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## Note

### Embryo Adoption: The Solution to an Ambiguous Intent Standard

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In *Prato-Morrison v. Doe*, a married couple suspected that the fertility clinic they used had implanted their unused frozen embryos into a third party without their consent.<sup>1</sup> Though unsuccessful in their own attempts to conceive, the Morrises suspected that another couple had twin girls using their embryos.<sup>2</sup> The Morrises wanted to find out, via genetic testing, if they were the biological parents of the twins, who were almost fourteen years old at the time.<sup>3</sup> The court refused to allow the testing, concluding that this would disrupt the twins' lives in a manner that was not in their best interest.<sup>4</sup> After the great expense of money and time the Morrises invested in having a child, they were left with no children and the belief that strangers may be raising the children who were genetically related to them.<sup>5</sup>

Faced with a similar situation in *Robert B. v. Susan B.*, the court allowed genetic testing,<sup>6</sup> but still the conclusion was wanting. Robert B. and his wife Denise learned that the fertili-

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1. 126 Cal. Rptr. 2d 509, 510 (Ct. App. 2002).  
2. *Id.*  
3. *Id.*  
4. *Id.* at 515.  
5. *See id.* at 516 (affirming the denial of the Morrises' request for biological testing).  
6. 135 Cal. Rptr. 2d 785, 786 (Ct. App. 2003) (“[T]he trial court determined that Robert had standing to bring a paternity action . . . and it ordered genetic testing.”).

ty clinic they used to attempt to conceive possibly sold their unused frozen embryos to Susan B. without their consent.<sup>7</sup> Upon learning that Susan B. had a child, Daniel, as a result of successful in vitro fertilization (IVF), Robert and Denise sought a parentage action.<sup>8</sup> Genetic testing revealed that Robert B. was Daniel's biological father.<sup>9</sup> Because Robert and Denise used a donated ovum, on the other hand, Denise was not genetically related to the child.<sup>10</sup> The court found that Robert and Susan were the legal parents of the child and refused to give Denise standing to challenge Susan's maternity.<sup>11</sup> Although this Solomonic approach offered some vindication to Robert, it left Denise with nothing.<sup>12</sup> The court relied heavily on biology (Robert's genetics and Susan's gestation) in making its decision,<sup>13</sup> even though Denise had invested much of her time and money in creating the embryo that became Daniel.

Both *Prato-Morrison* and *Robert B.* evoke more questions than answers. Unsettling outcomes are inevitable given the sensitive subject matter of assisted reproduction. Potential parents remove procreation from within the privacy of the home to the public sphere of physicians, researchers, courts, and technology.<sup>14</sup> Outsourcing baby making essentially turns it into a business and invites the potential legal complications of the business world.<sup>15</sup> However, the emotional value placed on a

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*; see Kenneth Ofgang, *CA Rejects Maternal Rights Claim Arising from Clinic Mixup*, METROPOLITAN NEWS-ENTERPRISE, June 17, 2003, at 1, available at <http://www.metnews.com/articles/robe061703.htm> (reporting on the court's finding that Denise was not Daniel's mother).

11. *Robert B.*, 135 Cal. Rptr. 2d at 790.

12. See *id.* (recognizing Robert and Susan as Daniel's parents, but not allowing Denise to assert her maternity claim).

13. See *id.* at 786-87.

14. See Debora Spar & Anna M. Harrington, *Building A Better Baby Business*, 10 MINN. J. L. SCI. & TECH. 41, 42-44, 69 (2009) (connecting the public's hesitancy toward recognition of the market functions of artificial reproduction to its view that baby making is typically a private enterprise).

15. See, e.g., *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1988) (invalidating a "surrogacy contract" on the ground of its unenforceability according to law and public policy); cf. *Prato-Morrison v. Doe*, 126 Cal. Rptr. 2d 509, 515 (Ct. App. 2002) (referencing the amount of money accepted by the Morrisons to resolve a civil action against the fertility clinics that misused their genetic material). See generally Carol Sanger, *Developing Market in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67 (2007) (discussing the growing market and business of baby making in the United States).

child and on parenting creates a situation that is far more complicated than the mistaken transfer of property or a broken contract.<sup>16</sup> Both of the above cases were the results of poor fertility clinic practices. Without regulation, fertility clinics are free to exchange and combine genetic material in whatever self-regulated manner they choose.<sup>17</sup> In a market where the product is both monetarily priceless and emotionally invaluable,<sup>18</sup> self-regulation is risky.

Application of general contract and property law to embryos is no longer appropriate once actual children are involved—which is precisely when litigation surrounding embryo donation is most likely to occur.<sup>19</sup> Regulation of embryo donation is necessary to ensure that the expectations of all the parties involved are clear, to avoid unethical and abusive practices by fertility clinics, and to reduce the risk of litigation resulting from embryo donations.<sup>20</sup> Regulations organized around parentage, not around ownership or biology, can best meet the expectations of persons involved in embryo creation and donation.

This Note suggests that the best way to achieve the above goals is by importing a regulatory system similar to the adoption system that already exists in many states to embryo donation. This is not the first time that commentators have made this suggestion;<sup>21</sup> however, the proposed solution is nuanced by the argument that the purpose of the embryo “adoption” should be to transfer the status of intended parent from the embryo’s creators to a third party. For this reason, in the realm of as-

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16. *Cf. Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (rejecting a property interest in embryos).

17. *See* DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 51 (2006) (noting that “private rules reign” at fertility clinics).

18. *See id.* at 2, 32 (evaluating the market that emerges when demand is limited only by ability to pay).

19. *See* *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785, 786 (Ct. App. 2003) (litigating the parentage of a boy named Daniel); *Prato-Morrison*, 126 Cal. Rptr. 2d at 510 (involving thirteen-year-old twins).

20. *See, e.g., Kass v. Kass*, 663 N.Y.S.2d 581, 594 (App. Div. 1997) (Miller, J., dissenting) (“The legal, emotional, and ethical nightmare . . . demonstrates the clear need for legislation . . .”).

21. *See, e.g.,* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 866 (2000) (suggesting a system analogous to adoption for embryo donation, with some exceptions); Janette M. Puskar, “Prenatal Adoption”: *The Vatican’s Proposal to the In Vitro Fertilization Disposition Dilemma*, 14 N.Y.L. SCH. J. HUM. RTS. 757, 760, 776–77 (1998) (evaluating the papal suggestion that embryo adoption be the sole embryo disposition method).

sisted reproductive technology (ART), the role of intent becomes particularly important.

Part I of this Note explains the embryo's current ambiguous legal status. This outline of existing case law and proposed legislation sets up a framework for understanding the role intent plays in parentage determinations generally. Specifically, surrogacy cases set up a useful analogy for understanding why an intent standard is the best way to determine parentage in embryo donation. Part II argues that intent, rather than biology or genetics, should be used to determine parentage and that intent is established when an embryo is created. Part III suggests that in order for a donor to donate an embryo to anyone other than its creator, the status of intended parent must also be transferred. A regulatory system that mimics the current adoption system is best suited to transfer intent rather than relying on privately negotiated contracts. Part III also addresses some of the critiques of this solution and offers a general suggestion for reform of current uniform legislation as it exists in the Uniform Parentage Act (UPA)<sup>22</sup> and the Model Act Governing Assisted Reproductive Technology (MAGART).<sup>23</sup>

#### I. LEGAL AMBIGUITY—THE EMBRYO, THE PARENT, AND INTENT

Collaborative reproduction, especially embryo donation, can involve a large number of players. There may be an egg donor and a sperm donor whose genetic material is used to create an embryo, one or two embryo donors who originally facilitate the creation of the embryo for their own use, one or two people who receive the donated embryo, and possibly a gestational surrogate who agrees to have the embryo implanted into her uterus and carry it to term.<sup>24</sup> At the very least, there are two donors who are both genetically related to the embryo and at least one person who receives the embryo for his or her own artificial reproductive use.<sup>25</sup> While there is growing legal discourse on all of these potential relationships and parentage is-

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22. *Cf.* UNIF. PARENTAGE ACT (amended 2002), 9B U.L.A. 4 (Supp. 2009); *id.*, 9B U.L.A. 295 (2001).

23. *Cf.* MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 101 (2008), available at <http://www.abanet.org/family/committees/artmodelact.pdf>.

24. *See* Garrison, *supra* note 21, at 849.

25. *See id.* (discussing the different parenting possibilities created by IVF).

sues,<sup>26</sup> there is still relatively little discussion about the relationship between an embryo donor and those receiving the embryo.<sup>27</sup>

Embryo donation rarely arises in case law—probably due to its limited use and typically willing parties.<sup>28</sup> Most state and proposed uniform legislation completely ignores the practice.<sup>29</sup> When handled properly, embryo donation under the current self-imposed rules put in place by fertility clinics seems to work, as evidenced by the small number of cases litigating embryo donation.<sup>30</sup> However, as the use of reproductive technologies and embryo donation increases, problems are inevitable.

The following discussion of the legal status of the embryo, as well as who should be the “parents”<sup>31</sup> of a donated embryo, provides a basis for evaluating the need for a consistently applicable standard for determining parentage. Though there is little case law or legislation specifically addressing parentage of donated embryos, courts have developed models for determining parentage in surrogacy cases. These models are instructive

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26. *See id.* at 840 (“There is a wealth of popular and scholarly literature dealing with the ethical, legal, medical, and human issues arising from [IVF].”). *See generally id.* (discussing the myriad of relationships implicated in assisted reproductive technology (ART) and suggesting analogous legal systems be used to govern these relationships and the issues that arise around them).

27. For example, a search of the term “surrogacy” in Westlaw’s Journals and Law Reviews database results in 2388 sources, while searching for the terms “embryo adoption” or “embryo donation” only renders 358 results (search last conducted Dec. 7, 2009).

28. *See* Aaron Zitner, *A Cold War on Embryo Adoptions*, L.A. TIMES, Mar. 22, 2002, at A1 (detailing the process of embryo adoption and the considerations made both by embryo-donating and embryo-receiving couples); RAND INST. FOR CIVIL JUSTICE & RAND HEALTH, HOW MANY FROZEN EMBRYOS ARE AVAILABLE FOR RESEARCH? 1 (2003), [http://www.rand.org/pubs/research\\_briefs/RB9038/RB9038.pdf](http://www.rand.org/pubs/research_briefs/RB9038/RB9038.pdf) (finding that only 2.3% of all frozen embryos are designated for donation).

29. *See, e.g.*, MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102 (2008), available at <http://www.abanet.org/family/committees/artmodelact.pdf> (failing to address parentage in embryo donation or adoption); UNIF. PARENTAGE ACT § 102 (amended 2002), 9B U.L.A. 11–12 (Supp. 2009) (same).

30. *See generally* Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 788–90 (Ct. App. 2003) (relying on cases that, with the exception of *Prato-Morrison*, do not involve embryo donation); *Prato-Morrison v. Doe*, 126 Cal. Rptr. 2d 509, 514–16 (Ct. App. 2002) (citing cases that do not involve embryo donation).

31. For the purposes of this Note, the term “parent” means the party or parties that have a legally cognizable right to a parent-child relationship with any child born as a result of successful embryo implantation.

when attempting to determine the parentage of a child born as a result of embryo donation.

#### A. THE EMBRYO'S STATUS

The embryo, or more accurately the preembryo,<sup>32</sup> is a four-to-eight-cell zygote with a unique genome.<sup>33</sup> At this stage, the cells are undifferentiated and each has the capacity for developing into any cell in the human body and even separate individuals (clones).<sup>34</sup> It is at this stage of in vitro fertilization (IVF) that a doctor would implant the embryos into a woman's uterus.<sup>35</sup> Usually, for the purposes of IVF, more embryos are created than will be immediately implanted.<sup>36</sup> Remaining embryos are then frozen for storage, destroyed, or used for scientific research.<sup>37</sup> Based on a study conducted in 2002, there were almost 400,000 embryos frozen in storage.<sup>38</sup>

The legal status of the embryo is ambiguous. With the exception of Louisiana,<sup>39</sup> no state has recognized an embryo as an individual with legally enforceable rights.<sup>40</sup> If the law recognized an embryo as a person and gave it individual rights, embryo donation would require adoption and full relinquishment of parental rights.<sup>41</sup> In fact, one of the strongest points of opposi-

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32. This Note uses the terms embryo and preembryo interchangeably.

33. See John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 441 (1990).

34. See Francis J. Beckwith, *Must Theology Always Sit in the Back of the Secular Bus?: The Federal Courts' View of Religion and Its Status as Knowledge*, 24 J.L. & RELIGION 547, 565 (2008) (defining undifferentiated cells as "totipotent," which means that the cells "have the capacity to develop into any organ"); Gregory Dolin, M.D., *A Defense of Embryonic Stem Cell Research*, 84 IND. L.J. 1203, 1208 (2009) (discussing undifferentiated cells' capacity to develop into a fully adult organism or any cell in the organism).

35. See Robertson, *supra* note 33, at 443.

36. See Katheryn D. Katz, *The Legal Status of the Ex Utero Embryo: Implications for Adoption Law*, 35 CAP. U. L. REV. 303, 303 (2006) ("[M]ore embryos are created than can safely be transferred to the woman's body for implantation . . .").

37. See *id.* at 304.

38. See RAND INST. FOR CIVIL JUSTICE & RAND HEALTH, *supra* note 28, at 1.

39. See LA. REV. STAT. ANN. § 9:121 (2008) (giving a human embryo the legal status of a person).

40. See *Davis v. Davis*, 842 S.W.2d 588, 590 n.1 (Tenn. 1992) (noting that at the time of trial only one state had enacted legislation that recognized an embryo as having legally enforceable rights as an individual).

41. See Katz, *supra* note 36, at 337 ("If embryos are persons, then logic dictates that adoption law with all of its regulations and restrictions should govern the process of embryo donation.").

tion on the question of embryo adoption versus donation is the fear that the embryo will be recognized as a person, thus implicating a host of abortion and embryonic stem-cell research issues.<sup>42</sup>

Despite their lack of rights, embryos occupy a unique legal sphere somewhere between property and personhood. When addressing issues concerning embryos, courts tend to apply a combination of property, contract, and family law.<sup>43</sup> The status of embryos typically becomes important in disputes between embryo creators where the parties disagree as to the disposition of the embryo.<sup>44</sup> Courts tend to agree that contracts concerning the disposition of the embryo are enforceable unless one of the parties changes his or her mind at any time up to destruction or implantation of the embryo.<sup>45</sup> This rationale is based on the privacy rights that surround procreation and is often identified as an interest in “avoiding procreation” tied up with procreational autonomy.<sup>46</sup> While some commentators suggest that the qualified recognition of contracts ultimately equates to property law,<sup>47</sup> the courts’ willingness to overlook the contract<sup>48</sup> and base their decisions on a balancing test of

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42. See *id.* at 333–34 (“If the ex utero embryo is recognized as a person, the most powerful effect would be as an entering wedge in the fight against legal abortion.”).

43. See, e.g., *Davis*, 842 S.W.2d at 597 (“We conclude that preembryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”).

44. See, e.g., *id.* at 598 (analyzing the disposition of an embryo where the divorcing parties had neither an express nor implied contract as to its disposition).

45. See, e.g., *In re Marriage of Witten*, 672 N.W.2d 768, 782–83 (Iowa 2003) (holding that public policy prohibits the enforcement of a contract for the disposition of unused embryos when one of the parties changes his or her mind). *But cf. id.* at 782 (“[W]e think judicial enforcement of an agreement *between a couple* regarding their future family and reproductive choices would be against the public policy of this state. Our decision should not be construed, however, to mean that disposition agreements *between donors and fertility clinics* have no validity at all.”).

46. *Davis*, 842 S.W.2d at 602 n.26.

47. See *Katz*, *supra* note 36, at 315–16 (“Despite paying lip service to the notion of special respect, in reality courts treat the embryo as the property of its progenitors.”).

48. See *In re Witten*, 672 N.W.2d at 782 (rejecting the contractual agreement and holding that a contract in this realm is subject to the right of either party to change its mind after the initial agreement).

each contributor's rights<sup>49</sup> intimate that the interest one has in an embryo is greater than a property interest. Though courts have been clear that they do not intend to give the embryo itself rights,<sup>50</sup> the unique legal status of the embryo creates a distinctive interest for its creators.

The difference between egg or sperm donors and embryo donors further supports an embryo donor's special interest in his or her embryo. The primary difference is that people who provide their egg or sperm do not intend to parent any resulting children.<sup>51</sup> By contrast, people who create embryos have every intention of parenting any resulting children. Because embryo creators intentionally create more embryos than they might use in a single IVF cycle, they sometimes donate some of their embryos to other hopeful parents.<sup>52</sup> Nevertheless, the primary intent of embryo creators is to use those embryos for their own artificial reproduction.<sup>53</sup> This is generally supported by the contracts most parties sign concerning the disposition of unused embryos.<sup>54</sup> But as their needs change, so does their intent concerning each embryo. The extent to which donor intent determines the parentage of a future child is therefore of particular importance.

#### B. THE INTENDED PARENT

The scarcity of case law or legislation on embryo donation offers little guidance in determining parentage. By refusing to allow genetic testing in *Prato-Morrison*, the court refrained

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49. See *Davis*, 842 S.W.2d at 604 (employing a balancing test when no contract exists concerning disposition of unused embryos).

50. See, e.g., *id.* at 597 (refusing to characterize preembryos as either persons or property).

51. See Sarah Terman, Note, *Marketing Motherhood: Rights and Responsibilities of Egg Donors in Assisted Reproductive Technology Agreements*, 3 NW. U. J.L. & SOC. POL'Y 167, 172 (2008) (discussing the practice of assuring egg providers that their participation will terminate upon the extraction of their eggs).

52. See Karin A. Moore, *Embryo Adoption: The Legal and Moral Challenges*, 1 U. ST. THOMAS J.L. & PUB. POL'Y 100, 104–05 (2007) (explaining how cryopreservation creates the possibility of leftover embryos).

53. RAND INST. FOR CIVIL JUSTICE & RAND HEALTH, *supra* note 28, at 2 (finding that 88.2% of frozen embryos have been designated for family-building).

54. See Natalie R. Walz, *Abandoned Frozen Embryos and Embryonic Stem Cell Research: Should There Be a Connection?*, 1 U. ST. THOMAS J. L. & PUB. POL'Y 122, 123 (2007) (stating that couples often agree to the disposition of leftover embryos in a contract).

from addressing parentage.<sup>55</sup> In *Robert B.*, the court looked strictly at biology. It nullified the “donation” that Susan, the gestational mother, believed she had received; forced Robert, the genetic father, to raise his child alongside a complete stranger; and denied Denise, Robert’s wife and one of the embryo’s creators, recognition as the child’s mother.<sup>56</sup> None of the parties got what they bargained for. Nonetheless, as embryo donation becomes more frequent<sup>57</sup> and more litigation emerges, judges will likely take a piecemeal approach, based on common law and existing statutes, to resolving these cases.<sup>58</sup>

Surrogacy cases provide a parallel for discussing possible parentage issues in embryo donation. Courts typically employ one or more of three possible means of determining parentage in surrogacy disputes: genetics,<sup>59</sup> gestation,<sup>60</sup> and intent.<sup>61</sup> Judicial determination is usually predicated on statutory language; however, statutes often create loopholes for surrogacy issues by which parentage can be established either by gestation or genetics.<sup>62</sup>

State parentage statutes are often based on the original Uniform Parentage Act (UPA) adopted in 1973, which aimed to remedy the illegitimacy of children born to unmarried women by extending parentage to fathers regardless of marital status.<sup>63</sup> However, when applied to women, determining parentage

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55. See *Prato-Morrison v. Doe*, 126 Cal. Rptr. 2d 509, 515 (Ct. App. 2002) (holding that the alleged genetic mother lacked standing to pursue parentage action and therefore declining to decide parentage).

56. See *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785, 785–86 (Ct. App. 2003).

57. See *SPAR*, *supra* note 17, at 90–91 (noting that, due to the high demand for reproductive technology and the comparatively low cost for embryo donation, a market for embryo donation among the middle class is likely to expand).

58. See *Prato-Morrison*, 126 Cal. Rptr. 2d at 516 n.10 (“Whatever merit there may be to a fact-driven case-by-case resolution of each new issue, some overall legislative guidelines would allow the participants to make informed choices and the courts to strive for uniformity in their decisions.”).

59. See, e.g., *Belsito v. Clark*, 67 Ohio Misc. 2d 54, 64–65 (Ct. C.P. 2004).

60. See, e.g., *In re C.K.G.*, 173 S.W.3d 714, 730 (Tenn. 2005).

61. See, e.g., *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 289 (Ct. App. 1998).

62. See *In re C.K.G.*, 173 S.W.3d at 726 (recognizing the gap statutes create by assuming the gestating woman is the mother in situations where a surrogate is used); *Johnson v. Calvert*, 851 P.2d 776, 781–82 (Cal. 1993) (finding that application of state statutes could result in legal declaration of motherhood to either of two women, one by virtue of her gestation of the child and the other by her genetic relationship to the child).

63. See NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, SUMMARY:

by genetics creates a statutory void in surrogacy issues,<sup>64</sup> and potentially in embryo donation issues. A recurring complaint in cases surrounding embryos and surrogacy is the lack of directly applicable legislation.<sup>65</sup> Reliance on these outdated uniform laws forces courts to apply rules that do not consider all of the emerging issues of artificial reproductive technologies (ART).<sup>66</sup>

Revisions of the UPA in 2000 specifically addressed parentage of children resulting from ART.<sup>67</sup> In particular, the UPA defines the “intended parent” and applies the intent standard to surrogacy agreements,<sup>68</sup> but does not address embryo donation or embryo adoption. In 2008, the American Bar Association published the Model Act Governing Assisted Reproductive Technology (MAGART).<sup>69</sup> This Act briefly discusses the issue of embryo donation, but limits its discussion to providing donation as one of the options for disposition of unused embryos.<sup>70</sup> Like

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UNIFORM PARENTAGE ACT, [http://www.nccusl.org/nccusl/uniformact\\_summaries/uniformacts-s-upa.asp](http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-upa.asp) (last visited Dec. 7, 2009) (explaining that the original UPA extended the parent-child relationship without regard to marital status and crafted a “modern civil paternity action in which the sole issue was identifying the natural father of any child”); *see also Johnson*, 851 P.2d. at 778–79 (noting that the Uniform Parentage Act was enacted in California in 1975 with the goal of eliminating the “legal distinction between legitimate and illegitimate children”).

64. *See Johnson*, 851 P.2d at 782 (noting the failure of California statutes to resolve the conflict between genetic and gestational bases for maternal rights).

65. *See In re C.K.G.*, 173 S.W.3d at 730 (“Given the far-reaching, profoundly complex, and competing public policy considerations necessarily implicated by the present controversy, we conclude that crafting a general rule to adjudicate all controversies so implicated is more appropriately accomplished by the Tennessee General Assembly.”).

66. *See Belsito v. Clark*, 67 Ohio Misc. 2d 54, 60 (Ct. C.P. 1994) (“It is apparent that the law must adapt and change to end the confusion caused by surrogacy.”).

67. UNIF. PARENTAGE ACT §§ 701–809 (amended 2002), 9B U.L.A. 354–70 (2001) (addressing assisted reproduction in article 7 and gestational agreements, or surrogacy, in article 8); *see also id.* §§ 701–809, 9B U.L.A. 61–77 (Supp. 2009) (amending the 2000 version of the UPA and discussing the variations of the official text that some states have enacted).

68. *See id.* § 102(12), 9B U.L.A. 304 (2001) (defining “intended parents”); *id.* § 801(a)(3), 9B U.L.A. 362 (2001) (authorizing a “gestational agreement” whereby the intended parents may agree to become the parents of a donor’s or gestational mother’s child). *But see id.* § 102, 9B U.L.A. 11–12 (Supp. 2009) (amending the Uniform Parentage Act to omit the definition of “intended parent,” although the term does appear in § 801(a)(3) of the amended version of the UPA).

69. *Cf. MODEL ACT GOVERNING ASSISTED REPROD. TECH.* (2008), *available at* <http://www.abanet.org/family/committees/artmodelact.pdf>.

70. *See id.* § 203(1)(c).

the UPA, this Act fails to address parentage for donated embryos.

Genetics determined parentage in *Belsito v. Clark*, where the intended parents wanted an order placing their names on the birth certificate of their genetic child who was carried to term by the intended mother's sister.<sup>71</sup> In declaring this couple the child's parents, the court based its decision on the protection of a genetic parent's right to consent to procreate.<sup>72</sup> Because the genetic parents did not intend for the surrogate to become the legal parent of the child, the court held that they should not lose their right to parent the resulting child.<sup>73</sup> The shortcoming of this test is that often only one or neither of the intended parents is biologically related to the child.<sup>74</sup> In such cases, the child would be left with no parents, since egg and sperm donors are often anonymous.<sup>75</sup>

Without proffering a formal standard, the *Belsito* court also relied on the fact that the surrogate did not wish to parent the child.<sup>76</sup> Under this narrow holding, it is likely that the court implicitly intended a genetic test to apply only in situations where the intended parents are both genetic contributors to the embryo.

A genetics-based decision relies on a biological connection with the child. Sometimes the gestational mother is the intended parent but has no genetic connection to the child. In such cases, gestation, not genetics, provides the biological connection on which courts can rely to determine parentage. In *In re C.K.G.*, a couple used the intended father's sperm to fertilize a donated egg, which was then implanted in the uterus of the intended mother, who gave birth to triplets.<sup>77</sup> When the couple's relationship dissolved and a custody battle ensued over the triplets, the court refused to base its parentage decision

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71. 67 Ohio Misc. 2d 54, 58, 66 (Ct. C.P. 1994).

72. See *id.* at 63–64 (arguing that the right to consent to procreate is fundamental and must be protected by the law).

73. See *id.* at 64–65 (“The test to identify the natural parents should be, ‘Who are the genetic parents?’”).

74. See *In re C.K.G.*, 173 S.W.3d 714, 726 (Tenn. 2005) (“In the event that a dispute were to arise between an intended mother who had obtained eggs from a third-party donor and a gestational surrogate in whom the eggs had been implanted, the genetic test would implicitly invalidate any surrogacy agreement.”).

75. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 289 (Ct. App. 1998) (arguing that a biological test results in “legal parentlessness”).

76. See *Belsito*, 67 Ohio Misc. 2d at 65.

77. 173 S.W.3d at 717–18.

strictly on genetics.<sup>78</sup> Instead, it surveyed a variety of factors: the intended mother's gestation of the children, her former husband's original intent that she be the triplets' mother, and the fact that the genetic mother did not want custody.<sup>79</sup>

The holdings in *C.K.G.* and *Belsito* apply to situations in which the intended mother is biologically connected to the embryo that results in a child. In *Belsito*, the intended mother contributed genetic material to the embryo.<sup>80</sup> In *C.K.G.*, the intended mother gestated and gave birth to the children.<sup>81</sup> The problem with a biology-based determination of parentage is that many situations may arise in which the intended mother is neither genetically nor gestationally connected to the resulting child. In such cases, this woman would never be recognized as the child's parent. These surrogacy cases highlight the gaps that begin to form when applying a biological standard to parentage.

The intent approach, however, fills in this gap, as demonstrated in *In re Marriage of Buzzanca*. The court in *Buzzanca* found that a husband and wife who facilitated the creation of an embryo and arranged for a surrogate to carry the child to term, but were not biologically related to the child, were nonetheless the legal parents of the resulting child.<sup>82</sup> The court relied heavily on the language that the California legislature employed in its enactment of the original UPA.<sup>83</sup> The statute said that gestation or genetics "may" establish parentage but did not say that it must.<sup>84</sup> This language gave the court room to recognize a third way of determining parentage: intent.<sup>85</sup>

Unfortunately, courts applying the intent standard are not entirely clear as to when intent is established. In *Johnson v. Calvert*, the court found that when gestation and genetics do

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78. *See id.* at 727–28 ("In cases such as this one, where a woman has become intimately involved in the procreation process even though she has not contributed genetic material, factors other than genetics take on special significance.").

79. *Id.* at 730.

80. *See Belsito*, 67 Ohio Misc. 2d at 63–64.

81. *See In re C.K.G.*, 173 S.W.2d at 730.

82. *See In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998) ("Even though neither [the intended mother nor the intended father] are biologically related to [the child], they are still her lawful parents given their initiating role as the intended parents in her conception and birth.").

83. *See id.* at 284 (noting that California's adoption of the UPA controlled the parentage issue).

84. *Id.*

85. *See id.* at 293.

not reside in the same woman, the nongestational woman's intent to procreate a child, bring about its birth, and raise it makes her its legal parent.<sup>86</sup> The court noted that the couple and the surrogate consented to the surrogacy agreement before the in vitro process began,<sup>87</sup> but it did not indicate how their intent would be affected if the embryo were created before the surrogate was identified.<sup>88</sup> In *Buzzanca*, the court curtly stated that the child "never would have been born had not [the intended parents] both agreed to have a fertilized egg implanted in a surrogate."<sup>89</sup> The court analogized the determination of maternal parentage to cases in which a man who consents to artificial insemination of his wife by another man's sperm is still considered the legal parent of the resulting child.<sup>90</sup> In both *Buzzanca* and *Johnson*, the courts recognized that intent to be a parent was established by consent to and initiation of a medical procedure for procreation of a child.<sup>91</sup>

The two major criticisms of the intent test are its ambiguity and the opportunity it creates for unmonitored adoption.<sup>92</sup> Ambiguity may arise when both the surrogate and the person facilitating the embryo creation intend (or claim to intend) to parent the resulting child.<sup>93</sup> Unmonitored adoption could occur if only the surrogate intended to parent the child and the creators of the embryo did not.<sup>94</sup> As the law stands these may or may not be valid concerns, but an adoption-based system would alleviate these concerns if applied to embryo donation.

## II. THE INTENDED PARENT AND EMBRYO DONATION

An intent standard is the best method for determining parentage in embryo donation because it remedies the shortcomings of the two biological tests of genetics and gestation. More broadly, it provides a uniform standard that can be applied to

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86. See *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (holding that when the woman who gives birth to a child is not the woman who provided its genetic material, "she who intended to procreate the child . . . is the natural mother under California law").

87. See *id.* at 784.

88. Cf. *id.* (failing to address to what degree intent can be separated from the contract, but concluding that intent determines parentage).

89. *In re Buzzanca*, 72 Cal. Rptr. 2d at 282.

90. *Id.*

91. See *id.* at 293; *Johnson*, 851 P.2d at 782.

92. See *Belsito v. Clark*, 67 Ohio Misc. 2d 54, 61-62 (Ct. C.P. 1994).

93. See *id.* at 62.

94. See *id.*

all parentage issues associated with assisted reproduction. Having an umbrella-like standard for these issues acknowledges the fact that assisted reproduction is collaborative; the parties involved and their roles are not consistent and vary with the particular needs of each situation. Further, there is a foundation for using an intent standard within emerging case law and uniform laws. This is not to say that an intent standard, as it functions in current case law and proposed legislation, is readily applicable to embryo donation. Intent should be considered throughout the ART process and its fluidity should also be recognized so as to make it more germane to embryo donation.

#### A. DETERMINING PARENTAGE BY BIOLOGY IS INAPPLICABLE TO EMBRYO DONATION

For the purposes of embryo donation, determining parentage strictly through biology simply will not work because donees are never genetically related to the embryos they receive and consequently would never be found to be parents.<sup>95</sup> While gestation protects a woman who receives an embryo and has it implanted in her uterus, it would not protect a couple who obtained an embryo and then hired a surrogate.<sup>96</sup>

Additionally, gestation only determines parentage for the mother, which could end up melding families in ways not intended by the donors or donees. Such was the case in *Robert B.* where the court recognized Robert, the genetic father of the child, as the legal father and Susan as the legal mother by virtue of her gestation.<sup>97</sup> This pair was inadvertently bound by the court through “their” child, while neither person’s spouse had any claim to the child.<sup>98</sup>

Further, the biology-based standards do not protect embryo creators from having their embryos stolen and implanted without their consent.<sup>99</sup> In contrast, an intent standard would over-

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95. See *In re Buzzanca*, 72 Cal. Rptr. 2d at 289 (arguing that a biological test results in “legal parentlessness”).

96. See *id.* at 283 (noting the trial judge’s partial reliance on the fact that the embryo creator was not the gestational mother to find that she was not the legal mother).

97. See *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785, 785 (Ct. App. 2003).

98. See *id.* (denying Denise, Robert’s wife, standing to pursue her parentage claim and failing to mention whether Susan had a spouse or what his role was in this process).

99. See *id.* (ruling that Denise, one of the embryo creators, could not seek parentage).

come the barriers that biology imposes by being more broadly applicable.

B. AN INTENT STANDARD WOULD APPLY UNIFORMLY TO SURROGACY AND OTHER ART PRACTICES

Applying an intent standard would create uniformity by identifying the greatest number of biological combinations within a single standard. Surrogacy and embryo donation are essentially mirror images of the same practice.<sup>100</sup> A standard that explicitly recognizes genetics as determinative of parentage will always bar embryo donation and will not always be effective in surrogacy situations.<sup>101</sup> In fact, a child could be left totally parentless.<sup>102</sup> A standard based entirely on gestation will always result in the child having a mother, but will never protect surrogacy agreements.<sup>103</sup> Additionally, gestation will not determine a father.<sup>104</sup> Intent, in contrast, is not tied to biology and allows collaborative reproduction to function. The very goal of artificial reproduction is to circumvent the biological process, so it is appropriate that biology be removed from the parentage equation.

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100. See SPAR, *supra* note 17, at 90 (“The only real difference [between embryo donation and surrogacy] was subtle but huge: in embryo adoption, the birth mother—the woman who was bearing another’s genetic child—was now legally and socially the ‘real’ mother. The surrogate, in other words, had become the real thing.”).

101. See *Belsito v. Clark*, 67 Ohio Misc. 2d 54, 66 (Ct. C.P. 1994) (holding that if the “individuals who have been identified as the genetic parents have not relinquished or waived their rights to assume the legal status of natural parents, they shall be considered the natural and legal parents of that child,” a rule that would unsatisfactorily resolve a *Robert B.*-like situation in which the embryo creators did not waive their rights, but the woman in whom it was implanted believed that they had).

102. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 289 (Ct. App. 1998) (arguing that a biological test results in “legal parentlessness”).

103. A gestational mother will always be identifiable because technology still prevents children from developing entirely outside of the womb. Inherent in the concept of surrogacy is that the intended mother does not carry the child. If gestation were the only factor considered, the woman who gave birth to the child would always trump the intended mother.

104. Technology has not advanced such that men are able to carry and give birth to children. See, e.g., *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 945 (8th Cir. 2007) (Bye, J., dissenting) (“[W]omen are the only gender which can become pregnant.”).

C. UNIFORM LAWS ARE READILY ADAPTABLE TO INCLUDE AN INTENT STANDARD FOR EMBRYO DONATION

Though they fail to address embryo donation, the most recent legislative guides have suggested that the intended parent be recognized for the purposes of surrogacy.<sup>105</sup> The definitions used for “intended parent” in both the UPA and the MAGART could apply to embryo donation.<sup>106</sup> The UPA defines intended parents as “individuals who enter into an agreement providing that they will be the parents of a child born to a gestational mother by means of assisted reproduction, whether or not either of them has a genetic relationship with the child.”<sup>107</sup> This definition is specifically tailored toward surrogacy,<sup>108</sup> but it recognizes a parental interest in individuals before a child is born based on their intention to parent that child after its birth.<sup>109</sup> An expansive reading of the definition could include anyone who signs a contract with a fertility clinic for IVF. Specifically extending this conclusion to embryo donation, the gestational mother, who is also the embryo donee, would be the intended parent.

The MAGART provides a broader definition of an intended parent that can more easily be extended to embryo donation: “[i]ntended parent” is an individual, married or unmarried, who manifests the intent as provided in this Act to be legally bound as the parent of a child resulting from assisted or colla-

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105. See, e.g., MODEL ACT GOVERNING ASSISTED REPROD. TECH. alternative B, § 701(2)(a) (2008), available at <http://www.abanet.org/family/committees/artmodelact.pdf> (“The intended parents shall be the parents of the child for purposes of State law immediately upon the birth of the child.”); UNIF. PARENTAGE ACT § 807 (amended 2002), 9B U.L.A. 69 (Supp. 2009) (requiring the court to confirm the intended parents as the parents of a child upon a validated gestational agreement).

106. See MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(19) (2008), available at <http://www.abanet.org/family/committees/artmodelact.pdf>; UNIF. PARENTAGE ACT § 102(12) (amended 2002), 9B U.L.A. 304 (2001). But see *id.* § 102, 9B U.L.A. 11–12 (Supp. 2009) (amending the Uniform Parentage Act to omit the definition of “intended parent,” although the term does appear in § 801(a)(3) of the amended version of the UPA).

107. UNIF. PARENTAGE ACT § 102(12) (amended 2002), 9B U.L.A. 304 (2001).

108. See *id.* §§ 801–809, 9B U.L.A. 362–69 (2001) (distinguishing the “intended parents” of a child born as a result of a gestational agreement from a “gestational mother,” previously referred to as a “surrogate mother”); see also *id.* §§ 801–809, 9B U.L.A. 69–77 (Supp. 2009) (adding to and amending the original version of the UPA).

109. See *id.*, 9B U.L.A. 304 (2001).

borative reproduction.”<sup>110</sup> There is no absolute definition of intent in the MAGART,<sup>111</sup> but in the section addressing the donation of unused embryos, the MAGART refers to donors as intended parents.<sup>112</sup>

These recent changes to uniform legislation show a movement toward a more expansive view of parentage in light of ART and begin to contemplate the role of intent in ART situations. Building on this existing uniform legislation to better define intent is the first step to creating a workable intent standard for parentage.

#### D. CLARIFYING THE FORMATION OF INTENT

None of these standards explicitly addresses when intent is formed.<sup>113</sup> In surrogacy, intent seems to be recognized through contracts,<sup>114</sup> though there is some language in case law that implies it may be formed earlier.<sup>115</sup> Applying the MAGART suggests that it is possible to exercise intent earlier since donors are intended parents.

For the purposes of embryo donation, intent should be recognized when the embryo is created. Embryo creators, regardless of their genetic relation to the embryo, have the greatest interest in that embryo because of the ambiguous status society and the law place on embryos.<sup>116</sup> Genetically speaking, the embryo is an individual apart from the genetic material used to create it.<sup>117</sup> For this reason, an egg or sperm donor should not automatically have a parentage claim. The embryo is no longer

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110. See MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(19) (2008), available at <http://www.abanet.org/family/committees/artmodelact.pdf>.

111. See *id.* (defining the procedure for manifesting intent broadly).

112. See *id.* § 502 (“Intended parents may choose to donate their unused embryos . . .”).

113. See, e.g., *id.* § 102(19) (requiring the manifestation of intent, but failing to explain how intent is manifested).

114. *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993) (“In deciding the issue of maternity under the [California Uniform Parentage] Act we have felt free to take into account the parties’ intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, inconsistent with public policy.”).

115. See *id.* (citing commentators who suggest that the idea of creating a child manifests intent as it controls the eventual creation of the child).

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

117. See *Robertson*, *supra* note 33, at 441.

uniquely theirs. Additionally, an egg donor or sperm donor, by definition, never intends to parent a child and, therefore, does not have the intent necessary to be considered an intended parent.<sup>118</sup> Embryo donors, however, do intend to parent the embryos they create to the extent that they desire children.<sup>119</sup> If they did not intend to have children, they would not have created the embryos. To the extent that someone allows their genetic material to be used to create an embryo that they intend to donate, they are actually egg or sperm donors. Given that embryos are not bought or sold,<sup>120</sup> there is no present market for people to create embryos, with their own genetic material or that of others, for the purpose of giving them to someone else.

Embryo creation is also a clearly definable moment at which intent can be established. For the intent standard to function effectively, intent should be manifested in a legally cognizable manner. Parentage cannot reliably be decided based on what people *want* to happen. Several people can “intend” to be parents—in fact, this is the source of much parentage litigation.<sup>121</sup>

One of the primary reasons for regulating embryo donation is to prevent this sort of litigation. Once a child is born the primary concern of the court is protecting that child’s best interest.<sup>122</sup> Custody disputes can be lengthy and prevent consistency and permanency in a child’s life, neither of which is consistent with the child’s best interest.<sup>123</sup>

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118. See MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(9) (2008), available at <http://www.abanet.org/family/committees/artmodelact.pdf> (excluding “intended parents” from the definition of the term “donor”).

119. See *supra* notes 52–54 and accompanying text.

120. See SPAR, *supra* note 17, at 91 (“Donors clearly are not selling their embryos; they are giving them to other parents . . .”). Although embryos are not currently being bought or sold, it is important to remember that other assisted-reproduction materials (such as sperm for artificial insemination, eggs for IVF, and wombs for surrogacy) were also not bought or sold in the early stages of the development of assisted reproductive technology. See *id.* The transition from donation to transaction of embryos may only be a matter of time.

121. See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993) (challenging a surrogate’s decision to keep the child she was carrying despite a contract stating that she would give the child to the intended parents when it was born).

122. See *Prato-Morrison v. Doe*, 126 Cal. Rptr. 2d 509, 511 (Ct. App. 2002) (“[T]he best interests of the children dictate the result reached by the trial court.”).

123. See *Belsito v. Clark*, 67 Ohio Misc. 2d 54, 63 (Ct. C.P. 1994) (noting

Preventing damaging litigation is also a goal of uniform legislation.<sup>124</sup> In its prefatory note, the MAGART addresses the child's interest directly: "[i]t is the purpose of this Act to give assisted reproductive technology (ART) patients, participants, parents, providers, and *the resulting children* and their siblings clear legal rights, obligations and protections."<sup>125</sup> In order to prevent litigation, legally recognized intent must be established by a readily identifiable action. Embryo creation is a clear and unmistakable moment when intent can be identified. If one waits until a surrogacy agreement or a contract to transfer an embryo is signed, parties can argue the contract is void, an argument that is recognized by courts.<sup>126</sup>

### III. APPLYING THE INTENT STANDARD TO EMBRYO DONATION

Embryo creators have a special interest in their embryos. Recognizing the intended parent relationship between an embryo and its creators reflects the embryo's ambiguous status between life and property.<sup>127</sup> The intended parent should have the same rights as any embryo creator. He or she should be able to control the embryo's disposition,<sup>128</sup> make contracts with fertility service providers,<sup>129</sup> and enjoy a presumption of parenthood of any child that results from the implantation of the embryo.<sup>130</sup> Recognizing the intended parent at the time of the embryo's creation provides a clear guideline for parentage is-

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that stability and finality in the parent-child relationship are in the child's best interest).

124. See John J. Sampson, *Uniform Family Laws and Model Acts*, 42 FAM. L.Q. 673, 677 (2008) (suggesting that uniform legislation reduces litigation).

125. MODEL ACT GOVERNING ASSISTED REPROD. TECH. prefatory note (2008) (emphasis added), available at <http://www.abanet.org/family/committees/artmodelact.pdf>.

126. See, e.g., *Belsito*, 67 Ohio Misc. 2d at 62 (holding that public policy will not allow the state to enforce or encourage private agreements or contracts to give up parental rights).

127. See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (explaining that preembryos are neither persons nor property).

128. See, e.g., MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 501(1)(a), available at <http://www.abanet.org/family/committees/artmodelact.pdf> (requiring that embryo agreements provide for the intended use and disposition of embryos).

129. See, e.g., *id.* § 501(1)(c) (requiring that embryo agreements have conditions under which embryos will be abandoned at fertility clinics).

130. See, e.g., *id.* § 603 ("An individual who provides gametes for, or consents to, assisted reproduction by a woman . . . with the intent to be a parent of her child is a parent of the resulting child.").

sues. Intent would not be a feeling or emotion, but rather a manifestation of an interest that arises at the time an embryo is created.<sup>131</sup> In the context of embryo donation, the intended parental interest would have to be transferred to those receiving the embryo in order for there to be a presumption of parentage on the part of the recipient.

#### A. PRESUMPTION OF PARENTAGE THROUGH INTENT IS DESIRABLE

Parentage determination is an inherent goal of embryo donation. Whoever receives the embryo wants to know that they will be the resulting child's legal parents. Establishing this before the child's birth is of the utmost importance because once a child is born, its best interest is the primary concern of the court, as evidenced in both *Prato-Morrison*<sup>132</sup> and *Robert B.*<sup>133</sup> How does one best pursue this goal before the child's birth in order to avoid unnecessary litigation that is both potentially harmful to the child and costly to the relevant parties? The ultimate goal of embryo donation is the birth of a child, yet simply applying the child's best interest standard to an embryo would be inconsistent with the determination that an embryo is not a person.

Embryo donation heightens the ambiguous nature of the embryo because it sets up a dichotomy between its characteristics that tend toward property and those that tend toward personhood. On the one hand, the embryo is property in that it can be destroyed, donated to science for experimentation, and stored for indefinite periods of time.<sup>134</sup> On the other hand, it is more like a person based on its biological uniqueness and potential for human life<sup>135</sup> and, in the case of embryo donation,

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131. See, e.g., *id.* § 102(19) (suggesting that a manifestation of intent be required for recognition of the intended parent).

132. See *Prato-Morrison v. Doe*, 126 Cal. Rptr. 2d 509, 516 (Ct. App. 2002) (“[H]ad the Morrises presented proof of a genetic link to the twins sufficient to establish their standing to pursue a parentage action, it would not be in the best interests of the twins to have the Morrises intrude into their lives . . .”).

133. See *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785, 788 n.6 (Ct. App. 2003) (concluding that Robert's actions were in line with the child's best interests).

134. See *Katz*, *supra* note 36, at 304 (“The progenitors have a number of options . . . They may use the embryos for attempts at a future pregnancy, donate them to be used for research, give them to another couple . . . leave them in cryostorage . . . or request that they be discarded.”).

135. See *Robertson*, *supra* note 33, at 441 (“At this stage a new and unique genome beginning a new generation exists . . .”).

the goal of the transaction is that a child be born.<sup>136</sup> Recognizing intent creates a link between these competing interests. Legally acknowledging the intended parents would create a legal fiction of sorts that would allow the embryo to be treated as something that it is not for the purpose of protecting what each party intends for it to be.

#### B. SEVERING THE INTENDED-PARENT RELATIONSHIP

The intended-parent relationship must transfer from the embryo's creators to the donees. Fertility clinics typically transfer the embryo in one of two ways, either by a contract or through embryo adoption. Considering the nature of the embryo, the ultimate goals of embryo donation, and the instability of contracts, embryo adoption should be the legislated process by which the intended-parent status is transferred. Adoption provides clarity and finality to embryo transfer. Embryo adoption, though currently practiced privately, mimics state adoption, requiring home studies, parenting classes, and criminal background checks.<sup>137</sup>

Having both the donors and the donees go through the adoption process creates a formalized agreement and imports the significance of the transfer. It also communicates the finality of the transaction. Donees are more likely to be protected because of the significant amount of time and effort the adoption process requires. Donors are less likely to dispute parentage because they, in a manner similar to normal adoption, exert a certain amount of control in choosing the donees.<sup>138</sup>

A regulated embryo adoption system would also establish uniformity in the embryo transfer process. Uniformity would increase the likelihood of predictability. When litigation does occur, courts would have a clear set of regulations applicable to every case. Rules for the transfer of intent would be consistent regardless of the parties or the fertility clinic used. It would

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136. See Katz, *supra* note 36, at 303 (noting that in vitro fertilization externalizes human conception).

137. See SPAR, *supra* note 17, at 92 (observing that one fertility clinic "explicitly subjects its prospective parents to the same procedures that govern domestic infant adoption—a home study, parent training sessions, criminal screening . . .").

138. See *id.* at 89–90 (noting that embryo donors may utilize a database of parents seeking to adopt in order to choose and often even interview potential donees).

provide the sort of guidance that courts often say artificial reproduction cases lack.<sup>139</sup>

Embryo adoption is also appropriate considering how easily it fits within the already established adoption system. The rules and regulations that control adoptions are already in place.<sup>140</sup> That embryo donation is still a relatively new practice would aid a transition into an adoption system because there is not yet a preset standard for the practice. Setting out clear guidelines would also lend a greater sense of legitimacy to embryo donation, which could increase its use and help to decrease the number of embryos currently frozen in storage.<sup>141</sup> Adoption also contemplates the fact that a child that will likely result from embryo donation.<sup>142</sup> A careful balance must be struck between recognizing that an embryo is not legally a person<sup>143</sup> and respecting that the goal of embryo donation is to create a child.<sup>144</sup> Ultimately, society should invest in ensuring that the child's best interests are maintained.

One alternative to an adoption system is reliance on private contracts. Since contracts are privately negotiated, they do not provide the structure needed for embryo donation regulation. Parties can dispute the meaning of ambiguous contracts, and contracts are not always enforced in the artificial reproduction context.<sup>145</sup> For instance, in *Belsito* the court's ruling aligned with the goal of the contract, but ultimately relied on the intended parent's biological connection to the child that was born using a surrogate.<sup>146</sup> An adoption system eschews this potentially litigious uncertainty.

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139. See, e.g., *In re C.K.G.*, 173 S.W.3d 714, 730 (Tenn. 2005) ("Given the far-reaching, profoundly complex, and competing public policy considerations necessarily implicated by the present controversy, we conclude that crafting a general rule to adjudicate all controversies so implicated is more appropriately accomplished by the Tennessee General Assembly.").

140. See, e.g., UNIF. ADOPTION ACT (1994), 9 U.L.A. pt. 1A, at 2 (Supp. 2009) (noting that Vermont has enacted the Uniform Adoption Act).

141. See RAND INST. FOR CIVIL JUSTICE & RAND HEALTH, *supra* note 28, at 1 (reporting that over 400,000 embryos are currently frozen in storage).

142. See Katz, *supra* note 36, at 321 ("By naming the practice 'adoption,' the implication arises that a baby is involved.").

143. See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (declining to grant the legal status of personhood to preembryos).

144. See Katz, *supra* note 36, at 303.

145. See *In re Baby M*, 537 A.2d 1227, 1264 (N.J. 1988) (holding that the surrogacy contract used was void because contrary to public policy).

146. See *Belsito v. Clark*, 67 Ohio Misc. 2d 54, 58 (Ct. C.P. 1994) ("[B]ecause Shelly Belsito and Anthony Belsito provided the child with its genetics, they must be designated as the legal and natural parents.").

C. ADDRESSING CRITICISMS OF RECOGNIZING INTENT AND EMBRYO ADOPTION

An intent standard, on its own, does not seem to ease fears that are typically associated with unregulated ART. In some ways, it seems to simply trade one arbitrary and inconsistent system for another. Embryo adoption also raises a fair amount of political discord.<sup>147</sup> However, by combining an intent standard with embryo adoption, those criticisms have less validity.

First, intent coupled with embryo adoption protects against ambiguity and unregulated adoption. As noted in *Belsito*, two concerns associated with applying an intent standard are its potential ambiguity and the creation of an unregulated adoption system.<sup>148</sup> On its own, intent seems like a fairly relative term. When determining parentage in assisted reproduction, any party could say that he or she intended to be the child's parent.<sup>149</sup> Even if a contract is signed, a party could say that the contract does not reflect his or her intent.<sup>150</sup> Perhaps taken to its logical extreme, a party could claim that the contract, despite being accurate at one point, no longer expresses his or her intent.<sup>151</sup> By defining intent based on the manifest action of creating an embryo and regulating the process that allows this intent to transfer through adoption, intent becomes much less ambiguous. It is attached to the action of creation and the process of adoption.

The intent standard must be coupled with an embryo adoption system in order to protect against unregulated adoption. There are dangers associated with allowing unregulated exchange of genetic material beyond parties changing their minds and pursuing parentage actions. Embryos could be bought and sold on an open market. Fertility clinics could fraudulently transfer embryos by telling one party the embryos were destroyed and telling the receiving party that they had been vo-

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147. See Katz, *supra* note 36, at 333–34.

148. See *Belsito*, 67 Ohio Misc. 2d at 61–62 (noting that the intent standard is “difficult to prove” and at odds with public policy).

149. See *id.* at 62 (“[W]ho is the natural parent if both a nongenetic-providing surrogate and the female genetic provider agree that they both intend to procreate and raise a child?”).

150. See *id.* (“It has long been recognized that, as a matter of public policy, the state will not enforce or encourage private agreements or contracts to give up parental rights.”).

151. See *In re Baby M*, 537 A.2d 1227, 1236 (N.J. 1988) (ruling on the enforceability of a surrogacy agreement signed by the surrogate who upon giving birth did not want to give up the child).

luntarily donated. Mistakes are more likely to happen without regulation, even if no fraud is involved. A defined adoption process would require clear action by both parties and set up a system of checks and balances that would reassure both sides of the adoption's legitimacy. The process could be removed from fertility clinics altogether by sourcing out the process to adoption agencies, further eliminating the risk of mistaken or fraudulent transfer.

Intent, on its own, poses a risk for unregulated adoption. Recognizing anyone who "intends" to be a parent as a parent is fairly arbitrary. Intent could be tied into buying and selling embryos. Abusive situations could arise out of insufficient background checks of intended parents. Intent itself could be skewed by having inconsistent understandings of the transfer of intent. Self-regulated clinics could arbitrarily honor the "intent" of one couple against the wishes of another. However, by vesting the status of intended parent in the embryo's creators and regulating the process by which intent is transferred between parties, the risks associated with unregulated adoption are decreased.

Second, embryo adoption does not affect the admittedly volatile issues of abortion and other reproductive rights. Embryo adoption is couched in the rhetoric that divides pro-life and pro-choice activists.<sup>152</sup> Those who are pro-choice hesitate to graft adoption, the process used for transferring parental rights, onto the current system, which transfers what are currently understood as ownership rights, out of fear that the embryo's legal status will become even more muddled.<sup>153</sup> The ambiguous nature of the embryo is a perceived threat against women's reproductive rights and embryonic stem-cell research.<sup>154</sup>

Recognizing intent, however, changes the status of the embryo *owners* rather than the embryo. Its ultimate goal is not to restrict the embryo creators' or recipients' ability to decide the disposition of the embryo, but rather to provide a system where these rights are vested in the correct person. Since so

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152. See Jaime E. Conde, *Embryo Donation: The Government Adopts a Cause*, 13 WM. & MARY J. WOMEN & L. 273, 274 (2006) (discussing the Bush administration's efforts to promote embryo adoption).

153. See *id.* at 280 (discussing embryo adoption).

154. See *id.* at 275 (noting that application of the "adoption concept" to embryo donation frames embryonic stem cell research within the abortion debate).

much of this controversy seems to be tied to rhetoric,<sup>155</sup> a simple solution would be to continue to refer to the process as embryo donation. Rather than creating a new system, this would simply regulate the current system. Even if applying the adoption process infuses a greater sense of the embryo's humanness than is legally applied in other reproductive situations, this is not unprecedented. Current tort and property laws often treat a human fetus as a person.<sup>156</sup> This legal distinction has not eliminated the recognized individual right to abort a fetus. It has not prevented scientists from destroying embryos through experimentation or embryo creators from destroying their own embryos.<sup>157</sup> Rather than require that all unused embryos be adopted instead of destroyed or donated for scientific research, donation is a process by which embryos may be transferred for the purpose of allowing another person or persons to have children.

#### D. REVISION OF THE UNIFORM LAWS SUGGESTED FOR STATE ADOPTION

In recent years, suggested uniform legislation has begun to address reproductive technology. Both the UPA, revised in 2002, and the MAGART address issues of sperm and egg donation, as well as surrogacy.<sup>158</sup> Both have also defined the intended parent and used that definition to offer clearer guidance

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155. See *id.* at 279–87 (discussing the emotionally charged nature of the debate between “embryo adoption” and “embryo donation”).

156. See Dawn Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After Webster*, 138 U. PA. L. REV. 179, 186–87 (1989) (discussing the development and current implementation of tort and probate laws that recognize the rights of a fetus for the purpose of protecting the interest of the mother or parents).

157. Compare *id.* (recognizing the legal fiction of treating a fetus as a person in certain legal contexts), with Katz, *supra* note 36, at 304, 325 (observing that abortion jurisprudence, which does not recognize the personhood of embryos, does not interfere with the options available to embryo creators for disposing of or destroying their unused embryos).

158. See generally MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 701–809 (2008), available at <http://www.abanet.org/family/committees/artmodelact.pdf> (discussing assisted reproduction and surrogacy agreements); UNIF. PARENTAGE ACT §§ 701–809 (amended 2002), 9B U.L.A. 354–70 (2001) (discussing assisted reproduction and surrogacy agreements); see also *id.* §§ 701–809, 9B U.L.A. 61–77 (Supp. 2009) (amending the 2000 version of the UPA and discussing the variations of the official text that some states have enacted).

on surrogacy practices.<sup>159</sup> However, neither set of suggested legislation addresses parentage issues in embryo donation. This is unfortunate considering that the definition of intended parent could easily be worded to include anyone who controls the disposition of an embryo. Uniform legislation should also clarify that intent is established through the creation of an embryo, regardless of the genetic material. Lastly, uniform laws should outline the process for transferring intent between parties. A regulatory system based on the adoption system already established in the state should be imposed on embryo donation.

### CONCLUSION

Embryo donation is still a new practice and, in many ways, its flaws have yet to reveal themselves. Yet based on the parentage issues that have surfaced as well as the parallel parentage issues in the more established practice of surrogacy, there exists a need to institute regulations that establish clear processes for determining and protecting the parentage of children born through embryo adoption. Since neither of the donees are genetically related to the embryo and at most only one party is able to give birth to the embryo, intent is the best method for establishing parentage. But because intent itself is ambiguous, legislation should define intent by its manifestation in creating an embryo.

In order to apply this intent standard to embryo donation, a process by which intent can be transferred must also be established. Currently this process either takes place through contract or a process that imitates adoption. Contracts lead to the same ambiguity and indeterminate issues that are ultimately the problem in this context. In comparison, the formality and uniformity of embryo adoption could bring a sense of clarity, finality, and predictability that will reduce the risk of parentage issues. Embryo adoption ultimately protects the goal of embryo donation: to transfer the embryo to another party for the purpose of bearing a child. Proposed uniform legislation should provide states with definitions of “intent” and “intended

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159. See MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(19) (2008), available at <http://www.abanet.org/family/committees/artmodelact.pdf> (discussing assisted reproduction and surrogacy agreements); UNIF. PAREN- TAGE ACT § 102(12) (amended 2002), 9B U.L.A. 304 (2001) (defining intended parent). *But see id.* § 102, 9B U.L.A. 11–12 (Supp. 2009) (amending the Uni- form Parentage Act to omit the definition of “intended parent,” although the term does appear in § 801(a)(3) of the amended version of the UPA).

parent” that are applicable both to surrogacy and embryo donation by establishing intent at the time the embryo is created. Additionally, uniform legislation should address embryo donation by outlining a process similar to adoption that transfers the intended parent status from the donors to the donees.

This solution is a preemptive measure. The hope is to prevent litigation as to parentage for people who participate in embryo donation by regulating the embryo donation process and removing it from the control of the ART market. In both *Prato-Morrison* and *Robert B.*, parentage issues arose out of underlying fertility clinic abuses.<sup>160</sup> Though legislation that prescribes an adoption-like process for embryo donation may not prevent all abuse, it adds an extra layer of protection to its participants. It is unlikely that the couples who received embryos in either *Prato-Morrison* or *Robert B.* intended to “steal” another couple’s embryo. By implementing an adoption system for embryo donation, all of the parties involved would have been aware of what was happening. The receiving couples would have received embryos from parties who wanted their embryos to be given to someone else, and the donating parties would not have been forced into their donation. The dynamic nature of ART creates both opportunity and controversy; ultimately, regulation must embrace the challenge of formulating solutions to its problems while still maintaining its usefulness and respecting its growing importance in today’s society.

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160. See *Prato-Morrison v. Doe*, 126 Cal. Rptr. 2d 509, 510 (Ct. App. 2002); *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785, 786 (Ct. App. 2003).