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## Embryo Exchanges and Adoption Tax Credits

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## Embryo Exchanges and Adoption Tax Credits

Sarah B. Lawsky and Naomi Cahn<sup>†</sup>

### I. Introduction

Soon after Nadya Suleman gave birth to octuplets in early 2009 as a result of in vitro fertilization,<sup>1</sup> Rep. James Mills, a staunchly anti-abortion member of the Georgia state legislature,<sup>2</sup> introduced the “Option of Adoption Act,” legislation addressing what it described as the “adoption” of embryos.<sup>3</sup> Various sources, from Ron Stoddart of Nightlight Christian Adoptions,<sup>4</sup> to Georgia Right to Life,<sup>5</sup> to the Evan B. Donaldson Adoption Institute,<sup>6</sup> have claimed or suggested that taxpayers who “adopt” an embryo under the Option of Adoption Act are entitled to claim a Georgia adoption tax credit and a federal adoption tax credit for their expenses. But, as this article explains, these claims

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<sup>1</sup> See, e.g., Tracy Connor, “Octuplet Mom Nadya Suleman Released from Hospital,” *N.Y. Daily News*, Feb. 6, 2009, available at [http://www.nydailynews.com/news/us\\_world/2009/02/05/2009-02-05\\_octuplet\\_mom\\_nadya\\_suleman\\_released\\_from.html](http://www.nydailynews.com/news/us_world/2009/02/05/2009-02-05_octuplet_mom_nadya_suleman_released_from.html) (last visited Apr. 23, 2009).

<sup>2</sup> For example, Rep. Mills has received the “Pro-Life Hero Award” from Georgia Right to Life for his “continual pro-life work.” Georgia Legislature, Rep. James Mills, Bio, [http://www.legis.ga.gov/legis/2009\\_10/house/bios/millsJames/millsJamesBio.htm](http://www.legis.ga.gov/legis/2009_10/house/bios/millsJames/millsJamesBio.htm) (last visited Apr. 23, 2009).

<sup>3</sup> H.B. 388, 2009 Gen. Assem., Reg. Sess. (Ga.), codified at Ga. Code Ann. §§ 19-8-40 to 19-8-43 and scattered sections. A similar bill has been introduced in Tennessee, the “Embryo Donation and Adoption Act of 2009.” H.B. 2159, S.B. 2136, 106th Gen. Assem., Reg. Sess. (Tenn.).

<sup>4</sup> See, e.g., Michael Foust, “Georgia May See U.S.’ First Embryo Adoption Law,” *Baptist Press*, Mar. 17, 2009, available at <http://www.bpnews.net/BPnews.asp?ID=30084> (“Stoddart claims the bill will provide another valuable bonus for embryo adopting couples in Georgia: clarifying that they are eligible for the federal adoption tax credit, which this year is \$11,650 [sic].”).

<sup>5</sup> See, e.g., Georgia Right to Life, Press Release, “Georgia Legislature Passes Nation’s First Embryo Adoption Law,” Apr. 3, 2009, available at <http://www.grtl.org/nationsfirst.asp> (“It is also possible that a Federal Adoption Tax Credit will now be available to parents to offset the legal costs of adoption. The limit under IRS guidelines is \$11,500 [sic].”).

<sup>6</sup> See, e.g., Evan B. Donaldson Adoption Institute, “Georgia Bill Sets First Legal Framework in U.S. for Embryo ‘Adoption,’” E-Newsletter, Mar. 2009, available at [http://www.adoptioninstitute.org/newsletter/2009\\_03.html](http://www.adoptioninstitute.org/newsletter/2009_03.html) (“If the new legislation is enacted, parents who ‘adopt’ an embryo would be eligible for state and federal adoption tax credits.”).

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are without merit: neither a Georgia adoption tax credit nor a federal adoption tax credit is available for “adopting” an embryo.

After this introduction, Part II describes what we call “embryo exchanges” and provides background on the Option of Adoption Act, which was signed by Georgia’s governor May 5, 2009,<sup>7</sup> and becomes effective July 1, 2009.<sup>8</sup> Part III explains why no adoption tax credits are available for the expenses incurred due to embryo exchanges, notwithstanding the Option of Adoption Act and its rhetorical use of the word “adoption.” Part IV concludes.

### II. Embryo Exchanges and the Option of Adoption Act

This part explains the medical context for embryo exchanges before explaining how Georgia’s Option of Adoption Act (the “Act”) is designed to regulate these exchanges.

#### A. Embryo Exchanges

One treatment for infertility is in vitro fertilization (IVF), in which a woman’s eggs are surgically removed from her body and then combined with sperm.<sup>9</sup> If the procedure is successful, some (but possibly not all) the eggs are fertilized, and some (but possibly not all) of the fertilized eggs undergo cell division, thus becoming embryos.<sup>10</sup> Some of the embryos are then returned to the woman’s body, with the exact number

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<sup>7</sup> Georgia General Assembly, HB 388: The Option of Adoption Act, [http://www.legis.ga.gov/legis/2009\\_10/sum/hb388.htm](http://www.legis.ga.gov/legis/2009_10/sum/hb388.htm) (last visited May 8, 2009).

<sup>8</sup> Ga. Code Ann. § 1-3-4(a) (“Any Act which is approved by the Governor...on or after the first day of January and prior to the first day of July of a calendar year shall become effective on the first day of July[.]”). The Act does not specify an effective date.

<sup>9</sup> For further discussion of IVF and other reproductive technologies, see Naomi Cahn, *Test Tube Families: Why the Fertility Market Needs Legal Regulation* (2009).

<sup>10</sup> U.S. Dep’t of Health & Human Servs., Ctrs. for Disease Control & Prevention, 2006 Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports 3, 17 (2008), available at <http://www.cdc.gov/ART/ART2006/508PDF/2006ART.pdf> [hereinafter “CDC Report”].

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determined by the fertility clinic and their patients.<sup>11</sup> Embryos that implant and continue to develop will, at eight weeks after conception, become fetuses.<sup>12</sup> In 2006, the latest year for which statistics are available, more than 50,000 babies were born as a result of close to 140,000 cycles of IVF and related assisted reproductive technology (ART) techniques.<sup>13</sup>

Because IVF is expensive and can be physically uncomfortable, women who do IVF usually take drugs that permit them to produce a number of eggs in a single cycle—and thus more embryos than can be implanted may be created.<sup>14</sup> A woman may have several children through IVF and still have embryos left over; one 2005 study estimated that, following a successful fertilization, there remain, on average, seven unused embryos.<sup>15</sup> These embryos may be discarded, donated to researchers, or stored, or they may be transferred to someone else who wishes to have a child.

This last category—embryos transferred to someone else who wishes to have a child—is the subject of the Georgia Act. There are no precise statistics on the number of embryos available for transfer. Of the approximately 500,000 frozen embryos currently in storage, most would not survive if thawed, and in one study, only 7% of couples with embryos in storage said they would donate those embryos to another couple.<sup>16</sup> In 2006,

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<sup>11</sup> *Id.*

<sup>12</sup> Merriam-Webster Medical Dictionary (2009).

<sup>13</sup> *Id.* at 61.

<sup>14</sup> Am. Soc. of Reproductive Med., “Guidelines on Numbers of Embryos Transferred,” 90 *Fertility & Sterility* S163 (2008).

<sup>15</sup> Robert D. Nachtigall et al., “Parents’ Conceptualization of Their Frozen Embryos Complicates the Disposition Decision,” 84 *Fertility & Sterility* 431, 432 tbl.1 (2005).

<sup>16</sup> Bob Smietana, “In Tennessee and Elsewhere, Leftover Embryos Lie in Frozen Limbo,” *The Tennessean*, Apr. 4, 2009, available at <http://www.tennessean.com/article/20090404/NEWS06/90404026>.

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there were roughly 5,500 ART cycles using frozen embryos created from donor eggs; some of these cycles probably involved donated embryos.<sup>17</sup>

These embryos may be donated, or what some organizations call “adopted.”<sup>18</sup> For example, Nightlight Christian Adoptions, a pioneer in this area, runs the Snowflakes Frozen Embryo Adoption Program.<sup>19</sup> The first “snowflake” baby was born in 1998, and there have been between 1,000 and 3,000 babies born since then through Nightlight and other “adoption” programs.<sup>20</sup> However, the term “adoption,” as we discuss below, is a politically motivated term that does not accurately describe what actually happens when embryos are transferred. Thus we instead use the term “embryo exchanges” to describe these transactions.

### B. The Option of Adoption Act

The “Option of Adoption Act” was introduced by Rep. James Mills as an anti-abortion response to the dilemma of unused embryos.<sup>21</sup> The initial version of the “Option of Adoption Act” would have amended the definition of “child” for purposes of the

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<sup>17</sup> CDC Report, *supra* note 10, at 89.

<sup>18</sup> Embryos could also be sold, though nonbinding guidelines promulgated by the American Society for Reproductive Medicine Guidelines frown upon this practice. Am. Soc. of Reproductive Med., “2008 Guidelines for Gamete and Embryo Donation,” 90 *Fertility & Sterility* S30, S42 (2008) (“[Embryo d]onors should receive no compensation for the donation other than reimbursement for specific expenses (e.g., blood tests).”). The one for-profit company that tried to broker embryo sales is no longer doing so. *See, e.g.*, Ronald Bailey, “Embryos for Sale,” *Reason*, Aug. 18, 2006, *available at* <http://www.reason.com/news/show/36844.html>; Craig Malisow, “Ringin’ Up Baby,” *Dallas Observer*, June 7, 2007. For further discussion of why such sales may seem disturbing, see generally Naomi Cahn, *Test Tube Babies* 145-164 (2009), which discusses commodification concerns that may be raised by the sale of eggs and sperm.

<sup>19</sup> *See, e.g.*, Nightlight Christian Adoptions Homepage, <http://www.nightlight.org/snowflakeadoption.htm> (last visited Apr. 23, 2009).

<sup>20</sup> Cheryl Weitzstein, “Extra Embryos Grow Adoptions,” *Wash. Times*, Apr. 21, 2009, at A15.

<sup>21</sup> Around the same time that Rep. Mills introduced the Option of Adoption Act, the “Ethical Treatment of Human Embryos Act” was introduced in the Georgia Senate. The original version would have amended the chapter of the Georgia Code relating to the parent-child relationship to define an embryo as a “biological human being who is not the property of any person or entity.” S.B. 169, 2009 Gen. Assem., Reg. Sess. (Ga.). A version of this bill that did not define an embryo as a human being was passed by the Senate and as of May 8, 2009, has yet to be voted on by the House.

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Georgia adoption statute, so that “child” meant not only “a person who is under 18 years of age and who is sought to be adopted,” but also “a human embryo.”<sup>22</sup> (The initial version of the bill also, however, explicitly stated that the taxpayer was not allowed to treat the embryo a dependent for purposes of computing Georgia taxable income until after birth.<sup>23</sup>)

Georgia Right to Life, an anti-abortion group, strongly supported the Option of Adoption Act. After the bill was passed by the Georgia House, the president of Georgia Right to Life stated, “We are pleased that we are making headway in our goal of establishing personhood for the pre-born.”<sup>24</sup> And Georgia Right to Life created a Facebook group, “Fight for Adoption! Pass the Georgia Option of Adoption Act HB 388,” that notes that the bill would indicate “value [for] life even at its earliest stages.”<sup>25</sup>

The Option of Adoption Act as enacted does not, however, redefine “child” to include a human embryo. Rather, the law creates a new article within the Georgia adoption code<sup>26</sup> that requires an embryo donor to sign a contract with the intended parent or parents to “relinquish all rights and responsibilities for an embryo to a recipient intended parent.”<sup>27</sup> The Act also permits, but does not require, the intended parents to

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<sup>22</sup> H.B. 388, as introduced.

<sup>23</sup> *Id.*

<sup>24</sup> Audrey Barrick, “Ga. House Passes Nation’s First Embryo Adoption Bill,” *Christian Post*, Apr. 4, 2009, available at [http://www.christianpost.com/Society/Ethics\\_rights/2009/04/ga-house-passes-nation-s-first-embryo-adoption-bill-04/index.html](http://www.christianpost.com/Society/Ethics_rights/2009/04/ga-house-passes-nation-s-first-embryo-adoption-bill-04/index.html) (quoting Daniel Becker, president, Georgia Right to Life).

<sup>25</sup> Georgia Right to Life, “Fight for Adoption! Pass the Georgia Option of Adoption Act HB 388,” <http://www.facebook.com/home.php#/group.php?sid=7c6d601ba2a8ee0cef18abbbdbacd6b&gid=54895391975&ref=search> (last visited Apr. 23, 2009).

<sup>26</sup> Act 171, 2009 Gen. Assem., Reg. Sess. (Ga.), § 2 (“Chapter 8 of Title 19 of the Official Code of Georgia Annotated, relating to adoption, is amended by designating the existing chapter as Article 1 and adding a new article to read as follows....”).

<sup>27</sup> Ga. Code Ann. § 19-8-41(a) (“A written contract *shall* be entered into between each legal embryo custodian and each recipient intended parent prior to embryo transfer....” (emphasis added)).

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petition for an order of adoption or parentage, either before or after the child is born.<sup>28</sup>

The Act does not directly address the tax consequences of this “adoption.” And notwithstanding the Act’s use of the term “adoption,” neither a Georgia adoption tax credit nor a federal adoption tax credit is available for the expenses incurred in an embryo exchange, as the next part explains.

### III. No Adoption Tax Credits for Embryo Exchanges

Expenses that may attend an embryo exchange include expenses for finding the embryo; legal expenses for arranging the transfer of rights to the embryo; medical expenses for implanting the embryo; medical expenses for the pregnancy and birth; and expenses for an “adoption” post-birth. These expenses can be considerable. Nightlight Christian Adoptions, for example, estimates that the total cost of an embryo exchange to the embryo recipients, including Nightlight’s own program fees, will range from \$12,000 to \$16,000.<sup>29</sup> As this part explains, under current law, none of these expenses can be claimed as expenses for which a Georgia or federal adoption tax credit is available.

#### A. Georgia Adoption Tax Credit

The claim that the costs of adopting an embryo could be offset by the Georgia adoption tax credit is clearly wrong. The only adoption tax credit available under current Georgia law is a credit for adoption of a foster child from the Georgia foster care

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<sup>28</sup> Ga. Code Ann. § 19-9-42(a) (“Prior to the birth of a child or following the birth of a child, a recipient intended parent *may* petition the superior court for an expedited order of adoption or parentage.” (emphasis added)).

<sup>29</sup> Nightlight Christian Adoptions, Frequently Asked Questions by Adopting Families, Program Fees, [http://www.nightlight.org/programs\\_SnowflakesFrozenEmbryoFaqs.html#Program](http://www.nightlight.org/programs_SnowflakesFrozenEmbryoFaqs.html#Program) (last visited Apr. 24, 2009) (stating that the Snowflakes Program fee is \$8,000, and estimating that the home study fee will range from \$1000 and \$3000 (Nightlight’s home study fee is \$2,600) and medical fees for a frozen embryo transfer will range from \$3,000 to \$5,000).

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system.<sup>30</sup> Embryos are neither foster children nor under the care of the Georgia Division of Family and Children Services of the Department of Human Resources, as is required to obtain the credit. The Georgia legislature could, of course, choose to enact a tax credit for adoptions in general, or for embryo exchanges, but current Georgia law provides no such credit.

### B. Federal Adoption Tax Credit

The analysis of whether a federal adoption tax credit is available for expenses related to embryo exchanges is slightly more complicated than the Georgia adoption tax credit analysis, but the answer is just as clear: no federal adoption tax credit is permitted under current law.

Individuals may take a credit against their federal income taxes for “qualified adoption expenses” up to \$10,000 (adjusted for inflation) for each “eligible child” adopted.<sup>31</sup> (Because of the inflation adjustment, a credit of up to \$12,150 per child is allowed for 2009.<sup>32</sup>) Qualified adoption expenses include adoption fees, court costs, attorney fees, and other expenses that are directly related to the legal adoption of an eligible child.<sup>33</sup> Qualified adoption expenses do not, however, include expenses paid under a surrogate parenting arrangement or expenses incurred in connection with an adoption of a spouse’s child.<sup>34</sup>

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<sup>30</sup> Ga. Code Ann. § 48-7-29.15. The credit is \$2,000 per year beginning with the year the adoption is finalized and ending with the year the child turns 18, without income limitation. *Id.*

<sup>31</sup> IRC § 23(b)(1) (permitting a credit of up to \$10,000), (h) (adjusting the amount in Section 23(b)(1) for inflation).

<sup>32</sup> Rev. Proc. 2008-66 § 3.03. The amount of the credit begins to phase out when the taxpayer’s adjusted gross income reaches \$182,180 (for 2009; the amount is adjusted for inflation) and phases out completely when AGI reaches \$222,180 (for 2009; again, this number is adjusted for inflation). IRC § 23(b)(2)(A) (describing the phase-out), (h) (inflation adjustments); Rev. Proc. 2008-66, § 3.03 (providing the inflation-adjusted amounts for 2009).

<sup>33</sup> IRC § 23(d)(1)(A).

<sup>34</sup> IRC § 23(d)(1)(B), (C).

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This section explains why the federal adoption tax credit is not available by examining the three possible scenarios for an embryo exchange. First, if a surrogate carries the embryo, no federal adoption tax credit is available, because qualified adoption expenses do not include expenses paid under a surrogate parent agreement. Second, if the intended mother carries the embryo and a state court “adoption” supposedly occurs before the child’s birth (i.e., the embryo itself is supposedly adopted), no credit is available, because an embryo is not an “eligible child” for purposes of the federal adoption tax credit, and the “adoption” is not a legal adoption. Finally, recharacterizing the expenses as expenses for adopting the child post-birth cannot make the expenses creditable: under Georgia law, the child born of the embryo would *already* be considered the child of the gestational mother and her husband, so adoption is legally impossible.

### 1. Expenses Related to Surrogacy Arrangements

No federal adoption tax credit is available for expenses incurred in the embryo exchange to the extent that, as claimed by Rep. James Mills, the bill’s author, the Act serves as “a safeguard against mothers who agree [to] carry the fetuses of infertile couples from refusing to give up the infants after birth.”<sup>35</sup> A woman who carries the fetus of an infertile couple and then relinquishes the child to that couple is, of course, a surrogate mother, and no federal adoption tax credit is available for costs incurred in carrying out a surrogate parenting agreement.<sup>36</sup>

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<sup>35</sup> Ben Smith, “House Moves To Allow Embryo ‘Adoption,’” *Atlanta Journal-Constitution*, Mar. 12, 2009, available at <http://blogs.ajc.com/gold-dome-live/2009/03/12/house-moves-to-allow-embryo-adoption/>.

<sup>36</sup> IRC § 23(d)(1)(B).

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### 2. “Adopting” an Embryo

The result is no different if the intended mother carries the child herself and the intended parents claim to adopt the embryo itself. As this section explains, no federal adoption tax credit is available for “adopting” an embryo, because an embryo is not an eligible child, and an embryo “adoption” is not a legal adoption.

#### a. An Embryo Is Not an “Eligible Child”

The federal adoption tax credit is available only for expenses incurred in the adoption of an “eligible child.” An eligible child is an “individual” who is younger than 18 or who is not able to care for himself.<sup>37</sup> The Code does not define the term “individual,” and there is no guidance in either case law or administrative interpretations that directly addresses whether an embryo is an eligible child for purposes of the adoption tax credit. However, cases and guidance regarding the definitions of “individual” in related areas, in particular the area of exemptions for dependents, demonstrate that the term “individual,” and thus the term “eligible child” for the purposes of the adoption tax credit, cannot reasonably be interpreted to include children not yet born.<sup>38</sup>

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<sup>37</sup> IRC § 23(d)(2).

<sup>38</sup> The issue of whether a child must be born to be claimed as a dependent appears to have been resolved by an anti-fraud provision enacted in 1996, which requires a taxpayer identification number to be provided for each dependent in order to for an exemption to be allowed. IRC § 151(e). The adoption tax credit includes a similar, but not identical, requirement: a taxpayer identification number (as well as the eligible child’s name and age) must be provided, but only “if known.” IRC § 23(f). As the legislative history explains, Congress was concerned about “problems [that] may arise in processing tax returns of adopting parents because of unavoidable delays involved in obtaining a social security number of a child who is being adopted.” Conf. Comm. Report on P.L. 104-188. The statute thus does not require a taxpayer to provide the adopted child’s TIN in order to claim the adoption tax credit. Therefore, in contrast to the dependency exemption, there is no taxpayer identification number requirement that resolves the question of whether a child must be born in order to be an eligible child for adoption tax credit purposes, and the dependency exemption cases remain useful for gaining insight into that question.

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A taxpayer may take an exemption for every individual who is the taxpayer's dependent.<sup>39</sup> A dependent includes, inter alia, a "qualifying child,"<sup>40</sup> which is, like "eligible child" for adoption tax credit purposes, an "individual" who meets certain requirements.<sup>41</sup> In *Wilson v. Commissioner*, the Board of Tax Appeals held, as a matter of first impression, that parents could not take a dependency exemption for an unborn child.<sup>42</sup> The Board was brief and to the point in its ruling:

The interpretation which the [taxpayers] suggest [i.e., that a dependency exemption should be allowed for an unborn child] is so obviously strained as to merit little discussion. Doubtless in this fact is to be found the reason why this question has never heretofore been presented to the Board. It may also account for the paucity of authority in petitioners' brief.<sup>43</sup>

More recently, in *Cassman v. United States*, the Court of Federal Claims rejected on summary judgment the taxpayers' attempt to claim a dependent exemption for 1991 for a child that was in utero on December 31, 1991, but was not born until 1992.<sup>44</sup> The taxpayers argued that dependents include children from the moment of conception. The court rejected their argument based on, inter alia, the precedent of *Wilson*, legislative history, and textual analysis.<sup>45</sup> (It found no need to decide the "sensitive issue[]" of

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<sup>39</sup> IRC § 151(c).

<sup>40</sup> IRC § 152(a)(1).

<sup>41</sup> IRC § 152(c)(1).

<sup>42</sup> *Wilson v. Comm'r*, 41 B.T.A. 456 (1940). A dependent at that time was defined as a "person," not an "individual," but this change does not seem relevant to the analysis. See discussion *infra*.

<sup>43</sup> *Wilson*, 41 B.T.A.

<sup>44</sup> 31 Fed. Cl. 121 (1994).

<sup>45</sup> The court provided two additional reasons for its decision. First, the court explained that policy also support its decision, because "birth...is a clearly defined event, providing a bright line by which the available of the exemption can be determined...[T]o allow a deduction based on conception, rather than live birth, would create confusion because of the uncertainty regarding the date when a particular conception occurs." *Id.* at 129. Second, the court stated that, while it was not bound by IRS administrative interpretations, those interpretations were "useful" in guiding the court, and were consistent with the court's ruling. "[T]he Commissioner," the court noted, "has a longstanding position that a live birth is a prerequisite for claiming a dependent exemption." *Cassman* at 128; see also, e.g., Gen. Couns. Mem. 35124 (1972) ("[A] child must at least be born *alive* in order to be the object of a dependency exemption for tax purposes."); Rev. Rul. 73-156, 1973-1 CB 58 (permitting a dependency exemption where a child was born but lived only momentarily, because the child had lived); IRS Pub. 17, Your Federal Income Tax 25 (2009) ("Child born alive. You may be able to claim an exemption for a child who was born alive during

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whether a fetus is a person,<sup>46</sup> although it did cite *Roe v. Wade* in a footnote for the proposition that “the unborn have never been recognized as persons in the whole sense.”<sup>47</sup>) Each of these three elements of the court’s analysis also supports the conclusion that no adoption tax credit is available for expenses incurred in an embryo exchange.

First, the *Cassman* court noted that while it was not bound to follow *Wilson*, *Wilson* was “entirely on point,” and there was no reason to disregard it. The *Cassman* court was unimpressed by the fact that the provision at issue in *Wilson* conferred an exemption for a dependent “person,” rather than for an “individual”:

The [current] operative word [for purposes of the dependency exemption] is “individual.” In its everyday sense, however, the term is synonymous with “person,” the latter term being distinguishable only when applied to entities other than natural persons. Certainly, Congress did not intend to change the meaning of the provision when it substituted the word “individual” for “person.”<sup>48</sup>

Second, the court pointed out that although the statute did not explicitly state that a dependent must be born in order to qualify a taxpayer for a dependency exemption, it did require that the child be younger than a particular age in order to qualify as a dependent. As the court explained, “The imposition by Congress of age limits would be impracticable if the age of dependents was to be determined by reference to the date of conception rather than the date of birth.”<sup>49</sup> This impracticability concern applies with the same force in the context of the adoption tax credit, which requires the eligible child to be

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the year, even if the child lived only for a moment. State or local law must treat the child as having been born alive. There must be proof of a live birth shown by an official document, such as a birth certificate.... You cannot claim an exemption for a stillborn child.”).

<sup>46</sup> *Id.* at 123.

<sup>47</sup> *Id.* at 124 n.3, *citing* *Roe v. Wade*, 410 U.S. 113, 162 (1973).

<sup>48</sup> *Id.* at 124 n.3.

<sup>49</sup> *Id.* at 127.

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younger than 18.<sup>50</sup> Indeed, a subsequent IRS ruling held that for purposes of both the adoption tax credit and the dependency exemption, a child attains a certain age on the anniversary of the date he was born.<sup>51</sup>

The court also noted that a dependent was required to be either a citizen or resident of the United States. Immigration law required a person to be born in order to be a citizen of the United States, and therefore the unborn child could not be a citizen. The court also dismissed as “without merit” the contention that the unborn child should be considered a resident of the United States because “it would have been physically impossible for the mother to be a resident and her unborn child not to be a resident.” As the court explained:

The court cannot justify viewing an unborn child as “residing” anywhere; moreover, it would also be unreasonable for the court to view the unborn differently for the purposes of the terms “citizen” and “resident.” The court declines to accept plaintiffs’ interpretation and concludes that [the child] was neither a “citizen” nor a “resident” of the United States [before he was born].<sup>52</sup>

Similarly, how the adoption tax credit is applied requires a determination of whether the child adopted is a U.S. citizen or resident.<sup>53</sup> Following the *Cassman* reasoning, children who are not yet born cannot be U.S. citizens or residents. And while children who are not U.S. citizens or residents can be adopted, the statutory language and legislative history make clear that the somewhat stricter rules for adopting non-U.S. citizens and residents are meant to address international adoptions;<sup>54</sup> there is no mention of children not yet born.

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<sup>50</sup> IRC § 23(d)(2).

<sup>51</sup> Rev. Rul. 2003-72, 2003-2 CB 346.

<sup>52</sup> *Cassman*, 31 Fed. Cl. at 126.

<sup>53</sup> IRC § 23(e).

<sup>54</sup> The section relevant to adoption of children who are not U.S. citizens or residents is entitled “Special Rules for Foreign Adoptions.” IRC § 23(e) (“In the case of an adoption of a child who is not a citizen or

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The *Cassman* court was not persuaded by the single tax case treating an unborn child as a person for tax law. In that case, *Faulkner v. Commissioner*, the Board of Tax Appeals treated a gift in trust to an unborn child as a valid gift of a present interest for gift tax purposes.<sup>55</sup> Like the *Faulkner* board itself,<sup>56</sup> the *Cassman* court found *Faulkner* irrelevant for income tax purposes (and thus not in conflict with *Wilson*, which was decided by Board of Tax Appeals less than two months before *Faulkner*), as *Faulkner* was based almost entirely on an analysis of how trust and estate law treated unborn children.<sup>57</sup>

Moreover, even if the *Cassman* court's reasoning is unpersuasive<sup>58</sup> (and we do not think it is), Congress enacted the adoption tax credit in 1996, after *Cassman* was decided. Had it wished the adoption tax credit to apply to the "adoption" of a fetus or an embryo, it could have chosen a word other than "individual" to describe the adopted child, but it did not. Instead, the language for the adoption tax credit is strikingly similar to the language for the dependency exemption.<sup>59</sup> Indeed, rather than expanding the adoption tax credit beyond the reach of the dependency exemption to include embryos

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resident of the United States...[the credit is not available for] any qualified adoption expense with respect to such adoption unless such adoption becomes final[.]"). The legislative history makes clear that this section addresses "international adoptions." Joint Committee on Taxation, "Description of Chairman's Mark for the Provisions of H.R. 3286 Relating to Tax Credit for Adoption Expenses and Certain Revenue Offsets and the Removal of Barriers to Interethnic Adoptions" (JCX-24-96) at 2 ("In the case of an international adoption, the credit is not available unless the adoption is finalized.").

<sup>55</sup> *Faulkner v. Comm'r*, 41 BTA 875 (1940).

<sup>56</sup> *Id.* at 870-880 ("The case of...*Wilson*, where it was held that an unborn child is not a 'person' within the meaning of the statute for the purpose of computing the amount of credit for dependents, is distinguishable from the instant case.").

<sup>57</sup> *Cassman*, 31 Fed. Cl. at 124 ("[T]he Board in *Wilson* [drew] a distinction between the IRC's dependent exemption and the general law of trusts and estates, to make the point that the latter law was irrelevant to the former. That distinction would have been inappropriate in *Faulkner*—a case involving a gift in trust. The two cases, therefore, are not in conflict.").

<sup>58</sup> See, e.g., Paul L. Caron, "When Does Life Begin for Tax Purposes?" 68 *Tax Notes* 320, 323 (1995) ("The [*Cassman*] court's statutory analysis is not particularly compelling.").

<sup>59</sup> As discussed *supra* note 38, the adoption credit differs slightly from the dependency exemption with respect to the requirement of a taxpayer identification number.

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and fetuses, Congress explicitly stated that costs relating to surrogacy agreements were not “qualified adoption expenses” that could be offset by the adoption tax credit.<sup>60</sup>

Finally, the adoption tax credit is a special exemption created by Congress to assist taxpayers. Such exemptions are, as the Supreme Court has held, “a matter of legislative grace,”<sup>61</sup> and “provisions granting special tax exemptions are to be strictly construed.”<sup>62</sup> But there is no sign in the language of the statute or the legislative history that Congress intended the adoption tax credit to extend to the “adoption” of embryos or fetuses. Thus an “eligible child” for adoption tax credit purposes does not include a child not yet born, and expenses related to the “adoption” of an embryo are not qualified adoption expenses for purposes of the adoption tax credit.

### b. Embryo “Adoption” Is Not a Legal Adoption

An adoption tax credit is available only for expenses related to the “legal adoption” of an eligible child. Not only is it clear that, as discussed above, an embryo is not an eligible child for purposes of the federal adoption tax credit, but it also appears that the procedures envisioned by the Georgia Act are not a legal adoption.

Georgia, like all other states, has well-established adoption laws that set out the qualifications for adoptive parents, the procedures for relinquishment or termination of the parental rights of the biological parents, and the legal consequences of an adoption.<sup>63</sup> In order to be eligible to adopt, an individual must satisfy four criteria, including being

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<sup>60</sup> Surrogacy expenses may have been excluded because some members of Congress, like a sponsor of the original adoption tax credit bill, viewed surrogacy and other ART procedures to be “riskier, more expensive[,] and [more] ethically dubious” than adoption. Prepared Testimony of Congressman Christopher H. Smith Before the House Ways & Means Comm. on Human Resources, July 20, 1999.

<sup>61</sup> *White v. United States*, 305 U.S. 281, 292 (1938).

<sup>62</sup> *Helvering v. Northwest Steel Mills*, 311 U.S. 46, 49 (1940); see also *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934) (“A taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms.”).

<sup>63</sup> See generally Ga. Code Ann., tit. 19, ch. 8 (“Adoption”).

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“financially, physically, and mentally able to have permanent custody of the child.”<sup>64</sup> A child is generally eligible for adoption only after the rights of her parents have been terminated by court order or the parents have voluntarily surrendered their parental rights;<sup>65</sup> while a biological father who is not the legal father (e.g., a biological father who is not married to the gestational mother) may file a pre-birth surrender,<sup>66</sup> a mother can surrender her rights only after the child has been born.<sup>67</sup> (Indeed, no state allows a mother to sign an irrevocable consent to relinquish a child for adoption before the child is born,<sup>68</sup> and a number of states require counseling for one or both birth parents.<sup>69</sup>) In Georgia, parents have ten days after signing the surrender to change their mind.<sup>70</sup> Before an adoption can be finalized, the court must determine that the adoption is in the child’s best interest,<sup>71</sup> a standard to which (again) all states subscribe.<sup>72</sup>

Contrast these rigid procedures with the procedures specified under the Georgia Act for an embryo exchange. The Act does not simply expand adoption law to include embryos. (As discussed above, this was the approach of an earlier version of the bill, which changed the definition of “child” for purposes of Georgia adoption law, but this language was removed in the final version.<sup>73</sup>) Indeed, the Act does not even place the embryo-related language in the same article as Georgia’s actual adoption law, but rather

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<sup>64</sup> *Id.* § 19-8-3.

<sup>65</sup> *Id.* § 19-8-4(a).

<sup>66</sup> *Id.* § 19-8-4(e)(3)(A).

<sup>67</sup> *Id.* § 19-8-4(c).

<sup>68</sup> See Joan Heifetz Hollinger, *Adoption Law & Practice* § 2.11[1][a] (2008); Elizabeth J. Samuels, “Time to Decide? The Laws Governing Mothers’ Consents to the Adoption of Their Newborn Infants,” 72 *Tenn. L. Rev.* 509, 542 (2005) (noting that in the few states that do permit pre-birth relinquishment of maternal rights, consent can be revoked within a certain amount of time after birth).

<sup>69</sup> *Id.* at 544.

<sup>70</sup> Ga. Code Ann. § 19-8-9(b).

<sup>71</sup> *Allen v. Morgan*, 44 S.E.2d 500, 506 (Ga. 1947).

<sup>72</sup> Hollinger, *supra* note 68, § 1.01 [2]. See generally Naomi R. Cahn, “Perfect Substitutes or the Real Thing?” 52 *Duke L.J.* 1077 (2003).

<sup>73</sup> Compare H.B. 388, as introduced, with Ga. Code Ann. § 19-8-42(a).

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blocks off a new article for the embryo-related provisions. Most importantly, though, while the earlier version of the bill *required* embryo transfers to “be conducted pursuant to the adoption laws” of Georgia,<sup>74</sup> the bill as enacted is permissive, not mandatory. Under the Act, the recipients of the embryo “may” petition a court for an order of adoption or parentage, but they are not required to do so.<sup>75</sup>

Even if the birth parents do not choose to petition a court for an order of parentage, they are still be considered the parents of the child under Georgia law. Although Georgia law does not directly address the parenthood of children born through donor embryos, donor eggs, or surrogacy,<sup>76</sup> it does address the paternity of a child born through donor sperm (artificial insemination), applying the marital presumption that children born within a marriage are legitimate children of that marriage.<sup>77</sup> Moreover, as a general rule, a woman who gives birth to a child is presumed to be that child’s mother.<sup>78</sup> Children born from donated embryos or eggs should enjoy a similar presumption of parenthood, without need for a court order of parentage or adoption. Put another way, even if Georgia calls the procedures contemplated by the Act “adoptions,” these putative adoptions appear to have no effect, as the intended parents are already the child’s legal

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<sup>74</sup> H.B. 388, as introduced.

<sup>75</sup> See *supra* note 28.

<sup>76</sup> See Sara K. Alexander, Note, “Who Is Georgia’s Mother? Gestational Surrogacy: A Formulation for Georgia’s Legislature,” 38 *Ga. L. Rev.* 395 (2003).

<sup>77</sup> Ga. Code Ann. § 19-7-2; see also Note, “Illegitimacy: Equal Protection and How To Enjoy It,” 4 *Ga. L. Rev.* 383 (1970) (discussing the legitimacy of children born in Georgia by means of artificial insemination). Georgia law does not address paternity when the child is nonmarital.

<sup>78</sup> Alexander, *supra* note 76, at 397; see also, e.g., John Lawrence Hill, “What Does It Mean To Be a ‘Parent’? The Claims of Biology as the Basis for Parental Rights,” 66 *N.Y.U. L. Rev.* 353, 370-372 (1991) (describing the “presumption of biology” and noting the “ancient dictum” *mater est quam gestation demonstrat*, i.e., “by gestation the mother is demonstrated”).

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parents.<sup>79</sup> It seems unlikely, therefore, that such adoptions could constitute a “legal adoption” for purposes of the federal adoption tax credit.

### 3. Adopting a Child Born from an Embryo Exchange

Because no federal adoption tax credit is available for “adopting” an embryo, embryo recipients might claim that the expenses are for adopting the child born as a result of the embryo exchange rather than for adopting the embryo. After all, various costs incurred before the birth of a child who is subsequently adopted can constitute “qualified adoption expenses”; adoptive parents might, for example, have occasion to pay a lawyer before the adoptive child is born. And the Act permits parents to petition the court for an order of adoption or parentage after, as well as before, the child is born.<sup>80</sup>

The problem with this argument, though, is that even if the birth parents do not petition a court for an order of parentage, they are, as discussed above, already considered the parents of the child under Georgia law, and thus no legal adoption is possible.<sup>81</sup> Therefore, no federal adoption tax credit is available for expenses incurred in the pro forma “adoption” of a child born as a result of an embryo exchange.

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<sup>79</sup> See, e.g., “ART-Related Legislation in Georgia,” *ASRM Bulletin*, Mar. 13, 2009 (“The [Option of Adoption Act] provides for an optional court order of adoption or parentage of a child resulting from embryo donation, but does not require this for the recognition that the child is legally the child of the recipients.”), available at <http://www.asrm.org/Washington/Bulletins/vol11no16.html>.

<sup>80</sup> See *supra* note 28.

<sup>81</sup> See discussion *supra*. The plain language of the Code does provide that no credit is available to a married couple for expenses related to adoption of a spouse’s child, thereby (albeit somewhat indirectly) indicating that a credit for expenses relating to adoption of one’s own child would be impermissible. Thus one might argue (although unnecessarily) that the expenses incurred by each parent would be disallowed as qualified adoption expenses under the plain language of the statute, if the taxpayer claims that the expenses are for adopting the child born as a result of the embryo exchange, because the other parent is already the child’s parent. IRC § 23(d)(1)(C).

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### IV. Conclusion

Notwithstanding various claims and aspirations to the contrary, neither the Georgia adoption tax credit nor the federal adoption tax credit is available for the expenses incurred in embryo exchanges under the Georgia Act. The Georgia adoption tax credit applies only to adoptions of children from the Georgia foster care system, and embryo exchanges clearly do not meet this requirement. The federal adoption tax credit applies only to expenses incurred in the “legal adoption” of an “eligible child.” Embryos are not “eligible children,” and embryo “adoptions” as contemplated by the Georgia Option of Adoption Act are not “legal adoptions” as contemplated by the federal adoption tax credit. The federal adoption tax credit is also not available if the intended parents are a married couple who wait to “adopt” the child until after the child is born, because the child will already be the child of its intended parents upon its birth, even without the “adoption” procedures contemplated by the Act.