INTRODUCTION

With the advent of in vitro fertilization (IVF) and the ability to conceive a human embryo outside of a mother’s womb in the late 1970s, hundreds of thousands of human embryos have been conceived and stored in laboratories across the United States. Minimal regulation of assisted reproductive technologies (ART) exacerbates the plight of these embryos, and the number of embryos languishing in a frozen state grows annually.

Generally, there have been limited options as to what can be done with the vast and growing number of frozen human embryos. Depending on state law and any dispositional agreement signed by the parents, the embryos can be implanted in the mother, stored, destroyed, donated to adoptive parents, or donated for research. Notably, some transfers or donations of embryos are currently conducted under principles of contract and property law.

Given the growth in the number of stored human embryos and the likelihood that the genetic mothers may decide not to implant all of the created embryos, the adoption of embryos and implantation in adoptive mothers have been given increased attention in recent years.

Adoption was “unknown to the common law” and was first granted legal sanction in the American states in the middle of the nineteenth century, with the first comprehensive statute enacted by Massachusetts in 1851. The essence of child adoption is the consensual termination of the parental rights and responsibilities of the genetic parent(s) (or guardian(s)) and the transfer of those parental rights and responsibilities to the adoptive parent(s). Child adoption also involves a name change and affects inheritance rights.

Only two federal statutes, the Indian Child Welfare Act (ICWA) and the Multi-Ethnic Placement Act (MEPA), affect adoptions in the United States. Otherwise, state law governs adoption including the legal procedures used, the surrender of parental rights, the release of health-related information, and other issues.

As a practical and legal matter, embryo “adoption” has been practiced since the advent of IVF, in the sense that the rights to embryo have been transferred from relinquishing to adoptive parent(s). Given the unclear legal status of the human embryo in many states, however, embryo

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“adoption” has been carried out under contract or property law. Specifically, the conception and storage of the embryos is conducted as a matter of contract law between the IVF clinic, the storage laboratory, and the parents, with the embryo treated as a form of property—albeit a status that is characterized by “special respect.”

Conversely, experienced professionals in the field of embryo donation recommend procedures for donation that are akin to legal adoption procedures. For example, the Snowflakes Embryo Adoption agency recommends that embryo adoptions utilize home studies of adopting parents.

In compliance with experts’ view that embryo donations and transfers should be governed by adoption—not property—law, AUL has developed the *Embryo Adoption Act*. This model bill creates procedures to ensure that the adoptive parents are considered the legal parents of the human embryo. It also provides greater legal certainty for relinquishing (genetic) and adoptive parents.

In the context of embryo adoption, one key issue that must be specifically addressed is the timing of the relinquishment (surrender) of the rights of the genetic parents. In the context of the adoption of an infant, surrender of rights is typically delayed until a certain period of time (e.g., 24 hours or 72 hours) after the genetic mother gives birth. In the context of embryo adoption, when the mother who commissioned the creation of the child (either through the use of her own gamete or the gamete of another) does not carry the child, relinquishment of rights should take place before embryo transfer.

Notably, AUL’s model language does not change the law of gestational surrogacy unless the surrogate is an adoptive mother who has indicated her intent to adopt the child and signed a written adoption agreement with the genetic parents before implantation.

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For more information and drafting assistance, please contact AUL’s Legislative Coordinator at (202) 289-1478 or Legislation@AUL.org.

DENISE M. BURKE, ESQ.
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EMBRYO ADOPTION ACT

HOUSE/SENATE BILL No. ______
By Representatives/Senators ____________

Section 1. Short Title.

This Act may be cited as the “Embryo Adoption Act.”

Section 2. Legislative Findings and Purposes.

(a) The [Legislature] of the State of [Insert name of State] finds that:

(1) There are hundreds of thousands of cryopreserved (frozen) human embryos in laboratories and facilities in the United States, and that the number grows annually.

(2) There is little guidance from federal or state law for the disposition of frozen embryos. In fact, few states have laws governing the disposition of frozen embryos.

(3) Embryo donation can be a haphazard process, providing insufficient protection for the best interests of the child and insufficient certainty for the rights and responsibilities of relinquishing (genetic) and potential adopting parents.

(4) Allowing parents who adopt embryos to obtain a court order of adoption creates greater protection for the child, greater certainty for the termination of rights of the relinquishing (genetic) parents, and greater certainty for the rights of the adopting parents.

(5) Further, allowing a court order of adoption promotes the psychological health of the child who later will not feel that he or she was “donated” or given away, but was adopted from and by loving parents.

(6) Finally, allowing a court order of adoption may allow adopting parents to claim an adoption tax credit that would not be available to them under a typical “embryo donation” scenario, further encouraging the adoption of embryos which might otherwise remain in a state of frozen limbo.
Based on the findings in subsection (a), it is the purpose of this Act to:

(1) Clarify the rights of relinquishing (genetic) and adopting parents;

(2) Allow for a court order of adoption for adopted frozen embryos; and

(3) Promote the best interests of the child.

Section 3. Definitions.

As used in this Act only:

(a) “Adopting parent” means the person or persons who receive a relinquished embryo and who accept full legal rights and responsibilities for such embryo and any child that may be born as a result of embryo transfer.

(b) “Embryo relinquishment” means the relinquishment of rights and responsibilities by the relinquishing parent(s) of a human embryo and the acceptance of said rights and responsibilities by adopting parent(s).

(c) “Embryo transfer” means the medical procedure of physically placing an embryo into the uterus of a woman.

(d) “Human embryo” or “embryo” means an individual organism of the human species, from the single cell stage to eight (8) weeks development.

(e) “Relinquishing parent” means the person or persons who hold the legal rights and responsibilities for an embryo, regardless of whether the embryo was created with the use of the relinquishing parents’ gametes or through the use of donor gametes, who is seeking to relinquish the embryos to adopting parents.

[Drafter’s Note: Amending a state’s adoption law requires input from legal counsel experienced in that particular state’s adoption requirements. Thus, legislators wishing to amend the state’s adoption law as opposed to introducing an analogous procedure for embryo adoption are encouraged to contact AUL, as well as in-state legal counsel before introducing a measure based on Sections 4 and 5 of this model language.]
[Section 4.] Amendment to Definition Section of State Adoption Law.

For purposes of embryo adoption under this Act and [Insert appropriate reference(s) to the definition section(s) of state adoption law(s)], “child” [or “minor”] shall include a human embryo.

[Section 5.] Exclusivity.

The relinquishment of human embryos from relinquishing to adopting parents shall be conducted pursuant to the adoption laws of this state, as amended by [Sections 6 through 9] of this Act.

[Section 6.] Relinquishment of Rights.

(a) A relinquishing parent may relinquish all rights and responsibilities for an embryo to an adopting parent prior to embryo transfer. Prior to embryo transfer, a written contract shall be entered into between each relinquishing parent and each adopting parent for the legal transfer of rights to an embryo and to any child which may result from the embryo transfer. The contract shall be signed by each relinquishing parent of such embryo and by each adopting parent in the presence of a notary public and a witness. Initials or other designations may be used if the parties desire anonymity. The contract may include a written waiver by the relinquishing parent of notice and service in the legal adoption proceeding which may follow.

(b) If the embryo was created using donor gametes, the sperm or oocyte donors who irrevocably relinquished their rights in connection with in vitro fertilization shall not be entitled to any notice of the embryo relinquishment nor shall their consent to the embryo relinquishment be required.

(c) Upon embryo relinquishment by each relinquishing parent pursuant to subsection (a) of this Section, the legal transfer of rights to an embryo shall be considered complete, and the embryo transfer shall be authorized.

(d) A child born to an adopting parent as the result of embryo relinquishment pursuant to subsection (a) of this Section shall be presumed to be the legal child of the adopting parent.
Section 7. Petition for Expedited Order of Adoption.

(a) Prior to the birth of a child or following the birth of a child, an adopting parent may petition the superior court for an expedited order of adoption. In such cases, the written contract between each relinquishing parent and each adopting parent shall be acceptable in lieu of a surrender of rights.

(b) All petitions under this Section shall be filed in the county in which any petitioner or any respondent resides.

(c) The court shall give effect to any written waiver of notice and service in the legal proceeding for adoption.

(d) In the interest of justice, to promote the stability of embryo transfers, and to promote the interests of children who may be born following such embryo transfers, the court in its discretion may waive such technical requirements as the court deems just and proper.

Section 8. Finality of Orders of Adoption.

Upon a filing of a petition for adoption or parentage and the court finding that such petition meets the criteria required by this Act, an expedited order of adoption shall be issued and shall be a final order. Such order shall terminate any future parental rights and responsibilities of any past or present relinquishing parent or gamete donor in a child which results from the embryo transfer and shall vest such rights and responsibilities in the adopting parent.


Relinquishment of rights to an embryo pursuant to Section 6 shall cancel any prior written agreement governing disposition of the embryo.

Section 10. Severability.

Any provision of this Act held to be invalid or unenforceable by its terms or as applied to any person or circumstance shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable herefrom and shall not affect the remainder hereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.
[Section 11.] Right of Intervention.

The [Legislature], by joint resolution, may appoint one or more of its members who sponsored or co-sponsored this Act, as a matter of right and in his or her official capacity, to intervene to defend this law in any case in which its constitutionality is challenged or questioned.

[Section 12.] Effective Date.

This Act takes effect on [Insert date].
STATE OF THE STATES:
WHERE ARE WE NOW?
LAWS RELATED TO EMBRYO DONATION & ADOPTION

At least eleven states provide varying levels of guidance for embryo donation: CA, NJ, NM, ND, OH, OK, TN, TX, UT, WA, and WY.

At least three states provide varying levels of guidance for embryo donation and allow for embryo adoption: FL, GA, and LA.
More detailed information about the need and justification for state embryo adoption laws can be found in AUL’s annual publication *Defending Life*.

*Defending Life* is available online at AUL.org.

For further information regarding this or other AUL policy guides, please contact:

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