EMBRYO ADOPTION ACT

Model Legislation & Policy Guide
For the 2013 Legislative Year

AMERICANS UNITED FOR LIFE
Changing Law to Protect Human Life, State by State
INTRODUCTION

Since the late 1970s and the advent of the ability to conceive and store human embryos outside a mother’s womb through *in vitro* fertilization (IVF), hundreds of thousands of human embryos have been conceived and stored in laboratories. It is estimated that there are now at least 600,000 cryopreserved (frozen) human embryos in storage in the United States. In the past quarter century, there have been limited options as to what to do with the vast and growing numbers of frozen embryos. Depending on state law and any dispositional agreement signed by the parents, they can be implanted in the mother, stored, destroyed, donated to adoptive parents, or donated for research. Some transfers or donations of embryos are currently conducted under contract and property law.

Given the growth in numbers and the likelihood that the genetic mothers may decide never to implant all of the created embryos, adoption of embryos and implantation in an adopting mother has been given increased attention in recent years, including in Congressional hearings. A 2005 survey by Resolve (the National Infertility Association) of its members found that members overwhelmingly (96.2%) “contend that embryo donation is a ‘good thing.’”

Experienced professionals in the field of embryo donation recommend procedures for donation that are akin to adoption procedures. For example, the Snowflakes adoption agency recommends that embryo adoptions utilize home studies of adopting parents. Moreover, Resolve recommends the use of written contracts, informed consent, written consent, surrender and relinquishment, physical and mental health screening, psychological counseling, exchange of health information, and clinical interviews.

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)\(^3\) and the “Multi-Ethnic Placement Act” (MEPA)—affect adoptions in the United States. Otherwise, adoption is completely a matter of state law, which governs procedures, surrender of rights, health information, and other issues.

As a practical and legal matter, embryo “adoption” has been going on in the states since the advent of IVF in the sense that the rights to the embryo have been transferred from relinquishing to adoptive parent(s). Given the unclear legal status of the human embryo in many states, however, embryo “adoption” has been carried out under contract or property law.\(^4\) 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.”

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 adopting parents are considered the legal parents of the human embryo. It also provides greater legal certainty for relinquishing and adoptive parents.

One key issue that must be uniquely addressed in the context of embryo adoption 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 under state law 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.

This bill 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.


\(^4\) “Six cases have squarely addressed the disposition of cryopreserved preembryos. Each of the six courts used different reasoning in deciding the fate of the preembryos in dispute….” Skouvakis, supra, at 892 (citing In re the Marriage of Witten, 672 N.W.2d 768 (Iowa 2003) (holding that embryos should remain frozen when a divorcing couple disagreed as to the disposition); J.B. v. M.B., 783 A.2d 707 (N.J. 2001); In re Marriage of Litowitz, 48 P.3d 261 (Wash. 2001), amended, 53 P.3d 516 (Wash. 2002), cert. denied sub. nom., Litowitz v. Litowitz, 537 U.S. 1191 (2003); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); Kass v. Kass, 696 N.E.2d 174 (N.Y. Ct. App. 1998); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), cert. denied sub. nom., Stowe v. Davis, 507 U.S. 911 (1993)). As of 2012, additional cases had also been decided, but with varying analyses.
For more information and drafting assistance, please contact AUL’s Legislative Coordinator at (202) 741-4907 or Legislation@AUL.org.

DENISE M. BURKE, ESQ.
Vice President of Legal Affairs
Americans United for Life
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 Purpose and Findings.

(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, given that 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 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 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—thus encouraging further adoption of embryos that might otherwise remain in a state of frozen limbo.
(b) The Legislature’s purposes in enacting this law are to:

   (1) Clarify the rights of relinquishing 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.

For purposes of this Act:

(a) “Adopting parent” means the person or persons who receive a relinquished embryo and who accepts 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.

[Section 4.] Amendment to Definition Section of State Adoption Law.

For purposes of embryo adoption under this Act and the [Insert definition section(s) of this State’s 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 to 9 of this Act.

[Draper’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 of embryo adoption are encouraged to contact AUL as well as in-state legal counsel before introducing a measure including Sections 4 and 5 herein.]

[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. A written contract shall be entered into between each relinquishing parent and each adopting parent prior to embryo transfer for the legal transfer of rights to an embryo and to any child that may result from the embryo transfer. The contract shall be signed by each relinquishing parent for 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.

[Section 9.] Status of Prior Agreements for Disposition of Embryos.

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].
At least ten states provide varying levels of guidance for embryo donation: CA, NJ, NM, ND, OH, OK, 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 2012: Building a Culture of Life, Deconstructing the Abortion Industry.*

*Defending Life 2012* is available online at AUL.org.

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

**AMERICANS UNITED FOR LIFE**
655 15th Street NW, Suite 410
Washington DC  20005
202.289.1478 | Fax 202.289.1473 | Legislation@AUL.org

www.AUL.org

©2012 Americans United for Life

This policy guide may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the creator and owner of this content.