup> See generally *In re H.C.S.*, 219 S.W.3d 33 (Tex. App.—San Antonio 2006, no pet.); *In re Sullivan*, 157 S.W.3d 911 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

<sup>132</sup> *In re H.C.S.*, 219 S.W.3d at 34; *In re Sullivan*, 157 S.W.3d at 912.

<sup>133</sup> *In re H.C.S.*, 219 S.W.3d at 34; *In re Sullivan*, 157 S.W.3d at 912–13.

<sup>134</sup> *In re H.C.S.*, 219 S.W.3d at 34; *In re Sullivan*, 157 S.W.3d at 913.

<sup>135</sup> Compare *In re H.C.S.*, 219 S.W.3d at 36 ("J.S., as an unmarried man who provided sperm used for assisted reproduction and who did not sign and file an acknowledgment of paternity, does not have standing to pursue a suit to determine paternity of the child . . ."), with *In re Sullivan*, 157 S.W.3d at 922 ("[S]ection 160.602 of the Family Code broadly confers standing upon Brian Keith Russell in the present case . . .").

<sup>136</sup> *In re Sullivan*, 157 S.W.3d at 911.

<sup>137</sup> *Id.* at 912–13.

<sup>138</sup> *Id.* at 914.

<sup>139</sup> *Id.* at 915.

proceeding, controls and that depriving him of standing would be unconstitutional.<sup>140</sup> The trial court denied the woman's plea to the jurisdiction, and the woman then sought a writ of mandamus from the court of appeals vacating the trial court's order.<sup>141</sup>

The appellate court explained that the initial inquiry was therefore whether donor status is part of the standing determination, and that this inquiry could result in one of two outcomes.<sup>142</sup> One possible outcome is that the man had standing as a "man whose paternity of the child is to be adjudicated," and thus whether he is a donor is a question to the merits and not standing.<sup>143</sup> The other possible outcome is that the statute requires men to disprove their donor status before they can have standing to pursue a proceeding.<sup>144</sup>

The court engaged in statutory construction and specifically focused on the legislative history of the two provisions.<sup>145</sup> The court performed an extensive analysis of the statutes, and their precursors, and ultimately concluded that the man did have standing to seek adjudication as to the paternity of the child.<sup>146</sup> The court acknowledged that during a trial on the merits, it may be determined that the man was a donor, and thus without parental rights.<sup>147</sup> However, the court was careful to emphasize that the determination of donor status goes to the merits and not to standing.<sup>148</sup>

The second reported case, *In re H.C.S.*, was decided by the Fourth District Court of Appeals in San Antonio the following year.<sup>149</sup> In *H.C.S.*, as in *Sullivan*, the woman filed a plea to the jurisdiction, arguing that the man did not have standing under § 160.702 because he was a donor.<sup>150</sup> Unlike *Sullivan*, the trial court granted the woman's plea and dismissed the case.<sup>151</sup>

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<sup>140</sup> *See id.*

<sup>141</sup> *Id.* at 914.

<sup>142</sup> *Id.* at 915–16.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 916.

<sup>145</sup> *See id.*

<sup>146</sup> *Id.* at 917–19.

<sup>147</sup> *See id.* at 920.

<sup>148</sup> *See id.*

<sup>149</sup> *In re H.C.S.*, 219 S.W.3d 33 (Tex. App.—San Antonio 2006, no pet.).

<sup>150</sup> *Id.* at 34.

<sup>151</sup> *Id.*

The San Antonio Court of Appeals acknowledged the *Sullivan* holding, but quickly disagreed with the Houston court's conclusions.<sup>152</sup>

The court disagreed both with the conclusion that donor status does not affect standing, and with the holding that donor status is more appropriately addressed in a trial on the merits.<sup>153</sup> Instead, the court in *H.C.S.* held that the plain language of the Family Code made it clear that the man, as a donor, did not have standing to maintain the suit.<sup>154</sup> The court explained that the Family Code provided a mechanism for the man and the child's mother to execute a voluntary acknowledgement of the man's paternity.<sup>155</sup> The court explained that having failed to utilize this process, the man could not circumvent the statutory procedure for determining paternity in assisted-reproduction cases.<sup>156</sup> Therefore, the man did not have standing to maintain the suit and the trial court's dismissal was affirmed.<sup>157</sup>

The result in *H.C.S.* appears to be the "right" result, at least in terms of the intent of the drafters of the Uniform Parentage Act. The comment for § 702 states that "[t]he donor can n[ot] sue to establish parental rights . . . . In sum, donors are eliminated from the parental equation."<sup>158</sup> Furthermore, the court in *H.C.S.* emphasized the fact that there is a mechanism for voluntary acknowledgement of paternity, and that the parties failed to utilize this procedure.<sup>159</sup>

#### IV. OTHER SOURCES OF EMBRYO ADOPTION LAW

While Texas statutory and case law are the foundation for information regarding embryo adoption, it is helpful, and sometimes necessary, to look to other sources as well. For example, industry groups such as the Uniform Law Commission, which provided the Uniform Parentage Act, and the American Bar Association can help establish consistency across the states. Further, it is necessary to look to federal law and evaluate any situations where it may preempt state law.

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<sup>152</sup>*Id.* at 35–36.

<sup>153</sup>*Id.*

<sup>154</sup>*Id.* at 36.

<sup>155</sup>*Id.* at 36; TEX. FAM. CODE ANN. § 160.301 (West 2008).

<sup>156</sup>*In re H.C.S.*, 219 S.W.3d at 36–37.

<sup>157</sup>*Id.* at 37.

<sup>158</sup>U.P.A. § 702 cmt. (2000, amended 2002), available at [http://www.uniformlaws.org/shared/docs/parentage/upa\\_final\\_2002.pdf](http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf).

<sup>159</sup>*In re H.C.S.*, 219 S.W.3d at 36.

### A. ABA Model Act Regarding Assisted Reproductive Technology

In 2008, the American Bar Association Section of Family Law's Committee on Reproductive and Genetic Technology released a Proposed Model Act Governing Assisted Reproductive Technology.<sup>160</sup> Recognizing the need for legislative attention, the Committee intends for the Act to provide a "flexible framework that will serve as a mechanism to resolve contemporary controversies, to adapt to the need for resolution of controversies that are envisioned but that may have not yet occurred, and to guide the expansion of ways by which families are formed."<sup>161</sup> The mere action of releasing this Model Act was an important milestone and represents the ABA's response to the growing need for a legal framework to address the issues associated with ART.<sup>162</sup>

The Act provides many "updated" definitions that reflect the current state of, and seek to account for, future advances in ART.<sup>163</sup> The Act includes in its definition of an embryo donor the requirement that the donor relinquish all present and future parental and inheritance rights and obligations.<sup>164</sup> This provision appears to resolve many of the issues surrounding the termination of existing parental rights. As states incorporate the Model Act in whole or in part, it will be interesting to see if it provides the necessary framework to resolve many of the outstanding legal issues surrounding ART.

### B. Applicable Federal Laws

Under the George W. Bush Administration, frozen embryos were given considerable legal rights, and federal funds were used to support embryo adoption.<sup>165</sup> Conversely, under the Obama Administration, funding for embryo adoption has been eliminated and federal funding for research on

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<sup>160</sup>MODEL ACT GOVERNING ASSISTED REPROD. TECH. Prefatory Note (2008), available at <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

<sup>161</sup>*Id.*

<sup>162</sup>See Charles Kindregan, Jr. & Steven Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 203 (2008).

<sup>163</sup>See MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102 (2008), available at <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

<sup>164</sup>*Id.* § 102(9).

<sup>165</sup>Jaime E. Conde, *Embryo Donation: The Government Adopts a Cause*, 13 WM. & MARY J. WOMEN & L. 273, 274 (2006).

human embryonic stem cells has been reinstated.<sup>166</sup> This has led to litigation under two primary theories. The first theory is that the research violates federal law prohibiting research that destroys a human embryo.<sup>167</sup> The other theory, which is more relevant to this topic, is that the increased researcher demand for embryos caused by the increase in federal funding will influence the decision of biological parents to donate embryos.<sup>168</sup> The allegation is that biological parents will choose to not donate embryos and thereby reduce the number of embryos available for adoption.<sup>169</sup> Courts have, to this point, dismissed these cases because of the putative plaintiff's lack of standing.<sup>170</sup> Ultimately, these cases reveal that adoption law is primarily a state issue and there is little, if any, guidance from Federal law.

### C. Other States' Approaches

One recent example of the legal issues presented by ART comes out of Kansas.<sup>171</sup> There, a man donated sperm to a lesbian couple so that they could conceive via artificial insemination.<sup>172</sup> When the man donated the sperm in 2009, he and the couple signed a contract in which he relinquished all of his parental rights, including financial responsibility.<sup>173</sup> A few years later, the lesbian couple, the parents of the child, applied for state Medicaid benefits.<sup>174</sup> At that point, the Kansas Department for Children and Families became aware of the situation and ultimately decided to pursue the male donor for child support.<sup>175</sup> The state's case is based on the fact that the artificial insemination was done at home, and not at medical facility.<sup>176</sup> Kansas law requires that the donor must provide the sperm to a licensed

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<sup>166</sup> Exec. Order No. 13,505, 74 Fed. Reg. 10667 (March 9, 2009).

<sup>167</sup> See, e.g., *Sherley v. Sebelius*, 644 F.3d 388, 389–90 (D.C. Cir. 2011).

<sup>168</sup> See, e.g., *Doe v. Obama*, 631 F.3d 157, 162 (4th Cir. 2011).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 163.

<sup>171</sup> Aly Van Dyke, *Former Partners 'Forever Grateful' to Topeka Sperm Donor*, THE CAPITAL-JOURNAL (Dec. 30, 2012), <http://cjonline.com/news/2012-12-30/former-partners-forever-grateful-topeka-sperm-donor>.

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

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Bill Chappell, *Kansas Presses Sperm Donor to Pay Child Support*, THE TWO-WAY (Jan. 3, 2013, 06:15 PM), <http://www.npr.org/blogs/thetwo-way/2013/01/03/168568383/kansas-presses-sperm-donor-to-pay-child-support>.

physician in order for there to be a presumption that the donor is not the birth father.<sup>177</sup> The reason for this requirement is so that the doctor can certify that the donor has no connection with the mother and is not actually a party who should be required to help support the child, such as a boyfriend.<sup>178</sup> Therefore, because the insemination was performed at home, the presumption that the donor is not the birth father does not apply.<sup>179</sup>

It is not uncommon, or controversial, for a state to attempt to find the biological father when a single mother applies for public benefits.<sup>180</sup> The purpose of this effort is to lessen the burden on taxpayers to support the mother and child by ensuring that the biological father provides proper financial support.<sup>181</sup> In this situation however, there was a facially valid contract, and neither of the women are asking for money from the male donor.<sup>182</sup> The male donor argued that the Kansas law, enacted in 1994, was outdated and failed to account for the developments in assisted reproduction technology.<sup>183</sup> The state, however, argued that similar laws are in place in many other states and that the donor exposed himself to financial responsibility by not following the law.<sup>184</sup>

The 2002 version of the Uniform Parentage Act, which has been adopted by Texas and eight other states, has no qualifying requirement that the insemination is done at a medical facility.<sup>185</sup> The statute simply says that the donor is not the parent of a child of assisted reproduction.<sup>186</sup> Thus, it would appear that this type of situation would not arise in Texas. As of this writing, the donor in Kansas is still seeking the dismissal of the state's case against him.<sup>187</sup> This situation is a good example of the need to frequently update laws in order to account for advances in medical technology and changing social norms.

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<sup>177</sup>KAN. STAT. ANN. § 23-2208(f) (Supp. 2012).

<sup>178</sup>Chappel, *supra* note 176.

<sup>179</sup>*Id.*

<sup>180</sup>*See* Heather Hollingsworth & John Hanna, *Sperm Donor Legal Issues Highlighted by Kansas Case*, HUFFINGTON POST (January 4, 2013 03:11 AM), [http://www.huffingtonpost.com/2013/01/04/sperm-donor\\_n\\_2408580.html](http://www.huffingtonpost.com/2013/01/04/sperm-donor_n_2408580.html).

<sup>181</sup>*Id.*

<sup>182</sup>*Id.*

<sup>183</sup>*See id.*

<sup>184</sup>*Id.*

<sup>185</sup>TEX. FAM. CODE ANN. § 160.702 (West 2008).

<sup>186</sup>*Id.*

<sup>187</sup>Hollingsworth, *supra* note 180.

As illustrated by the *Marotta* case in Kansas, an individual state's laws can have a profound effect on the rights and responsibilities of any party involved in an assisted reproduction.<sup>188</sup> Louisiana employs a unique approach in that it defines an embryo as a juridical person.<sup>189</sup> Under this standard, an embryo, prior to implantation, has many rights, including the power to sue and be sued.<sup>190</sup> Perhaps most significant is the fact that this designation means that the embryo cannot be the property of the physician, the facility, or the even the donors.<sup>191</sup> Plus, the embryo cannot be intentionally destroyed, for research, or otherwise.<sup>192</sup>

In 2009, Georgia passed what are considered the first statutes specifically addressing embryo adoption.<sup>193</sup> The statutes set forth a process through which an embryo may be adopted.<sup>194</sup> First, the embryo "custodian"<sup>195</sup> relinquishes all rights and responsibilities via a written contract with the intended recipient.<sup>196</sup> Then, the intended recipient petitions the court for an order of adoption or parentage.<sup>197</sup> While this mechanism may not be ideal, it does provide a legal framework through which adoptive parents, and their attorneys, can effect an embryo adoption that is at least somewhat protected by law.

#### V. CURRENT OPTIONS AND RECOMMENDATIONS FOR FUTURE CHANGES

For those seeking to effect a binding embryo adoption, the best option at this point is to remember that the general rule in Texas is that contract is king. A contract covering all of the rights and obligations of both the donating and adopting parents is the best method to ensure that each side obtains what they want from the bargain. As evidenced by the *Roman* case,

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<sup>188</sup> *Id.*

<sup>189</sup> LA. REV. STAT. ANN. § 9:121 (West 2008).

<sup>190</sup> *Id.* § 9:124.

<sup>191</sup> *Id.* § 9:126.

<sup>192</sup> *Id.* § 9:129.

<sup>193</sup> Polina M. Dostalík, *Embryo "Adoption"? The Rhetoric, the Law, and the Legal Consequences*, 55 N.Y.L. SCH. L. REV. 867, 889 (2010/2011).

<sup>194</sup> GA. CODE ANN. § 19-8-40–43 (West 2010).

<sup>195</sup> The Georgia statute defines a "legal embryo custodian" as "the person or persons who hold the legal rights and responsibilities for a human embryo and who relinquishes said embryo to another person or persons." *Id.* § 19-8-40(4).

<sup>196</sup> *Id.* § 19-8-41.

<sup>197</sup> *Id.* § 19-8-42.

in the absence of any clear statutory directive, Texas courts will enforce a valid contract, even if it leads to uncomfortable results.<sup>198</sup>

An attorney representing parties in an ART-related contract faces many novel legal problems. Often, individual representation of each party is preferred because of the unique issues involving ART.<sup>199</sup> For example, the donative party and the adopting parents will each have an attorney, as well as the surrogate, if one is used. Furthermore, if the parties are located in multiple states, the attorney could be presented with unauthorized-practice-of-law issues.<sup>200</sup>

The Texas Legislature could take steps to resolve the confusion by adopting legislation that clearly defines the rights of all involved parties. This might include adopting all or part of the ABA Model Act Governing Assisted Reproduction Technology. Another step would be to resolve whether the biological parent of an adoptive embryo is actually a parent and therefore needs to terminate her parental rights. Possibly the most important action the Legislature could take is to define the characterization of the embryos. This characterization, whether as a child, property, property with special dignity, or some other option, will provide a level of certainty that will allow adoption agencies and potential parties to an embryo adoption, to proceed without the current uncertainty.

## VI. CONCLUSION

As often happens when there is rapid social and technological change, the law struggles to accurately balance the interests of the state versus the desires of the individual. While there are no uniform laws amongst the states, there is a unified request from the judiciary for the respective legislatures to take action.<sup>201</sup> Whether choosing to treat the transfer of an embryo as an adoption, a conveyance of property, a contractual obligation, or some other concept, a family law practitioner must be careful to accurately and completely fulfill their clients' goals. Hopefully soon, the

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<sup>198</sup>Roman v. Roman, 193 S.W.3d 40, 49-50 (Tex. App.—Houston [1st Dist.] 2006, pet. denied), *cert. denied*, 552 U.S. 1258 (2008).

<sup>199</sup>CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, *Assisted Reprod. Tech.: A Lawyer's Guide to Emerging Law & Sci.*, in, LEGAL STUDIES RESEARCH PAPER SERIES at 345 (2d ed. 2011).

<sup>200</sup>*Id.* at 346.

<sup>201</sup>*Id.*



Texas Legislature will provide a statutory framework addressing the rights and liabilities of all involved parties.