

**THE BATTLE OVER THE EMBRYO: HOW WEST VIRGINIA
SHOULD LEGALLY DEFINE THE EMBRYO AND REGULATE
EMBRYO ADOPTION**

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I. INTRODUCTION: THE AGONIZING EMBRYO CUSTODY BATTLE

It all started in 2006, when Edward and Kerri Lambert of California chose to undergo fertility treatment.¹ The couple desperately hoped to bring a child into the world. To fulfill such hope, staff at the San Ramon Fertility Clinic² combined an anonymous donor's eggs with Edward Lambert's sperm to create multiple embryos for the Lamberts to conceive through in vitro fertilization.³ After having a son through in vitro fertilization in 2006,⁴ the Lamberts still possessed unused embryos and confronted the difficult question of what to do with them. Viewing these remaining embryos as human beings and refusing to keep these lives preserved in limbo in a laboratory, the Lamberts decided to donate four of the embryos to Patrick and Jennifer McLaughlin of Missouri.⁵ This donation was a new phenomenon called embryo adoption.

An Embryo Adoption Agreement written between the two couples in February 2009 stated in pertinent part:

1. The four subject embryos are pre-born children who are endowed by God with unique characteristics and are entitled to the rights and protections accorded to all children, legally and morally.
2. Jennifer McLaughlin desires to accept the full moral and legal responsibility for parenting the subject embryos adopted hereunder.
3. Jennifer McLaughlin agrees to implant all of the subject embryos that are viable after being thawed.⁶

The Embryo Adoption Agreement also contained a clause stipulating that any unused embryos could revert back to the Lamberts after one year, should the Lamberts decide they want them back.⁷ After the McLaughlins signed the Embryo Adoption Agreement, a physician transferred two of the

¹ Cynthia S. Marietta, *Frozen Embryo Litigation Spotlights Pressing Questions: What Is the Legal Status of an Embryo and Can It Be Adopted?*, HEALTH L. PERSP. 1, 1 (2010), <http://www.law.uh.edu/healthlaw/perspectives/2010/marietta-embryolegal.pdf>.

² Marnette Federis, *Update: Frozen Embryo Legal Battle Reach Settlement*, PLEASANTON PATCH (May 17, 2010, 1:13 PM), <http://pleasanton.patch.com/groups/editors-picks/p/pleasanton-couple-embroiled-in-legal-battle-over-frozen-embryos>.

³ Marietta, *supra* note 1.

⁴ *Id.*

⁵ *Id.* at 1–2.

⁶ *Id.* at 2.

⁷ Joe Harris, *Couples Clash over Frozen Embryo Custody*, COURTHOUSE NEWS SERVICE (Apr. 12, 2010, 8:27 AM), <http://www.courthousenews.com/2010/04/12/26303.htm>.

four embryos to Jennifer McLaughlin's uterus in May 2009.⁸ Jennifer McLaughlin gave birth to twins in January 2010.⁹ In December 2009, prior to the birth of the twins, the Lamberts hit the McLaughlins with shocking news: they wanted their two remaining unused embryos back.¹⁰ This request came via email two months before the couples' Embryo Adoption Agreement expired.¹¹ The McLaughlins refused to return the embryos, stipulating their intent to keep them to have two more children in the future.¹²

Initially, the Lamberts wanted the embryos back to donate to a couple that lived nearby so the children could grow up with their "genetic sibling,"¹³ the Lamberts' son. The Lamberts later added that "they [did] not want the remaining embryos implanted in Jen McLaughlin because of her violation of the contract [particularly, the Embryo Adoption Agreement reversion clause]."¹⁴ The Lamberts believed the McLaughlins violated the contract's reversion clause by refusing to return the unused embryos, even though the Lamberts made their request within the one-year term.¹⁵ However, the McLaughlins objected to enforcing the agreement, claiming the reversion clause and the contract itself were outdated.¹⁶ The McLaughlins also argued that they should be able to keep their family together; their family included their twins and their future children from the remaining embryos.¹⁷

The Lamberts, desperate to regain custody of the embryos, filed a lawsuit in California.¹⁸ The McLaughlins also filed suit in St. Louis County

⁸ Marietta, *supra* note 1, at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Harris, *supra* note 7.

¹² Marietta, *supra* note 1, at 2.

¹³ *Id.* at 3.

¹⁴ Harris, *supra* note 7.

¹⁵ As mentioned, the contract between the Lamberts and McLaughlins included a reversion clause that provided any unused embryos could revert back to the Lamberts after one year, should the Lamberts decide they want them returned. *See supra* text accompanying note 7.

¹⁶ The McLaughlins argued the contract was outdated because it "[was] a glorified form contract, written up years earlier by an attorney at the urging of the Catholic Archdiocese." *See* Harris, *supra* note 7. This contract pertained to women experiencing multiple miscarriages caused by the newness and underdevelopment of in vitro fertilization technology at the time. *Id.* Women, tired of going through miscarriages, often donated their remaining embryos for adoption. *Id.* The adoption contract included a reversion clause in case donor women changed their minds and decided to take their remaining embryos back to try in vitro fertilization again. *Id.* "But [in vitro fertilization technology had since] improved, resulting in Jen McLaughlin getting pregnant and giving birth to twins on the first attempt" after using only two embryos. *Id.* Thus, the McLaughlins believed this type of contract with a reversion clause should not apply to the adoption agreement between themselves and the Lamberts. *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

Circuit Court.¹⁹ Each couple valued the embryos as human beings and wanted them to be a part of their lives. Both couples faced losing two potential children in this agonizing custody dispute. While both couples eventually reached a private settlement agreement²⁰ regarding the disposition of the embryos, the potential for future disputes like this one still remains because “from a legal standpoint . . . we have no guidance for . . . situations like this. Day in, day out, people are dealing with fertility issues of this nature . . . [because] . . . courts are ill-suited to deal with these situations.”²¹ Ironically, while both couples in this case strictly viewed the embryos as human beings, the ultimate question that must be answered to resolve such disputes is whether embryos should legally be defined as persons, property, or an interim category—something in between persons and property.

The legal definition of an embryo greatly influences which type of law, between contract law and standard adoption law, governs the rights of both donor and recipient couples in embryo adoption agreements.²² While not all states have laws regulating the custody of embryos, those that do have generally implemented them to resolve embryo custody disputes.²³ Usually, when state courts define the embryo as a person, they implement standard adoption law to regulate custodial rights to the embryo.²⁴ When state courts define the embryo as property or an interim category, contract law tends to govern custody rights.²⁵ Many states, like West Virginia, currently have clinics that offer embryo adoption²⁶ but have implemented no laws to protect the custody rights of parties in embryo adoption or to prevent future lawsuits.²⁷

This Note argues that West Virginia should define the embryo as an interim category, deserving special respect because of its potential to become

¹⁹ *Id.*

²⁰ While both the McLaughlins and Lamberts agreed to keep the specific terms of the settlement confidential, the settlement “provide[d] that the disposition of the embryos [would] be in accordance with the original intent of the parties with the hope that the child or children born from the embryos [would] be raised with other siblings of the embryos.” Nancy Cambria, *Families Settle Dispute over Frozen Embryos: Details of Deal Unavailable; Mother of Twins Here Had Wanted Girls to Have Contact with Siblings*, ST. LOUIS-POST DISPATCH (May 14, 2010), http://www.stltoday.com/news/local/metro/families-settle-dispute-over-frozen-embryos/article_824aef94-c15b-5030-94dd-4ba4db82104f.html.

²¹ *Id.*

²² *See infra* Parts IV.A–C.

²³ *See infra* Parts IV.A–C.

²⁴ *See infra* Part IV.B.

²⁵ *See discussion infra* Parts IV.A, IV.C.

²⁶ The Charleston Area Medical Center Physicians Group - Fertility Center in Charleston, West Virginia, identifies itself as having an embryo adoption program. *See infra* text accompanying notes 146–47.

²⁷ The Embryo Adoption Awareness Campaign’s website lists the state laws on embryo adoption in West Virginia as “None identified.” *See infra* text accompanying note 148.

human; for the sake of protecting both couples in the embryo adoption process, West Virginia should regulate embryo adoption through contract law. In support of this argument, this Note discusses in Part II couples' use of in vitro fertilization to achieve pregnancy and how in vitro fertilization often produces excess embryos. Part III describes the definition, benefits, and one main issue of embryo adoption, which involves the unsettled nature of the law that governs it. Part IV examines different courts' approaches to legally defining embryos. Part V demonstrates that West Virginia has no particular laws defining the legal status of an embryo or regulating embryo adoption. Part VI explains how the lack of attempt and uniformity in defining the legal status of an embryo through federal and state law leads to unsettled law on embryo adoption. Part VII analyzes why West Virginia should follow the common law of other jurisdictions, particularly Tennessee, to conclude in Part VIII that West Virginia should define the embryo as an interim category and implement contract law to govern embryo adoption and protect both couples.

II. THE FATE OF EMBRYOS AFTER IN VITRO FERTILIZATION

Many couples in the United States use Assisted Reproductive Technology ("ART") to conceive children they desperately desire. Couples frequently attempt conception through the ART form known as in vitro fertilization ("IVF"). Part II of this Note further defines IVF and explains how it often leads to excess embryo production. Couples can choose from several primary options to handle excess embryos, including a newly developed phenomenon: embryo adoption.

A. *The Definition of IVF*

ART utilizes several types of medical treatment to achieve pregnancy.²⁸ ART includes all fertility treatments involving both egg and sperm.²⁹ Nearly one out of every six couples in the United States is tested for infertility.³⁰ To fight infertility, couples may seek reproductive assistance through ART.³¹ According to the Centers for Disease Control and Prevention

²⁸ *IVF/ART*, THE NAT'L INFERTILITY ASS'N, <http://www.resolve.org/family-building-options/ivf-art.html> (last visited Sept. 26, 2013).

²⁹ *Assisted Reproductive Technology (ART)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/art/> (last visited Sept. 26, 2013).

³⁰ Geneva Pittman, *Almost One in Six Couples Face Infertility: Study*, CHI. TRIB. (Jan. 11, 2013), http://articles.chicagotribune.com/2013-01-11/lifestyle/sns-rt-us-couplesinfertility-bre90a13y-20130111_1_male-factor-infertility-infertility-rate-couples-face-infertility.

³¹ CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 29.

("CDC"), 451 reporting clinics in the United States performed a total of 163,039 ART cycles during 2011, resulting in 61,610 infants.³²

Elizabeth Jordan Carr, born on December 28, 1981, in Norfolk, Virginia, was the first baby ever conceived through ART in the United States, particularly through IVF.³³ Since then, women have used ART to achieve pregnancy, most commonly through IVF.³⁴ Over ninety-nine percent of ART consists of the IVF treatment.³⁵ "[IVF] is a highly sophisticated, meticulously timed procedure, which involves removing a ripened egg or eggs from a female's ovary, fertilizing the egg with semen, incubating the dividing cells in a laboratory dish and then replacing the developing embryo in the uterus at the appropriate time."³⁶

B. The Issue with IVF: Overproduction of Embryos

One main issue with IVF is that clinics produce more embryos for couples than needed.³⁷ Couples who undergo IVF often find themselves with excess embryos after they successfully conceive or abandon their attempts to have children.³⁸ Researchers believe clinics throughout the United States currently store at least several hundred thousand embryos.³⁹ Cryopreservation storage nationwide holds an estimated 600,000 frozen embryos.⁴⁰ This number has increased from the estimated 400,000 embryos reportedly stored in 2003.⁴¹ The number will likely continue to increase "given the advances in technology, more couples seeking infertility treatment, and the recommended practice that only a limited number of embryos be transferred each cycle."⁴²

³² *Id.*

³³ *The US' First Test Tube Baby*, PBS.ORG., <http://www.pbs.org/wgbh/americanexperience/features/general-article/babies-americas-first/> (last visited Sept. 26, 2013).

³⁴ *In Vitro Fertilization Today*, PBS.ORG., <http://www.pbs.org/wgbh/americanexperience/features/general-article/babies-today/> (last visited Sept. 26, 2013).

³⁵ SOC'Y FOR ASSISTED REPROD. TECH., CLINIC SUMMARY REPORT: ALL SART MEMBER CLINICS, (2011), available at https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?ClinicPKID=0.

³⁶ THE NAT'L INFERTILITY ASS'N, *supra* note 28.

³⁷ Laura Beil, *What Happens to Extra Embryos After IVF?*, CNN.COM (Sept. 1, 2009, 12:32 PM), <http://www.cnn.com/2009/HEALTH/09/01/extra.ivf.embryos/>.

³⁸ Krista Conger, *New Approach to IVF Embryo Donations Lets People Weigh Decision*, STAN. SCH. MED. (Apr. 7, 2011), <http://med.stanford.edu/ism/2011/april/embryo-donate.html>.

³⁹ *Id.*

⁴⁰ *Cryopreservation*, NAT'L FERTILITY SUPPORT CENTER, <http://fertilitysupportcenter.org/service-programs/learning/cryopreservation> (last visited Sept. 26, 2013).

⁴¹ Marietta, *supra* note 1, at 7.

⁴² *Id.* at 7-8.

One reason so many embryos end up in storage is that couples struggle with deciding what to do with them after IVF.⁴³ In spite of this struggle, many doctors continue to support the practice of producing extra embryos, claiming it would adversely affect couples' chances of having a baby if this practice ceased.⁴⁴ As a result, many couples continue to confront the issue of "deciding the fate of their surplus embryos."⁴⁵

C. Primary Options for Handling Excess Embryos

1. Embryo Disposal

Couples can choose embryo disposal as one option for handling their unused embryos. With the consent of couples, IVF clinics destroy thousands of embryos through disposal each year.⁴⁶ Through this option, clinics generally handle embryos as biological waste material by disposing of them through incineration.⁴⁷ However, many people view the destruction of embryos as morally wrong, considering their potential for human life. Some individuals strongly believe that "[a]ll stages of life are stages of the same being" and humans become living beings at the time of fertilization.⁴⁸

2. Embryonic Stem Cell Research

Another alternative for handling excess embryos involves donating them to stem cell research, particularly embryonic stem cell research. Stem cells are cells that can divide and create exact copies of themselves through a process called self-renewal.⁴⁹ Stem cells can also "divide to form cells that . . . develop into mature tissue types such as liver, lungs, brain, or skin."⁵⁰ Most embryonic stem cells come "from embryos that develop from eggs that have been fertilized in vitro—in an [IVF] clinic—and then donated for research

⁴³ Daniel Schorn, *A Surplus of Embryos*, CBSNEWS.COM (Feb. 11, 2009, 6:47 PM), http://www.cbsnews.com/8301-18560_162-1300667.html.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Kristen Philipkoski, *Where Do the Extra Embryos Go?*, WIRED, Aug. 26, 2004, <http://www.wired.com/medtech/health/news/2004/08/64722?currentPage=all>.

⁴⁸ Richard Stith, *Why Embryo Destruction Is Worse than Abortion*, LIFESITENEWS.COM (July 19, 2006, 11:15 EST), <http://www.lifesitenews.com/news/archive/ldn/2006/jul/06071901>.

⁴⁹ *Stem Cell Definitions*, CAL.'S STEM CELL AGENCY: CAL. INST. FOR REGENERATIVE MED., <http://www.cirm.ca.gov/our-progress/stem-cell-definitions> (last visited Sept. 26, 2013).

⁵⁰ *Id.*

purposes with informed consent of the donors.”⁵¹ Scientists believe that stem cells from embryos can develop into almost any type of human cell and become treatment cells for many different diseases.⁵² Diseases that could be treated include “Parkinson’s disease, diabetes, traumatic spinal cord injury, Duchenne’s muscular dystrophy, heart disease, and vision and hearing loss.”⁵³

However, donating embryos to stem cell research poses problems.⁵⁴ Many clinics do not offer this option, and it is difficult for couples to proceed on their own.⁵⁵ Even when they do have access to this option, couples face onerous paperwork and phone calls.⁵⁶ Also, embryonic stem cell research involves the destruction of embryos.⁵⁷ Like the argument against the destruction of embryos through disposal, some people also oppose destroying embryos for stem cell research because they view embryos as humans. For example, “some religious and anti-abortion groups oppose embryonic stem cell research because extracting the stem cells destroys the embryo, which they believe is a human life.”⁵⁸

A scientific breakthrough recently occurred in stem cell research. In a paper published five years ago, Shinya Yamanaka, a scientist at Kyoto University, and six colleagues “showed how ‘induced pluripotent stem cells’ could be derived from adult stem cells and potentially substituted, in research and therapy, for embryonic stem cells.”⁵⁹ Researchers from the University of Wisconsin also reported the ability to turn skin cells into cells that “look and act like” embryonic stem cells.⁶⁰ This possibly means that stem cell research will no longer require the destruction of embryos in the near future. However, even if scientific advancement does lead to research without destructing

⁵¹ *Stem Cell Basics*, THE NAT’L INSTS. OF HEALTH, <http://stemcells.nih.gov/info/basics/basics3.asp> (last visited Sept. 26, 2013).

⁵² Philipkoski, *supra* note 47.

⁵³ THE NAT’L INSTS. OF HEALTH, *supra* note 51.

⁵⁴ Claudia Kalb, *All That Remains: Couples Who Decide not to Implant Embryos Often Face a Difficult Choice—and Limited Options*, THE DAILY BEAST (Jan. 19, 2010, 7:00 PM), <http://www.thedailybeast.com/newsweek/2010/01/19/all-that-remains.html>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Adam Keiper & Yuval Levin, *Stem Cells, Life, and the Law*, NAT’L REV. ONLINE (Aug. 25, 2010, 12:00 AM), <http://www.nationalreview.com/articles/244637/stem-cells-life-and-law-adam-keiper>.

⁵⁸ Philipkoski, *supra* note 47.

⁵⁹ William Saletan, *The Healer: How Shinya Yamanaka Transformed the Stem-Cell War and Made Everyone a Winner*, SLATE MAG. (Oct. 9, 2012, 12:05 AM), http://www.slate.com/articles/health_and_science/human_nature/2012/10/shinya_yamanaka_s_nobel_prize_he_saved_embryos_not_just_stem_cell_research_.html.

⁶⁰ Gretchen Vogel, *Researchers Turn Skin Cells into Stem Cells*, SCI. MAG. (Nov. 20, 2007), <http://news.sciencemag.org/2007/11/researchers-turn-skin-cells-stem-cells>.

embryos, it does not solve the issue of how to handle leftover embryos frozen in storage clinics.

3. Embryo Adoption

Embryo adoption, or embryo donation, is a recently developed phenomenon that serves as another possible alternative to handling excess embryos. Both the terms “embryo adoption” and “embryo donation” can be used interchangeably. This Note uses the term “embryo adoption.” States like West Virginia currently participate in embryo adoption through IVF clinics and fertility centers.⁶¹ As discussed in Part III of this Note, while the embryo adoption services offered by these clinics provide benefits to both donor and recipient couples, one main problem exists with embryo adoption: the unsettled nature of the law that governs it. As shown by the feud between the Lamberts and McLaughlins, the unsettled nature of the law on embryo adoption can lead to custody disputes. In order to avoid such custody disputes, states like West Virginia need to define the legal status of the embryo and, in turn, establish the type of law necessary to regulate embryo adoption.

III. EMBRYO ADOPTION: THE PROCESS

Part III of this Note defines embryo adoption and explains the benefits it provides to both donor and recipient couples. Part III also explains that one main issue with embryo adoption is the unsettled nature of the law that governs it, creating the need for states like West Virginia to legally define an embryo and thereupon establish the requisite law to regulate embryo adoption.

A. *Definition and Benefits of Embryo Adoption*

Embryo adoption takes place when a couple with stored frozen embryos donates these embryos to another couple for implantation into the woman’s uterus to bear children.⁶² Hence, the couple receiving the embryos, the recipient couple, “adopts” these embryos from another couple, the donor couple. According to a 2005 *New York Times* article, of the estimated 400,000 frozen embryos stored throughout the country at the time, about 9,000 were designated for other families.⁶³ Embryo adoption benefits donor couples by allowing the embryos they created to develop into human beings. It also benefits recipient couples who cannot naturally bear children by giving them

⁶¹ *Infra* text accompanying notes 146–47.

⁶² *Embryo Adoption*, ADOPTION.COM, <http://adopting.adoption.com/child/embryo-adoption.html> (last visited Sept. 26, 2013).

⁶³ Sarah Blustein, *Embryo Adoption*, N.Y. TIMES (Dec. 11, 2005), http://www.nytimes.com/2005/12/11/magazine/11ideas1-16.html?_r=0.

the chance to conceive through donated embryos. For example, on a Yahoo! Group called SnowBabies, where people interested in the embryo adoption process communicate, one posting explains how a couple endured constant fertility treatment and conceived twins.⁶⁴ These twins eventually died from a premature birth, and doctors deemed the woman's eggs too old for a successful pregnancy.⁶⁵ The woman posted on this site that she and her husband "desperately want to 'be pregnant' again."⁶⁶ Embryo adoption provides couples like this with the hope of having children.

Another advantage of embryo adoption is that, unlike most IVF treatments, donated embryos are relatively inexpensive.⁶⁷ Alternatively, if couples want to conceive and resort to an egg or sperm donor, it will cost a significant amount of money. For example, while egg donation costs differ depending on the IVF clinic, donor agency, or region, "the total donor egg cost can range from approximately \$20,000 up to \$40,000, but is more typically in the \$25,000 [to] \$30,000 range."⁶⁸ These fees include payment for drugs, egg retrieval, fertilization, transfer, and donor compensation.⁶⁹ Embryos, on the other hand, come "ready-made,"⁷⁰ and cannot be paid for because fertility clinics tend to view payment for embryos as "morally unacceptable . . . just as it's morally unacceptable to pay for a baby."⁷¹ Usually, a person receiving donated embryos pays only an estimated total of \$5,000 to \$6,000, making the process much cheaper than donor egg IVF.⁷²

B. *One Main Issue with Embryo Adoption: The Unsettled Law*

Generally, there remains no overriding supervision and little state legislation on embryo adoption.⁷³ However, agencies that work with both donor

⁶⁴ Liza Mundy, *Out of the Freezer, into the Family: The Booming, and Bizarre, Business of Embryo Adoption*, SLATE MAG. (May 31, 2005, 11:50 AM), http://www.slate.com/articles/health_and_science/medical_examiner/2005/05/out_of_the_freezer_into_the_family.html.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Egg Donation and Egg Donor Costs*, INFERTILITY RESOURCES, <http://www.ihr.com/infertility/egg-donation/egg-donation-egg-donor-costs.html> (last visited Sept. 26, 2013).

⁶⁹ Mundy, *supra* note 64.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *FAQ for Recipients: Embryo Donation Program*, UCSF MED. CENTER, http://www.ucsfhealth.org/education/embryo_donation_program_for_recipients/ (last visited Sept. 26, 2013).

⁷³ Mundy, *supra* note 64.

and recipient couples to facilitate the embryo adoption process do exist.⁷⁴ This Note discusses embryo adoption solely through the use of agencies and IVF clinics. The problem these agencies and clinics face is that the law governing embryo adoption both statewide and federally remains undeveloped and unsettled.⁷⁵ “The option to donate to others is something that poses its own risks legally,”⁷⁶ explained Nanette Elster, director of the Health Law Institute at DePaul University College of Law in Chicago. Elster further explained: “The risk is that the adoption laws we have in place don’t necessarily apply. In most states, embryo adoption falls under laws governing the transfer of property. But this is an unsettled area of law.”⁷⁷

As a result of the unsettled law, “agencies and legal practitioners involved [in the embryo adoption] process may differ on contract language and varying adoption programs.”⁷⁸ Additionally, both donor and recipient couples, when making embryo adoption agreements, must “to the extent not previously proscribed by law, define their legal rights, duties and responsibilities in connection with the transfer and implantation of the embryos of the [e]mbryo [d]onors, as well as future communications between the parties.”⁷⁹ The law’s lack of guidance on embryo adoption could confuse what both couples understood the terms of the adoption agreement to mean. This could result in more lawsuits:

With this increase in the number of frozen embryos “available” for adoption, more and more embryo adoption agencies are advertising their services for infertile couples. And unfortunately, unless and until the law becomes more settled on the legal status of embryos and uniform standards for “adoption” agreements are implemented, emotionally charged lawsuits such as the *McLaughlin v. Lambert* case will probably continue to appear in the newspaper headlines.⁸⁰

⁷⁴ *Id.*

⁷⁵ *General Information on Embryo Donation/Adoption*, EMBRYO ADOPTION AWARENESS CENTER, <http://www.embryooption.org/faqs/clinics.cfm> (last visited Sept. 26, 2013).

⁷⁶ Shari Roan, *She Can Donate; Who Will Adopt?: Unneeded Embryos Can Still Find a Home, but Thorny Issues Often Hamper the Process*, L.A. TIMES (Oct. 6, 2008), <http://articles.latimes.com/2008/oct/06/health/he-embryosdonate6>.

⁷⁷ *Id.*

⁷⁸ Sonja Brown, *Legal and Ethical Considerations of Embryo Adoption*, MLJ ADOPTIONS, INC. (Sept. 12, 2009), <http://mljadoption.com/Media.aspx?articleID=46>.

⁷⁹ *Open Donation Agreement*, NAT’L EMBRYO DONATION CENTER, http://www.embryodonation.org/pdf/Generic_Agreement_for_Open_Donation_and_adoption.pdf (last visited Sept. 26, 2013).

⁸⁰ Marietta, *supra* note 1, at 8.

States like West Virginia face the need to clearly define the embryo's legal status to regulate embryo adoption and prevent future lawsuits between couples. Various state courts have contrasting views on how to define an embryo, leading to a universally vague legal status.

IV. HOW DIFFERENT COURTS HANDLE LEGALLY DEFINING EMBRYOS

Part IV of this Note examines different courts' approaches to legally defining embryos. Part IV also demonstrates, in turn, that "[t]he legal status of an embryo is not yet universally clear,"⁸¹ leading to states' use of different types of law for regulating custody rights to embryos. For example, some state courts view embryos as property, regulating their custody through contract law. Other states view embryos as persons and govern the embryo adoption process through standard adoption law. Still other states define embryos as neither persons nor property but something in between—an interim category demanding special respect because of the embryos' potential to become human. Courts that view embryos as an interim category generally regulate custody rights to embryos through contract law. Part IV of this Note also discusses the Supreme Court's refusal to legally define embryos based on the notion that it is uncertain when human life begins.

A. *Embryos as Property: Custody Regulation Through Contract Law*

States such as New York and Texas view embryos as property. In *Kass v. Kass*,⁸² a couple tried to conceive a child through IVF and preserved nine embryos in the process.⁸³ After four of the embryos implanted in a surrogate failed to result in pregnancy, the couple decided to divorce.⁸⁴ Upon execution of the divorce, the ex-wife attempted to gain full custody of the embryos so she could "undergo another implantation procedure" and have a child.⁸⁵ The ex-husband objected and asked for the embryos to be donated to research, as stipulated in a prior written contract between the couple.⁸⁶ The IVF contract for the couple stated, "In the event of divorce, we understand that legal ownership of any stored [embryos] must be determined in a *property* settlement and will be released as directed by order of a court of competent jurisdiction."⁸⁷ Following the reasoning that embryos are property, the Court of Appeals of

⁸¹ *Id.* at 5.

⁸² 696 N.E.2d 174 (N.Y. 1998).

⁸³ *Id.* at 177.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 176 (emphasis added).

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New York adhered to the terms of the contract, stating that “[t]hese parties having clearly manifested their intention, the law will honor it.”⁸⁸

In *Roman v. Roman*,⁸⁹ a Texas case, a couple also decided to divorce after storing three frozen embryos from IVF.⁹⁰ After the divorce, the ex-wife attempted to gain custody of the three embryos to conceive a child on her own.⁹¹ The ex-wife also stated that the ex-husband “would not have parental rights or responsibilities” if children resulted from these embryos.⁹² However, the ex-husband contested that awarding his ex-wife custody would violate the original embryo agreement signed by the couple.⁹³ The terms of the agreement stipulated:

2. We consent and authorize the embryo(s) to be stored in a frozen state until Dr. Schnell and the IVF Laboratory determine that appropriate conditions exist for transfer of the embryo(s) to the wife’s uterus and both husband and wife agree to the transfer.

* * *

10. If we are divorced or either of us files for divorce while any of our frozen embryos are still in the program, we hereby authorize and direct, jointly and individually, that one of the following actions be taken:

The frozen embryo(s) shall be . . . Discarded.⁹⁴

In this case, the Court of Appeals of Texas looked at the agreement between the couple to determine what to do with the embryos. The court in *Roman* deemed the embryos property and followed contract law to decide how to handle the embryos after divorce.⁹⁵ In *Kass and Roman*, “[t]he courts in these states applied contract law . . . and looked to the intent of the parties to determine the disposition of the embryos, thus implying the embryos were ‘property’ to be transferred by contract.”⁹⁶

⁸⁸ *Id.* at 182.

⁸⁹ 193 S.W.3d 40 (Tex. App. 2006).

⁹⁰ *Id.* at 42–43.

⁹¹ *Id.* at 43.

⁹² *Id.*

⁹³ *Id.* at 44.

⁹⁴ *Id.*

⁹⁵ Marietta, *supra* note 1, at 5.

⁹⁶ *Id.*

B. *Embryos as Persons: Custody Regulation Through Adoption Law*

While laws in certain states define embryos as property, other states' laws define embryos as human beings. Louisiana law, for example, states that an embryo is a juridical person, "meaning that it has legal status and can be represented by an attorney in legal proceedings."⁹⁷ Louisiana law specifically provides: "An in vitro fertilized human ovum [embryo] exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law."⁹⁸ Missouri has a statute that defines life as beginning at conception. This statute specifically states that "the term 'unborn children' or 'unborn child' shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development."⁹⁹

"Georgia was the first state to enact an embryo adoption law, implying that embryos are human beings even though the language in the statute does not expressly state so."¹⁰⁰ This statute says donor parents give up their custody rights to recipient parents through the following language: "Upon embryo relinquishment by each legal embryo custodian pursuant to subsection (a) of this Code section, the legal transfer of rights to an embryo shall be considered complete, and the embryo transfer shall be authorized."¹⁰¹ This statute further states that a child, once born to the recipient parents, "shall be presumed to be the legal child of the recipient intended parent." Other states, including Louisiana, have statutes that provide donor couples relinquish all parental rights once they give their embryos up for donation or adoption.¹⁰²

C. *Embryos as an Interim Category: Custody Regulation Through Contract Law*

Certain states like Tennessee view the embryo as an interim category—something in between a person and property—deserving special respect and protection. In *Davis v. Davis*,¹⁰³ a couple divorced after creating seven embryos through IVF.¹⁰⁴ The ex-wife wanted to either implant these embryos for

⁹⁷ *Id.*

⁹⁸ LA. REV. STAT. ANN. § 9:123 (2013).

⁹⁹ MO. REV. STAT. § 1.205(3) (2013).

¹⁰⁰ Marietta, *supra* note 1, at 5–6.

¹⁰¹ GA. CODE ANN. § 19-8-41(c) (2013).

¹⁰² *E.g.*, LA. REV. STAT. ANN. § 9:130.

¹⁰³ 842 S.W.2d 588 (Tenn. 1992), *reh'g in part*, 1992 WL 341632 (Tenn. Nov. 23, 1992).

¹⁰⁴ *Id.* at 589.

conception or donate them to another couple.¹⁰⁵ The ex-husband objected because he refused to parent the embryos outside of marriage.¹⁰⁶ The Tennessee Supreme Court determined that “[o]ne of the fundamental issues the inquiry poses is whether the [embryos] in this case should be considered ‘persons’ or ‘property’ in the contemplation of law.”¹⁰⁷ After reviewing state statutes pertaining to abortion, the court in *Davis* agreed with the Court of Appeals’ holding that the “statutory scheme indicates that as embryos develop, they are accorded more respect than mere human cells because of their burgeoning potential for life. But, even after viability, they are not given legal status equivalent to that of a person already born.”¹⁰⁸

Tennessee’s murder and assault statutes make it a crime to attack or kill the unborn. Section 39-13-107 of the Tennessee Code states, “For the purposes of this part, ‘another,’ ‘individuals,’ and ‘another person’ include a human embryo or fetus at any stage of gestation in utero, when any such term refers to the victim of any act made criminal by this part.”¹⁰⁹ This statute stipulates that section 39-13-101 of the Tennessee Code, which criminalizes “intentionally, knowingly, or recklessly caus[ing] bodily injury to another,”¹¹⁰ applies to an unborn fetus or embryo. Section 39-13-214 of the Tennessee Code¹¹¹ demonstrates that the phrase “another person” in section 39-13-201 of the Code¹¹² includes “a human or embryo or fetus at any stage of gestation in utero,”¹¹³ making it illegal to kill an embryo. These four statutes together criminalize the attack or murder of an embryo.

While Tennessee law illegalizes attacking or murdering an embryo, the *Davis* court agreed with the Court of Appeals, which had noted that “[o]ther enactments by the legislature demonstrate . . . that viable fetuses in the womb are not entitled to the same protection as ‘persons.’”¹¹⁴ For example, Tennessee legalizes abortion under section 39-15-201 of the Tennessee Code, which provides that “[n]o person is guilty of a criminal abortion . . . under the following circumstances: [d]uring the first three (3) months of pregnancy, if the abortion or attempt to procure a miscarriage is performed with the pregnant woman’s consent and pursuant to the medical judgment of the pregnant

¹⁰⁵ *Id.* at 589–90.

¹⁰⁶ *Id.* at 589.

¹⁰⁷ *Id.* at 594.

¹⁰⁸ *Id.* at 595 (internal quotation marks omitted).

¹⁰⁹ TENN. CODE ANN. § 39-13-107(a) (2013).

¹¹⁰ *Id.* § 39-13-101(a)(1).

¹¹¹ *Id.* § 39-13-214.

¹¹² *Id.* § 39-13-201.

¹¹³ *Id.* § 39-13-214(a).

¹¹⁴ *Davis v. Davis*, 842 S.W.2d 588, 595 (Tenn. 1992), *reh’g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992) (internal quotation marks omitted).

woman's attending physician."¹¹⁵ This statute mirrors *Roe v. Wade*¹¹⁶ in that it allows for abortion during the first three months of pregnancy.

Under *Roe v. Wade*, "A woman and her doctor may decide on abortion within the first three months of pregnancy. . . . Moreover, after viability, abortion may be chosen to save the life of the mother."¹¹⁷ Because the statutory scheme in Tennessee makes it a crime to attack or murder an embryo, but legalizes abortion of a fetus, an entity further along in development than an embryo, the court found the best solution in determining the status of an embryo involved following the ethical standards set by the Ethics Committee of the American Fertility Society, now known as the American Society for Reproductive Medicine Ethics Committee ("Ethics Committee").¹¹⁸ It is important to recognize that the Ethics Committee and the court in *Davis* referred to embryos as "preembryos." This Note uses "embryos" and "preembryos" interchangeably.¹¹⁹

The Report of the Ethics Committee specified that the Ethics Committee's principal concern for the embryo involved "the treatment accorded the transferred embryo."¹²⁰ Thus, the Ethics Committee determined that "special respect" must be given to the embryo to "protect the welfare of potential offspring . . . [and] create[] obligations not to hurt or injure the offspring who might be born after transfer [by research or intervention with a preembryo]."¹²¹ In its report, the Ethics Committee asked IVF programs to establish policies in keeping with the "special respect" due to embryos. The Ethics Committee further suggested that the decision-making authority over the embryos should be vested in the individuals who "have provided the gametes,"¹²² because "[a]s a matter of law, it is reasonable to assume that the gamete providers have primary decision-making authority regarding preembryos A person's liberty to procreate or to avoid procreation is

¹¹⁵ TENN. CODE ANN. § 39-15-201(c)(1) (2013).

¹¹⁶ 410 U.S. 113 (1973).

¹¹⁷ *Davis*, 842 S.W.2d at 595 (internal quotation marks omitted).

¹¹⁸ *Id.* at 596.

¹¹⁹ "The terms zygote, pre-embryo, preembryo, embryo, among others, have all been used to describe what is typically understood by the layman as an embryo that possesses the capability of growing into a fetus and later a newborn baby." Elizabeth E. Swire Falker, *The Disposition of Cryopreserved Embryos: Why Embryo Adoption Is an Inapposite Model for Application to Third-Party Assisted Reproduction*, 35 WM. MITCHELL L. REV. 489, 495 (2009). Essentially, there is no significant difference between the term "embryo" or "pre-embryo." Therefore, for the purpose of this Note, the words "embryo" and "pre-embryo" will be used interchangeably.

¹²⁰ *Davis*, 842 S.W.2d at 596.

¹²¹ *Id.* (alteration in original) (internal quotation marks omitted).

¹²² *Id.* at 597 (internal quotation marks omitted).

directly involved in most decisions involving preembryos.”¹²³ According to the Ethics Committee:

[T]he (pre)embryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, it is not yet established as developmentally individual, and it may never realize its biologic potential.¹²⁴

The court next addressed how to regulate custody disputes over embryos “to provide the necessary guidance to all those involved with IVF procedures in Tennessee in the future.”¹²⁵ The court in *Davis* held that “an agreement regarding disposition of any untransferred [embryos] in the event of contingencies . . . should be presumed valid and should be enforced.”¹²⁶ Essentially, “prior agreements should be considered binding.”¹²⁷ The court also noted that because it could not readily determine whether the ex-husband ever intended to have a child outside the confines of marriage in the event of divorce, it “decline[d] to decide this case on the basis of implied contract.”¹²⁸

The court therefore held that prior written agreements pertaining to embryos were binding and implied contracts should not be considered, reasoning that “[t]his conclusion is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority so as to their disposition.”¹²⁹ This means because they initially provided the genetic material to produce the embryos, the “progenitors,” or parents who created the embryos, possess the authority to decide what to do with them after their creation. Therefore, the Tennessee court will follow a written contract the progenitors make regarding how to handle embryos in an event such as divorce.

The court further noted that in the absence of a written contract, it will determine who should receive custody of the embryos based on the rights of each of the parties under the United States Constitution.¹³⁰ Under the

¹²³ *Id.*

¹²⁴ THE ETHICS COMM. OF THE AM. SOC’Y FOR REPROD. MED., AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE: DEFINING EMBRYO DONATION, 1818, 1818 (2009), http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/DefiningEmbryoDonation.pdf.

¹²⁵ *Davis*, 842 S.W.2d at 597.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 598.

¹²⁹ *Id.* at 597.

¹³⁰ *Id.* at 598–99.

Fourteenth Amendment, “No state shall . . . deprive any person of life, liberty, or property, without due process of law.”¹³¹ Article I, section 8 of the Tennessee Constitution further enforces this right to the citizens of the state, stating “[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.”¹³²

From article I, section 8 of the Tennessee Constitution, the court determined that “there can be little doubt that [the drafters of the Tennessee Constitution] foresaw the need to protect individuals from unwarranted governmental intrusion into matters such as . . . [those] involving intimate questions of personal and family concern.”¹³³ In this case, “the specific individual freedom in dispute [involved] the right to procreate.”¹³⁴ The court further mentioned that “the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation. Undoubtedly, both are subject to protections and limitations.”¹³⁵ Therefore, “[o]ne way of resolving these [custody] disputes is to consider the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions.”¹³⁶

Using this reasoning, the court weighed the ex-wife’s interest to keep the embryos for reproduction against the ex-husband’s interest to avoid procreation. The court ruled in favor of the ex-husband, explaining that “[a]ny disposition which results in the gestation of the preembryos would impose unwanted parenthood on him, with all of its possible financial and psychological consequences.”¹³⁷ Assuming the ex-wife had other avenues of conceiving a child, such as adoption or IVF with another partner, the ex-husband’s interests in avoiding procreation outweighed her interests in having children.¹³⁸ Piecing everything together, the court held:

[I]f there is dispute, then [a] prior agreement concerning disposition [of the embryos] should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable

¹³¹ U.S. CONST. amend. XIV, § 1.

¹³² TENN. CONST. art. I, § 8.

¹³³ *Davis*, 842 S.W.2d at 600.

¹³⁴ *Id.*

¹³⁵ *Id.* at 601.

¹³⁶ *Id.* at 603.

¹³⁷ *Id.*

¹³⁸ *Id.* at 604.

possibility of achieving parenthood by means other than use of the preembryos in question [I]f the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.¹³⁹

D. *The Supreme Court's Refusal to Define When Human Life Begins*

In *Roe v. Wade*, the Supreme Court of the United States faced defining when human life begins. The Court, however, refused to specifically define when human life begins, stating:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.¹⁴⁰

The Court did, however, decide that a woman can legally have an abortion until the end of the first trimester. The Court stated, "With respect to

¹³⁹ *Id.* Recently, Tennessee enacted an embryo donation statute solidifying the court's reasoning in *Davis* that the disposition of embryos should be governed by contract law, considering embryos function as an interim category. Through this statute, donor and recipient couples are provided freedom of contract by entering into a "written contract . . . as appropriate when establishing embryo parentage prior to embryo transfer for the legal transfer of rights to an embryo and to any child that may result." See TENN. CODE ANN. § 36-2-403(a)(1) (2013). "Upon embryo relinquishment by each legal embryo custodian . . . the legal transfer of rights to an embryo shall be considered complete at the time of thawing or to such time as the parties may agree." *Id.* § 36-2-403(c) (emphasis added). Through contract law, donor and recipient couples, at a "time as the parties may agree," can determine when parenting rights to the embryo will transfer, which provides donor couples with the ability to exercise some control over how their embryos are handled prior to them developing into children. *Id.* § 36-2-403(c)–(e). The statute makes clear that the rights of donor couples to exercise control, or "rights or responsibilities," are limited to the time prior to when the embryo develops into a human, or in other words, when their donated embryo "has resulted in the birth of a child to a recipient intended parent." *Id.* § 36-2-403(e).

Tennessee's statute differs from Georgia's statute on embryo adoption, because Georgia's statute governs embryo adoption through laws "relating to adoption" and that "change the definition of 'child' to include a human embryo." See H.B. 388, 150th Gen. Assemb., Reg. Sess. (Ga. 2010). Georgia's statute requires donor couples to relinquish all parental rights to the embryo immediately upon entering into an agreement for adoption. According to Georgia's statute, an agreement "shall be entered into between each legal embryo custodian and each recipient intended parent prior to embryo transfer for the legal transfer of rights to an embryo Upon embryo relinquishment by each legal embryo custodian . . . the legal transfer of rights to an embryo shall be considered complete." See GA. CODE ANN. § 19-8-41(a)–(c) (2009). For the purpose of this Note, Tennessee common law, particularly the holding in *Davis*, serves as the main point of discussion.

¹⁴⁰ *Roe v. Wade*, 410 U.S. 113, 159 (1973).

the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester."¹⁴¹ The Court deemed legally allowing an abortion until the end of the first trimester an acceptable standard because no evidence shows the unborn is human. Essentially, "the unborn have never been recognized in the law as persons in the whole sense."¹⁴² The Court, through *Roe v. Wade*, noted that while it refused to define when human life begins, it did believe, judging by the history of the law, that the unborn has not been viewed as a person.

While, in the past, the Supreme Court has failed to define the legal status of embryos by refusing to stipulate when human life begins, currently some state courts do attempt to provide a clear definition and, in turn, determine the type of law applied to govern the custody of embryos. When state courts define the embryo as a person, they generally implement standard adoption law to regulate custodial rights to the embryo.¹⁴³ When state courts define the embryo as property or an interim category, contract law tends to govern custody rights.¹⁴⁴ As discussed in Part V, West Virginia currently has no laws defining the embryo or regulating custody rights for embryo adoption. Ultimately, West Virginia should define the embryo as an interim category, deserving special respect because of its potential to become human; for the sake of protecting both couples in the embryo adoption process, West Virginia should regulate embryo adoption through contract law.

V. WEST VIRGINIA: THE LACK OF LAW DEFINING THE EMBRYO AND REGULATING EMBRYO ADOPTION

IVF clinics exist throughout West Virginia, including Charleston, Huntington and Morgantown,¹⁴⁵ making the consideration of donating excess embryos a reality. Certain clinics within the state offer embryo adoption programs, like the Charleston Area Medical Center Physicians Group - Fertility Center ("CAMC Fertility Center") in Charleston.¹⁴⁶ CAMC Fertility Center comes into regular contact with the Embryo Adoption Awareness Center and identifies itself as having an embryo adoption program.¹⁴⁷

¹⁴¹ *Id.* at 163.

¹⁴² *Id.* at 162.

¹⁴³ *See supra* Part IV.B.

¹⁴⁴ *See discussion supra* Parts IV.A, IV.C.

¹⁴⁵ *Infertility Services in West Virginia*, THE FERTILITY NETWORK, <http://www.fertilitynetwork.com/state/west-virginia.htm> (last visited Oct. 2, 2013).

¹⁴⁶ *Clinics with Embryo Donation Programs*, EMBRYO ADOPTION AWARENESS CENTER, http://www.embryoadooption.org/clinics/clinic_donation_programs.cfm (last visited Oct. 2, 2013).

¹⁴⁷ *Id.*

Even though West Virginia has IVF and embryo adoption programs, the state has no particular laws to define the legal status of an embryo or regulate the embryo adoption process. For example, the Embryo Adoption Awareness Campaign's website lists the state laws on embryo adoption in West Virginia as "None identified."¹⁴⁸ West Virginia only remotely defines an embryo through one of its statutes, which recognizes an embryo as a distinct unborn victim of certain crimes of violence. In this statute, section 61-2-30 of the West Virginia Code, "[e]mbryo" means the developing human in its early stages. The embryonic period commences at fertilization and continues to the end of the embryonic period and the beginning of the fetal period, which occurs eight weeks after fertilization or ten weeks after the onset of the last menstrual period."¹⁴⁹

However, this statute also emphasizes that "these definitions [of the embryo] only apply for purposes of prosecution of unlawful acts under this section and may not otherwise be used: (i) [t]o create or to imply that a civil cause of action exists; or (ii) for purposes of argument in a civil cause of action."¹⁵⁰ This statute further recognizes the legality of having an abortion up until the end of the first trimester if the pregnant woman consents.¹⁵¹ The statute's provisions, making it illegal to injure or kill an embryo, does not apply to "[a]cts committed during a legal abortion to which the pregnant woman, or a person authorized by law to act on her behalf, consented or for which the consent is implied by law."¹⁵² *Farley v. Sartin*¹⁵³ further exemplifies the legality of abortion in West Virginia. In this case, the Supreme Court of Appeals of West Virginia stated that West Virginia's "definition of 'person' within the confines of the wrongful death statute neither affects nor interferes with the constitutional protection afforded a woman who chooses to have an abortion, as was set forth originally in *Roe v. Wade*."¹⁵⁴ The court in *Farley* explained:

[T]he decision to allow abortion does not depend on the same policies and justifications as does the decision to allow a cause of action for the wrongful death of a fetus [or embryo]. While the fetus may not be a 'person' for the purposes of the

¹⁴⁸ *State Laws Relating to Embryo Donation and Adoption*, EMBRYO ADOPTION AWARENESS CAMPAIGN, <http://www.embryolaw.org/statelaws.asp> (last visited Oct. 2, 2013).

¹⁴⁹ W. VA. CODE ANN. § 61-2-30(b)(1) (2013).

¹⁵⁰ *Id.* § 61-2-30(b).

¹⁵¹ *Id.* § 61-2-30(d)(1).

¹⁵² *Id.*

¹⁵³ 466 S.E.2d 522 (W. Va. 1995).

¹⁵⁴ *Id.* at 534.

[F]ourteenth [A]mendment, it may be a 'person' for the purposes of a state's wrongful death statute.¹⁵⁵

While a few statutes in West Virginia pertain to the embryo, no law exists to specifically define the legal status of an embryo and regulate embryo adoption. Because West Virginia participates in embryo adoption, the state has a need to implement such laws to protect West Virginia citizens as donor and recipient couples. Therefore, West Virginia should define the embryo as an interim category, deserving special respect because of its potential to become human; for the sake of protecting both couples in the embryo adoption process, West Virginia should regulate embryo adoption through contract law.

VI. LACK OF CLARITY AND UNIFORMITY AMONG FEDERAL AND STATE LAW MEANS UNSETTLED LAW ON EMBRYO ADOPTION

Part VI demonstrates that because of the Supreme Court's refusal to specifically identify when human life begins and the lack of uniformity in defining the embryo among states' laws, the law on embryo adoption remains unsettled. This is demonstrated through the words of the Embryo Adoption Awareness Center via their website:

The most significant legal issue associated with embryo donation and adoption relates to the unsettled nature of embryo adoption law, and the contractual agreements used to legally bind donor and recipient couples. First, both the donor and recipient couples should acknowledge that the law of embryo . . . adoption is unsettled. There are no federal or state laws specifically governing the adoption of embryos although some states do have laws generally related to embryo donation and or assisted reproductive technology.¹⁵⁶

The website goes on to warn both potential donor and recipient parents as follows:

Parties involved should also note that embryos have a special legal status that is yet to be clearly defined. While many courts are reluctant to classify embryos as property, they also do not characterize them as human beings. As a result, embryo adoption programs may differ in how they define embryos in their legal agreements. Some may refer to embryo donation as

¹⁵⁵ *Id.* at 534–35 (quoting Sheryl Anne Symonds, *Wrongful Death of the Fetus: Viability is Not a Viable Distinction*, 8 U. PUGET SOUND L. REV. 103, 113 n.68 (1984)).

¹⁵⁶ EMBRYO ADOPTION AWARENESS CENTER, *supra* note 75.

a transfer of property while others may incorporate traditional adoption language into their legal documents.¹⁵⁷

The website shows that because there is a lack of uniformity across states on how the legal status of an embryo is defined, embryo adoption programs differ on how they follow the law. As a result, the law regarding embryo adoption remains unsettled. As demonstrated by the dispute between the Lamberts and McLaughlins, this can lead to an emotional and drawn-out custody battle between the donor couple and recipient couple over their rights to the embryos. As discussed in Part VII, avoiding such custody disputes necessitates West Virginia to clearly define the embryo, specifically as an interim category demanding respect, and implement contract law to regulate the embryo adoption process.

VII. HOW WEST VIRGINIA SHOULD LEGALLY DEFINE EMBRYOS AND REGULATE EMBRYO ADOPTION

West Virginia should enact laws defining embryos and regulating embryo adoption to clarify adoption agreements and protect the rights of donor and recipient couples. In embryo adoption, both couples have “distinct, but, at times, competing interests.”¹⁵⁸ Recipients possess interests in “having an uncomplicated rearing situation.”¹⁵⁹ This means they will want to have protection from “later involvement from the donor” in their lives, as well as their children’s lives.¹⁶⁰ Donors also possess certain interests, such as “being able to donate, being protected in the process, being treated fairly if injuries occur, and . . . not having obligations imposed on them without their consent. They may also have an interest in having or not having contact with offspring.”¹⁶¹

If West Virginia fails to implement laws to protect the rights of donor and recipient couples in embryo adoption, such lack of protection could lead to future lawsuits between couples regarding their intended interests in the original adoption agreement. The possibility of future lawsuits obligates West Virginia to enact laws defining the status of an embryo and, in turn, regulating embryo adoption for the sake of protecting both donor and recipient couples in the adoption process. In essence, West Virginia should define the embryo as an

¹⁵⁷ *Id.*

¹⁵⁸ THE ETHICS COMM. OF THE AM. SOC’Y FOR REPROD. MED., INTERESTS, OBLIGATIONS, AND RIGHTS OF THE DONOR IN GAMETE DONATION 22 (2009), http://www.sart.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/interests_obligations_rights_of_donor.pdf.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

interim category, deserving special respect because of its potential to become human; for the sake of protecting both couples in the embryo adoption process, West Virginia should regulate embryo adoption through contract law.

In regard to personal beliefs, each individual can choose how to define an embryo. An individual's decision to view an embryo as a person, property or interim category stands as a personal choice with no right or wrong answer. This idea is demonstrated through the Supreme Court's refusal to define when human life begins, because even philosophers and scientists do not know the exact answer.¹⁶² However, for purposes of regulating embryo adoption, West Virginia should specify how to legally define an embryo. Because embryo adoption is still a relatively new phenomenon and West Virginia has yet to enact any laws to address it, West Virginia should emulate case law established by other jurisdictions. To determine which jurisdictional case law to use, West Virginia lawmakers should consider the state's similarity in law with other jurisdictions and how each state has viewed embryos in the past. They should also consider how the jurisdictions handled weighing the interests of the parties in an embryo custody dispute. Taking this into consideration, West Virginia should follow the ruling in *Davis* to ultimately conclude that embryos are an interim category deserving special respect and that contract law should regulate embryo adoption to protect both couples involved.

A. *West Virginia Should Legally Define Embryos as an Interim Category*

West Virginia should follow the ruling in *Davis*¹⁶³ for legally defining the embryo, which in turn influences the type of law West Virginia should use to govern embryo adoption. As mentioned previously, *Davis*, a Tennessee case, involved a couple's dispute over what to do with their remaining embryos after their divorce. The ex-wife wanted to keep the embryos for conception, but the ex-husband objected.

The court granted the ex-husband's request to follow the original contract written between the couple, which directed the destruction of the embryos in the event of divorce. As shown in *Davis*, Tennessee possesses a statutory scheme that legalizes abortion but criminalizes the attack or murder of an embryo. Given this statutory scheme, the court in *Davis* decided the best method for determining the status of embryos involved following the ethical standards set by the Ethics Committee. The court interpreted the Report of the Ethics Committee as follows:

Although the report alludes to the role of "special respect" in the context of research on preembryos not intended for

¹⁶² Roe v. Wade, 410 U.S. 113, 159 (1973).

¹⁶³ Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), *reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

transfer, it is clear that the Ethics Committee's principal concern was with the treatment accorded the transferred embryo. Thus, the Ethics Committee concludes that "special respect is necessary to protect the welfare of potential offspring . . . [and] creates obligations not to hurt or injure the offspring who might be born after transfer [by research or intervention with a preembryo]."¹⁶⁴

In its report, the Ethics Committee asked IVF programs to establish policies in keeping with the "special respect" due to embryos and suggested:

Within the limits set by institutional policies, decision-making authority regarding preembryos should reside with the persons who have provided the gametes As a matter of law, it is reasonable to assume that the gamete providers have primary decision-making authority regarding preembryos in the absence of specific legislation on the subject. A person's liberty to procreate or to avoid procreation is directly involved in most decisions involving preembryos.¹⁶⁵

Based on the court's opinion, the language from the Report of the Ethics Committee means that an embryo demands special respect because of its potential to develop into a human. The gamete providers, or the parents of the embryo who provided their sperm and egg for its creation, initially possess the decision-making authority over the embryo. The court in *Davis*, combining its state statutory scheme on embryos with the reasoning of the Ethics Committee, concluded that embryos "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."¹⁶⁶ Embryos are not strictly property, nor are they entirely human. However, because embryos have the potential for developing into humans, they deserve special respect and merit protection.

Like Tennessee, West Virginia law renders it a crime to attack or murder a fetus or an embryo. This is demonstrated through section 61-2-30 of the West Virginia Code, which "recognizes an embryo or fetus as a distinct unborn victim of certain crimes of violence against a person, including homicide and manslaughter."¹⁶⁷ This statute is "known and cited as the Unborn Victims of Violence Act."¹⁶⁸ Also like Tennessee law, however, West Virginia

¹⁶⁴ *Id.* at 596.

¹⁶⁵ *Id.* at 597 (internal quotations omitted).

¹⁶⁶ *Id.*

¹⁶⁷ *Fetal Homicide Laws*, NAT'L CONF. STATE LEG., <http://www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx> (last visited Oct. 4, 2013).

¹⁶⁸ W. VA. CODE ANN. § 61-2-30(a) (2013).

law legalizes abortion up until the end of the first trimester with the pregnant woman's consent.

The language in section 61-2-30 of the West Virginia Code emphasizes that its provisions making it illegal to injure or kill an embryo do not apply to "[a]cts committed during a legal abortion to which the pregnant woman, or a person authorized by law to act on her behalf, consented or for which the consent is implied by law."¹⁶⁹ As previously mentioned, the case law in *Farley* further exemplifies this point. In *Farley*, the court held that West Virginia's "definition of 'person' within the confines of the wrongful death statute neither affects nor interferes with the constitutional protection afforded a woman who chooses to have an abortion, as was set forth originally in *Roe v. Wade*."¹⁷⁰ The statutes in West Virginia, along with supporting case law, demonstrate that the statutory scheme of West Virginia, like Tennessee, illegalizes attacking or murdering an embryo but allows abortion.

Because West Virginia has a similar statutory scheme to Tennessee that criminalizes attacking or murdering an embryo but legalizes abortion, West Virginia should follow suit with Tennessee law and defer to the Ethics Committee's view of defining embryos as an interim category deserving special respect because of their potential for life.

B. West Virginia Should Regulate Embryo Adoption Through Contract Law

As mentioned previously, how an embryo is defined generally determines how custody rights are governed, which in turn will decipher the type of law needed for regulating embryo adoption. According to the Ethics Committee, "The [embryo adoption] process is not considered to be a legal adoption, because American law does not treat embryos as children."¹⁷¹ "Equating an embryo with an existing child and applying the procedural requirements of adoption designed to protect existing children to embryos is not ethically justifiable. . . ."¹⁷² The Committee has argued that "the experience of embryo donation 'more closely approximates normal human reproduction than it does traditional legal adoption.'"¹⁷³

This reasoning by the Ethics Committee suggests that embryos should not be viewed entirely as humans because embryos face the possibility of never developing into human life. However, embryos should be defined as an interim category, considering they still have the potential for human development.

¹⁶⁹ *Id.* § 61-2-30(d)(1).

¹⁷⁰ *Farley v. Sartin*, 466 S.E.2d 522, 534 (W. Va. 1995).

¹⁷¹ THE ETHICS COMM. OF THE AM. SOC'Y FOR REPROD. MED., *supra* note 124, at 1819.

¹⁷² *Id.*

¹⁷³ *Id.*

Based on the Ethics Committee's view that embryos are an entity different from human beings, standard adoption laws should not govern the embryo adoption process because adoption laws apply specifically to humans. Instead, embryo adoption should be viewed as a method for reproduction. However, a legal proceeding is still needed to regulate embryo adoption to ensure the agreement between both couples is followed and the interests of both couples are protected.

The court in *Davis* determined that "to provide the necessary guidance to all those involved with IVF procedures in Tennessee in the future,"¹⁷⁴ a written contractual agreement constituted the best method of regulating custody rights to embryos. If a dispute over custody occurred, the court would follow prior contractual agreements, because entering into a contract allowed the parents who provided the genetic material for creating the embryos to have a say in the disposition of the embryos.¹⁷⁵

Because West Virginia has similar laws to Tennessee, West Virginia should follow the ruling in *Davis* and allow contract law to govern the embryo adoption process between a donor and recipient couple. This permits the donors, the couple responsible for creating the embryos through their genetic material, to have a say on how their embryos are handled when provided to recipients. For example, the donor couple can decide whether to maintain contact with the offspring that result from the donated embryos.¹⁷⁶ If, hypothetically, West Virginia strictly defined embryos as humans, only regular adoption laws would apply and state law would not consider prior contractual agreements protecting donor and recipient rights.

1. Rebuttal of the Argument Favoring Adoption Law

Courts that view embryos as property generally regulate custody rights to embryos through contract law. Courts who define embryos as an interim category regulate embryo custody through contract law as well, paying deference to the Ethics Committee's advisement that embryos, as an interim category, should not have their custody governed by adoption law. Individuals who view embryos solely as humans will likely disregard the determination that embryos should not be regulated by adoption law. Those who view embryos as humans will likely argue in favor of adoption law to regulate embryo adoption. They may support their argument by referring to section 19-

¹⁷⁴ *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), *reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

¹⁷⁵ *Id.*

¹⁷⁶ As mentioned previously, one of the interests of donor couples is whether or not to maintain contact with the offspring of their donated embryos. *See supra* note 161 and accompanying text.

8-41 of the Georgia Code that implies embryos are human beings and adoption law governs embryo adoption.¹⁷⁷

However, if adoption law governed embryo adoption, the donor parents would have no rights or say in how recipient parents handle the embryos. “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.”¹⁷⁸ Complete, immediate termination of the biological parents’ parental rights is a prerequisite for adoption.¹⁷⁹ West Virginia law requires that the following individuals agree to surrender their rights when giving their child up for adoption: the parents or surviving parent of a marital child; and the birth mother, the birth father, any legal father, and any outside father who was adjudicated as the biological father of a non-marital child.¹⁸⁰

West Virginia adoption law demonstrates that in the adoption process, all biological or legal parents must promptly relinquish their parental rights to give their child to another family. If the embryo adoption process followed the regularly implemented laws of adoption, the donor couple, who went through the painstaking IVF process and used their genetic material to create the embryos in the first place, would have to relinquish all of their rights to the embryos to the recipient parents immediately. This could pose certain issues not initially foreseen by the donor couple. For example, donor couples mainly pick embryo adoption so that their embryos can eventually develop into humans. They choose not to destroy their remaining embryos but instead give them life. However, if under regular adoption laws a donor couple had seven remaining embryos and gave them up to a recipient couple, the recipient couple would exercise complete control over handling all seven embryos.

This means if a recipient couple used only two out of seven embryos for initial conception, had twins, and decided not to use the five remaining embryos, they could choose what to do with the remainders because they have full custody of them. They could, for example, decide to destroy these remaining embryos, which goes directly against the initial desire of the donor parents to develop all their embryos. The recipient couple could also give the excess embryos to another couple of their choice. The donor couple may have looked for certain moral standards or qualities in a family, and the recipient couple may choose to give the leftover embryos to a family that does not have these standards. According to the Ethics Committee, donors have an interest in:

¹⁷⁷ GA. CODE ANN. § 19-8-41 (2009) (implicitly defining embryos as humans and specifically regulating embryo adoption through standard adoption law).

¹⁷⁸ Molly Miller, *Embryo Adoption: The Solution to an Ambiguous Intent Standard*, 94 MINN. L. REV. 869, 874 (2010).

¹⁷⁹ *Adoption/TPR Resource Guide*, NAT’L CENTER FOR STATE COURTS, <http://www.ncsc.org/Topics/Children-Families-and-Elders/Adoption-Termination-of-Parental-Rights/Resource-Guide.aspx> (last visited Oct. 4, 2013).

¹⁸⁰ W. VA. CODE ANN. § 48-22-301 (2013).

[S]pecify[ing] the categories of people to whom the gametes will be given. For example, a donor may want to donate only to couples in their 20s or 30s or to married or gay couples. Requests could conceivably be made for age, marital status, health status, sexual orientation, race, religion, or education.¹⁸¹

Donors may also wish to seek information regarding the outcome of the embryo adoption process. This includes information about whether the recipient couple conceived a child that the donor couple is genetically related to or whether any health complications occurred.¹⁸² The donor couple may also want to have contact, or avoid contact, with the offspring of their donated embryos.¹⁸³ While these interests may conflict with the recipient couple's need for autonomy, "a donor's psychological need to know the outcome [of the embryo adoption] or to be prepared for future contact supports the principle that the donor's decision to know or not know the outcome should prevail over that of the recipient."¹⁸⁴

Donors, who endure substantial emotional and physical hardship from creating embryos through IVF, may suffer greater pain with little decision-making authority regarding the embryo adoption process. "IVF requires a significant physical, emotional, financial, and time commitment. Stress and depression are common among couples dealing with fertility. A woman taking fertility medicines may have bloating, abdominal pain, mood swings, headaches, and other side effects. Many IVF medicines [are] given by injection . . . several times a day."¹⁸⁵ Risks of retrieving eggs from the woman's body for embryo creation also exist, which include "reactions to anesthesia, bleeding, infection, and damage to structures surrounding the ovaries, including the bowel and bladder."¹⁸⁶ Couples undergoing IVF also face many financial difficulties:

[M]any insurance plans do not cover infertility treatment. Fees for a single IVF cycle—including costs for medicines, surgery, anesthesia, ultrasounds, blood tests, processing the eggs and sperm, embryo storage, and embryo transfer—can quickly add

¹⁸¹ THE ETHICS COMM. OF THE AM. SOC'Y FOR REPROD. MED., *supra* note 158, at 26.

¹⁸² *Id.*

¹⁸³ *Id.* at 22.

¹⁸⁴ *Id.* at 26.

¹⁸⁵ *In Vitro Fertilization (IVF)*, N.Y. TIMES, <http://health.nytimes.com/health/guides/surgery/in-vitro-fertilization-ivf/overview.html> (last visited Oct. 4, 2013).

¹⁸⁶ *Id.*

up. The exact total of a single IVF cycle varies with each individual, but may cost more than \$12,000 [to] \$17,000.”¹⁸⁷

Couples also experience emotional strife during IVF, particularly stress. Patients tend to rate the stress of IVF as more stressful than, or as stressful as, any major life event.¹⁸⁸ During IVF, “[t]ime is stressful [because of the] time commitment to an intense treatment which leads to disruption in family, work, and social activities.”¹⁸⁹ Aside from time, “[d]ealing with the medical staff and with the side effects or potential complications of medical treatment has its own stress: hot flashes, headaches, mood fluctuations, injections, sonograms, future health concerns, and decision making about embryos, their disposition and multiple pregnancies.”¹⁹⁰

The struggles from IVF demonstrate how donor parents must bear the emotional, physical and financial burden to create embryos. The woman of the recipient couple does not endure the physical pain of receiving shots and extracting eggs to produce embryos. The recipient couple also does not face the emotional toll of stress from IVF. Embryo adoption, considered as a donation, costs approximately \$5,000 to \$6,000 and does not place nearly as much of a financial drain on the recipient couple.¹⁹¹ Because the donor couple experienced the emotionally, physically and financially grueling process of creating embryos, they should have the decision-making authority on how to handle these embryos in adoption. This idea is reinforced through the court’s holding in *Davis*, which stipulates “that the progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority as to their disposition.”¹⁹²

Treating the embryo adoption process as an actual adoption does not give the donor couple any control over handling the embryos, because they immediately relinquish all of their “parental rights” once they give the embryos to the recipient couple. However, with a contract, even if the donor parents essentially lose their rights to raise children resulting from embryo adoption, they still have some control over how the embryos are handled during and after the adoption process. For example, the donor couple can choose the type of recipient family they want to care for their embryos once they develop into children. Also, once the recipient couple conceives a child through the donated embryos, if excess embryos remain, a clause in the contract can stipulate that

¹⁸⁷ *Id.*

¹⁸⁸ *Preparing for IVF: Emotional Considerations*, AM. SOC’Y FOR REPROD. MED., <http://www.asrm.org/detail.aspx?id=1902> (last visited Oct. 4, 2013).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ UCSF MED. CENTER, *supra* note 72.

¹⁹² *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), *reh’g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

the recipient couple must donate the excess embryos to a particular type of family. Through a contract, the donor couple can also decide whether to receive information on the donation's outcome and whether to keep in contact with the offspring. This allows the donor and recipient couple to reach an agreement on managing the donated embryos. This way, each party will know up front how to deal with the embryos prior to signing the contract, and no dispute will arise later on how recipient parents should handle these embryos, as well as future donor contact with the resulting offspring.

The contractual agreement, with all of its terms agreed upon by the parties, will also serve to protect the interests of both the donor and recipient couple. As mentioned previously, a contract clause can protect the donor couple by providing them with some control over how recipient parents handle remaining embryos. For a recipient couple, the contract can stipulate that once the embryos are turned over to them, the embryos are solely in their custody for implantation to have a child. As a result, the donor couple cannot later change their mind and decide they want the embryos back after the recipient couple has them implanted.

This provides recipients with the security that once they receive these embryos through the adoption process, the embryos can be used for them to conceive and cannot go back to the donor couple. Therefore, regulating embryo adoption through a written contract protects the interests of both couples. A written contract protects recipient couples "from later involvement from the donor."¹⁹³ It allows recipient couples to govern and limit the donor couple's future contact with offspring. It also protects donor couples in the embryo adoption process by allowing them to exercise some control over how the embryos are handled during and after adoption. In sum, a written contract enables donor and recipient couples to come to an agreement on their rights regarding the management and custody of embryos and to enforce the protection of these rights.

2. Implied Contracts: No Place in Embryo Adoption

West Virginia should also follow the ruling in *Davis* by refusing to interpret implied contracts for embryo adoption.¹⁹⁴ If no specific, written contract signed by the donor and recipient couple exists, then the court should deem no contract at all; the donor couple should maintain possession of the embryos. This follows the ruling in *Davis* that individuals who provide the genetic material for embryos have control over the disposition of those embryos.¹⁹⁵ As explained in *Davis*, individuals have an inherent right to procreate or not procreate, a right stemming from the Fourteenth Amendment

¹⁹³ THE ETHICS COMM. OF THE AM. SOC'Y FOR REPROD. MED., *supra* note 158, at 22.

¹⁹⁴ *Davis*, 842 S.W.2d at 598.

¹⁹⁵ *Id.* at 597.

of the United States Constitution.¹⁹⁶ Like *Davis*, where Tennessee law has a provision protecting its citizens' rights to procreate or not procreate,¹⁹⁷ West Virginia also imposes such a provision under article III, section 1 of the West Virginia Constitution:

All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: The enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.¹⁹⁸

Because West Virginia citizens have the implied right to procreate or not procreate, if a dispute arises over whether an implied contract exists between two couples regarding embryo adoption, the embryos should remain in the custody of the donor couple. The only way to clearly establish a donor couple's intent to donate embryos is through a written contract. Following implied contracts for embryo adoption in West Virginia could misconstrue the intent of the donor couple to donate embryos for another couple to conceive, causing the donor couple's unwanted development of their embryos. Because the donor couple's genetic material creates the embryos, following implied contracts for embryo adoption could essentially lead to the donor couple's unwanted procreation of children.

It can be argued that implied contracts should be recognized, even if they may erroneously determine that the donor couple wanted to give their embryos away, because the donor couple will not have to face the responsibility of raising these children. It will be the recipient couple that faces the financial burden and time needed to raise the children that develop from the embryos. However, even if this were the case, as the court points out in *Davis*, the donor couple could still be plagued with wondering about the welfare and upbringing of the children produced from the embryos.¹⁹⁹ This constant wonder stands as a large burden placed on a couple that did not want to donate their embryos to begin with. Therefore, to clarify, while West Virginia should use contract law to regulate embryo adoption, West Virginia should only follow written contracts. This distinction is worth noting when concluding West Virginia should define the embryo as an interim category, deserving special respect because of its potential to become human; for the sake of protecting both couples in the embryo adoption process, West Virginia should regulate embryo adoption through contract law.

¹⁹⁶ *Id.* at 598–601.

¹⁹⁷ *See supra* notes 133–35 and accompanying text.

¹⁹⁸ W. VA. CONST. art. III, § 1.

¹⁹⁹ *Davis*, 842 S.W.2d at 603.

VIII.CONCLUSION

Elizabeth Jordan Carr, born on December 28, 1981, in Norfolk, Virginia, was the first baby ever conceived through IVF in the United States.²⁰⁰ Since then, many couples in the United States have used IVF to conceive children. Couples who engage in IVF “often find themselves with excess embryos after they either successfully conceive or abandon their attempt to have children.”²⁰¹ These couples then must confront the question of how to handle the excess embryos and can consider several primary options. These options include disposing the embryos, donating them to research such as stem cell research, or donating them for another couple to conceive through embryo adoption.²⁰² Couples often decide to donate their embryos to another couple to ensure that the embryos they painstakingly created can develop into human life. However, the law remains unsettled on how to regulate embryo adoption. Defining the legal status of embryos, such as whether they are persons, property, or an interim category, helps determine the type of law needed to govern embryo adoption.

In the past, the Supreme Court refused to explicitly define embryos, because the Court itself did not know the answer to that question.²⁰³ The Court acknowledged that because even the most experienced and versed scholars do not know how to define embryos, it refused to define them under the law.²⁰⁴ This left state courts to legally define the embryo. State law currently varies significantly on this issue. For example, New York law defines embryos as property.²⁰⁵ Therefore, New York governs the custody of embryos through contract law. However, Georgia law defines embryos as human beings.²⁰⁶ This means the state regulates embryo adoption through standard adoption law, relinquishing all parental rights of the donor couple immediately. Some states, like Tennessee, follow the Ethics Committee’s mindset and define embryos as an interim category, deserving special respect because of their potential to become human.²⁰⁷ Tennessee chooses to regulate the custody of embryos through contract law, particularly through a written contract.

West Virginia presently has no laws defining the embryo or regulating the embryo adoption process. However, because West Virginia does have a multitude of IVF clinics and some of these clinics provide embryo adoption,

²⁰⁰ *The US’ First Test Tube Baby*, *supra* note 33.

²⁰¹ Conger, *supra* note 38.

²⁰² *See* discussion *supra* Part II.C.

²⁰³ *Roe v. Wade*, 410 U.S. 113, 159 (1973).

²⁰⁴ *Id.*

²⁰⁵ *See* discussion *supra* Part IV.A.

²⁰⁶ *See* discussion *supra* Part IV.B.

²⁰⁷ *See* discussion *supra* Part IV.C.

West Virginia should implement clear and specific laws defining embryos and, in turn, regulate embryo adoption so as to avoid any future custody disputes between donor and recipient couples. West Virginia should follow the ruling in *Davis*, because West Virginia's statutory scheme, which criminalizes attack and wrongful death of an embryo but legalizes abortion under *Roe v. Wade*, matches the statutory scheme of Tennessee law. In *Davis*, the court held that when a custody dispute arises over embryos, a prior written agreement must be followed.²⁰⁸ If no prior written agreement stands, then the parent or parents who desire to avoid procreation generally prevail.²⁰⁹ The court also noted that the parents who provided the genetic material to create the embryos hold the decision-making authority over the embryos.²¹⁰

When this holding is administered, it can be determined that contract law should apply to embryo adoption to protect the rights of both donor and recipient couples. Through a written contract, donor couples will have a say in how to handle their embryos after they pass those embryos on to recipients. On the other hand, the contract will protect recipient couples from later involvement from the donors. If no written contract exists, then the donor couples maintain the rights to the embryos, because their intent to donate the embryos cannot be determined otherwise. Taking this into account and following the holding in *Davis*, this Note concludes: West Virginia should define the embryo as an interim category, deserving special respect because of its potential to become human; for the sake of protecting both couples in the embryo adoption process, West Virginia should regulate embryo adoption through contract law.

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²⁰⁸ *Davis v. Davis*, 842 S.W.2d 588, 597, 604 (Tenn. 1992), *reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

²⁰⁹ *Id.* at 604.

²¹⁰ *Id.* at 597.

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