IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ED103138

JALESIA MCQUEEN-GADBERRY,

Plaintiff-Appellant,

v.

JUSTIN GADBERRY,

Defendant-Respondent.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Douglas R. Beach, Judge

APPELLANT'S BRIEF

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INTRODUCTION

Appellant McQueen and Respondent Gadberry are a divorced couple who decided, during the course of their marriage, to create embryos through the assistance of *in vitro* fertilization. In 2007, the couple created four embryos, two of which were implanted and brought to term by McQueen, and are now healthy 8-year-old twin boys. The other two embryonic children were cryogenically frozen. In 2007, the couple entered into an agreement providing that, in the case of a legal separation or divorce, McQueen would have custody of the embryonic children. In mid-2010, the couple entered into another agreement, again, providing that, in the case of legal separation or divorce, McQueen would have custody of the embryonic children.

In late 2010, the couple separated. In the divorce proceedings, the court initially treated the embryonic children as human beings, in conformance with RSMo. §§ 1.205 and 188.015(9), even appointing a guardian ad litem for the embryonic children. The trial court later erred when it reversed course and treated the embryonic children as mere marital ñproperty,ò disregarding their interests under Missouri law. The trial court further erred in failing to ñrequire the guardian ad litem to faithfully discharge [her] duties,ò RSMo. § 452.423.4, Appx. 21, to ñ***recommend only what is in the best interests of the child[ren,]***ò Missouri Supreme Courtôs Standards for Guardians ad Litem, Comment to GAL Standard 3.0, Appx. 25 (emphasis added); *see also* Order, ñAppointment of Guardian ad Litem,ò LF36, Appx. 37 (ñThe GAL shall be guided by the best interests of the child(ren) in all matters . . .).

Even if one were to accept the trial courtôs holding that the embryonic children were marital ñproperty,ò the trial court acted contrary to that holding by awarding the embryos to both McQueen and Gadberry, because the marital property statute, RSMo. § 452.330, requires that the court award marital property not jointly but only to one spouse, or the other.

Additionally, the trial court erred in failing to enforce the coupleôs valid, binding agreement that McQueen would gain custody of the embryonic children in the event of divorce.

JURISDICTIONAL STATEMENT

This appeal arises out of a judgment entered in a marriage dissolution case between Jalesia McQueen-Gadberry n/k/a Jalesia McQueen (ñMcQueenò) and Justin Gadberry (ñGadberryò) regarding the custody of two embryos created during their marriage. Trial was before a Commissioner, who issued findings and recommendations. The Circuit Judge confirmed and adopted the Commissionerôs findings and recommendations without any modification. McQueen filed a timely post-judgment motion to amend the judgment. Following denial of her motion, McQueen filed this timely appeal. This Court has jurisdiction over this appeal because St. Louis County is within the Eastern District of the Court of Appeals. RSMo. § 477.050. This appeal does not involve any issue within the exclusive jurisdiction of the Missouri Supreme Court and therefore is within the general appellate jurisdiction of this Court. *See* Mo. Const. art. V, § 3.

STATEMENT OF FACTS

Appellant Jalesia McQueen-Gadberry (ñMcQueenò) and Respondent Justin Gadberry (ñGadberryò) married on September 2, 2005. Tr. 4:24-5:1. McQueen lived in St. Louis and Gadberry was stationed at Fort Bragg, North Carolina. Tr. 79:14-21. Due to their geographical separation, McQueen and Gadberry used in vitro fertilization (ñIVFò) to facilitate having children. Tr. 79:1-13. McQueen and Gadberry voluntarily participated in IVF in early 2007 and created four children at the embryonic stage of life. Tr. 77:10-17, 79:25-80:2. Of the four embryonic children, two were implanted in McQueen in 2007, and she gave birth to twin boys. Tr. 80:6-8. The two remaining embryonic children were placed in cryogenic storage with McQueenôs doctor, under a contract providing that McQueen would have sole custody of the embryonic children in the event of divorce.[1] Tr. 80:15-23. In 2010, due to the impending closure of the practice of McQueenôs doctor, McQueen and Gadberry transferred the embryonic children to Fairfax Cryobank, a cryogenic storage facility. Tr. 80:23-81:5. In 2010, McQueen was a lawyer practicing in St. Louis and Gadberry received his MBA from SIU Edwardsville. Judgment, ¶ 10-11 (LF70, Appx. 3).

McQueen and Gadberry completed, signed, and notarized a document entitled ñFairfax Cryobank Directive Regarding the Disposition of Embryosò (ñCryobank

[1] See McQueenôs uncontested deposition testimony, which Gadberry submitted to the trial court. Respondentôs Exhibit J, McQueen Depo. (ñEx. Jò) 28:14-17, Appx. 60. Neither party was able to locate a copy of the agreement.

Agreementò)[2]. Exhibit B, at 6-8, Appx. 48-50. The Parties signed and notarized the Cryobank Agreement on May 15, 2010. Exhibit B, at 8, Appx. 50; Tr. 110:14-111:15 (McQueen authenticating the signatures); Tr. 165:7-19 (Gadberry authenticating the signatures). The Parties completed the Cryobank Agreement pertaining to the disposition of the embryonic children on May 21, 2010. Exhibit B, at 7, Appx. 49; Tr. 114:12-115:11 (McQueen authenticating the Partiesô signature by initials); Tr. 140:20-22 (Gadberry authenticating the Partiesô signature by initials).

In the Cryobank Agreement, McQueen and Gadberry agreed that, in the event that one of them were to die, the surviving partner would receive custody of the embryonic children. Exhibit B, at 7, Appx. 49. They further agreed that in the event both McQueen and Gadberry were to die, the embryonic children would be donated to another couple. *Id.* Finally, McQueen and Gadberry agreed that, in the event of a legal separation or divorce, McQueen would receive custody of the embryonic children. *Id.* The Cryobank Agreement provided notice that law was unsettled and that divorcing parties may be liable for child support: ñEven if you chose to make the embryos available to your

[2] At trial, both parties entered the Cryobank Agreement into evidence. McQueen entered Petitionerôs Exhibit 1, containing a black-and-white copy of the Cryobank Agreement at pages 2-4. Gadberry entered Respondentôs Exhibit B, containing a purportedly color copy of the Cryobank Agreement at pages 6-8. For consistency and clarity, this brief cites Respondentôs Exhibit B as the Cryobank Agreement even though on occasion a witness may have testified using Petitionerôs Exhibit 1.

divorcing partner, you may be legally responsible for child support obligations.ò *Id.* The Cryobank Agreement also provided notice that the decision was binding and could only be modified by mutual agreement of both parties, signed in writing. *Id.* The parties further acknowledged in the Cryobank Agreement that each party had the opportunity to be represented by an attorney. *Id.* at 8, Appx. 50.

McQueen and Gadberry separated on or about September 23, 2010. Tr. 5:2-4. McQueen filed the instant Petition for Dissolution of Marriage on October 11, 2013. LF5. McQueen and Gadberry reached a stipulation regarding issues related to child custody for their twins, child support, spousal maintenance, and the division of debts and property. Tr. 5:9-13:10. McQueen and Gadberry only disputed the custody of their embryonic children. Tr. 3:4-15.

The trial court appointed a guardian ad litem (the ñEmbryosô GALò) for the embryonic children. LF36-37, Appx. 37-38. At trial, the Embryosô GAL briefly examined McQueen. Tr. 129:9-132:11. She did not examine Gadberry. Tr. 174:14-15. Her only exhibit was her invoice for her fees. Tr. iv; Tr. 183:17-184:21. The Embryosô GAL did not testify regarding the best interests of the embryonic children, nor did she submit a report or other document of her findings. *See generally,* Tr. There is no evidence in the record suggesting that the Embryosô GAL adequately interviewed anyone, or took any other steps to ascertain the best interests of the embryonic children. *See generally*, LF and Tr.

While having appointed a guardian ad litem for the embryonic children, the trial court ultimately held that the embryonic children were property, and more specifically,

marital property. Judgment, ¶ 41, 58 (LF76-77, 80, Appx. 9-10, 13). The trial court awarded the embryonic children to McQueen and Gadberry jointly, prohibiting any ñtransfer, release, or use of the frozen embryos without the signed authorization of bothò McQueen and Gadberry. Judgment, ¶ 58 (LF80, Appx. 13). This appeal followed.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN TREATING THE EMBRYONIC CHILDREN AS MARITAL PROPERTY, BECAUSE EMBRYOS ARE HUMAN BEINGS UNDER MISSOURI LAW, IN THAT RSMO. § 1.205 STATES THAT "[T]HE LIFE OF EACH HUMAN BEING BEGINS AT CONCEPTION," AND THAT "UNBORN CHILDREN" ARE ENTITLED TO "ALL THE RIGHTS, PRIVILEGES, AND IMMUNITIES AVAILABLE TO OTHER PERSONS."

- RSMo. § 1.205
- RSMo. § 188.015
- *Connor v. Monkem Co.*, 898 S.W.2d 89, 92 (Mo. 1995)

II. THE TRIAL COURT ERRED IN FAILING TO REQUIRE THE EMBRYOS' GAL TO PERFORM HER LEGAL DUTIES, BECAUSE THE GUARDIAN AD LITEM DID NOT ADVOCATE FOR THE BEST INTERESTS OF THE EMBRYONIC CHILDREN, IN THAT SHE NEITHER INVESTIGATED WHICH OUTCOME WOULD BEST SERVE THE EMBRYONIC CHILDREN'S "LIFE, HEALTH, AND WELL-BEING" NOR PROVIDED INPUT TO THE COURT EITHER FORMALLY OR THROUGH ACTIVE PARTICIPATION IN THE DISSOLUTION PROCEEDING.

- RSMo. § 452.423

- Missouri Supreme Courtôs Standards for Guardians ad Litem.
- *Guier v. Guier*, 918 S.W.2d 940, 950 (Mo. Ct. App. 1996)
- *In re Marriage of Sisk*, 937 S.W.2d 727, 733 (Mo. Ct. App. 1996)

III. THE TRIAL COURT ERRED IN AWARDING THE PARTIES JOINT "OWNERSHIP" OF THE EMBRYONIC CHILDREN AS "MARITAL PROPERTY" BECAUSE THE AWARD CONTRAVENED THE PARTIES' AGREEMENT AND MISSOURI LAW IN THAT THE PARTIES AGREED THAT MCQUEEN WOULD HAVE CUSTODY OF THEM IN THE EVENT OF DIVORCE AND, EVEN IF THE EMBRYONIC CHILDREN WERE "MARITAL PROPERTY," MCQUEEN IS ENTITLED TO SOLE "OWNERSHIP."

- RSMo. § 452.330

STANDARD OF REVIEW

This Courtôs review of the trial court judgment involves multiple standards of review. The trial court erred in its failure to apply Missouri statutes, including RSMo. § 1.205 and RSMo. § 452.330. The trial court erred in that it made speculative factual findings regarding the best interests of the embryonic children without supporting evidence. Furthermore, the trial court erred in holding a contract unenforceable and ineffective.

The standard of review of judgments entered by the court without a jury is governed by *Murphy v. Carron*. ñ[T]he decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.ò *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976).

Specifically, the interpretation of statutes is a question of law, which courts of appeal review *de novo*. *Lorenzini v. Short*, 312 S.W.3d 467, 470 (Mo. App. E.D. 2010) (ñOur interpretation of Missouri Supreme Court Rules and statutes involves questions of law which we review de novo.ò). Questions of the interpretation of a contract are questions of law and are also subject to *de novo* review. *Newco Atlas, Inc. v. Park Range Const., Inc.*, 272 S.W.3d 886, 891 (Mo. App. W.D. 2008) (ñInterpretation of a contract is a question of law and is subject to *de novo* review.ò). The trial courtôs finding of fact will not be sustained if ñthere is no substantial evidence to support it.ò *Murphy*, 536 S.W.2d at 32.

ARGUMENT

I. THE TRIAL COURT ERRED IN TREATING THE EMBRYONIC CHILDREN AS MARITAL PROPERTY, BECAUSE EMBRYOS ARE HUMAN BEINGS UNDER MISSOURI LAW, IN THAT RSMO. § 1.205 STATES THAT "[T]HE LIFE OF EACH HUMAN BEING BEGINS AT CONCEPTION," AND THAT "UNBORN CHILDREN" ARE ENTITLED TO "ALL THE RIGHTS, PRIVILEGES, AND IMMUNITIES AVAILABLE TO OTHER PERSONS."

Human embryos are human beings, not property, under Missouri law. The governing statute provides that ñ[t]he life of each human being begins at conception,ò that ñ[u]nborn children have protectable interests in life, health, and well-being,ò and that ñ[t]he natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.ò RSMo. § 1.205.1(1)-(3), Appx. 16. The trial court initially followed but ultimately ignored these provisions.

In appointing a guardian ad litem, the trial court treated the embryonic children as human beings, as courts do not appoint guardians ad litem for property or inanimate objects. *See* RSMo. § 452.423, Appx. 21. The trial court reversed course, ultimately treating the embryonic children as inanimate objects. The trial court erred in failing (a) to treat the embryonic children as human beings, (b) to protect their ñinterests in life, health, and well-being,ò and (c) to consider the interests of McQueenð their biological motherð ñin the life, health, and well-being of [her] unborn child[ren].ò Because the trial court

treated the embryonic children as property, rather than human beings, this Court should reverse the trial courtôs order and award custody of the embryonic children to McQueen.

The interpretation of statutes is a question of law that courts of appeal review *de novo*. *See Lorenzini*, 312 S.W.3d at 470 (ñOur interpretation of Missouri Supreme Court Rules and statutes involves questions of law which we review de novo.ò).

A. The trial court failed to apply Missouri law that embryos are living human beings and "unborn children" of their biological parents.

ñThe life of each human being begins at conception.ò RSMo. § 1.205.1(1), Appx. 16. Missouri law defines conception as ñthe fertilization of the ovum of a female by a sperm of a male.ò RSMo. § 188.015(3), Appx. 17, (originally enacted together with RSMo. § 1.205 as part of the same act, H.B. 1596 (1986)).[3] It is undisputed that the frozen embryos in this case were created by the ñfertilization of the ovum of [McQueen] by a sperm of [Gadberry]ò via in vitro fertilization. Therefore, they are legally ñhuman beingsò under RSMo. §§ 1.205.1(1) and 188.015.

A fertilized eggï an embryoï is also an ñunborn childò under Missouri statute:

[3] RSMo. §§ 1.205 and 188.015(3) codify in Missouriôs statutes that which is already a scientific fact: human life begins at the moment when a human sperm fertilizes a human egg. *See* the Amicus Brief of Movant-Amicus Missouri Right to Life and Lawyers for Life, which Appellant expects to be filed in this case. An egg, once fertilized, has a new genome that is different from that of either parent. *Id.*

> [T]he term ñunborn childrenò or ñunborn childò 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***.

RSMo. § 1.205.3, Appx. 16, (emphasis added); *see also* RSMo. § 188.015(9), Appx. 17, (ñóUnborn childô, the offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, ***embryo***, and fetus . . . .ò) (emphasis added).

In *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 501, 504-07 (1989), the United States Supreme Court considered the constitutionality of RSMo. § 1.205ð specifically its provisions that ñ[t]he life of each human being begins at conception,ò and that ñunborn children have protectable interests in life, health, and well-being.ò The Court held that these provisions were a legitimate ñvalue judgment,ò not inconsistent with *Roe v. Wade*, 410 U.S. 113 (1973), and subsequent cases. *Webster*, 492 U.S. at 506. (The Court left open an ñas appliedò challenge to § 1.205 in the event that the state were to later attempt to use it to restrict abortion, *id.*ð which is not at issue here.)

Despite the controlling Missouri law, the trial courtôs judgment treated the embryonic children as inanimate objects, not human beings with the same interests as other unborn children. The courtôs judgment was based on its incorrect determination that the embryonic children are not human beings, but rather might *become* such under certain circumstances. For example:

> Although ***they are items of property***, if they are awarded to either party ***who then chooses to use them to create a new life***, that use ***potentially*** imposes the rights and responsibilities of being a parent on either party without their consent . . . .
>
> * * *
>
> [I]f [McQueen] is awarded the frozen embryos, ***she will have them implanted for the purpose of*** becoming pregnant and ***having a child or children***, which she would raise with her other children.
>
> * * *
>
> [Gadberry] does not want to use these embryos for ***future*** children.

Judgment ¶¶ 41-43 (LF76-77, Appx. 9-10) (emphasis added). These findings directly contradict Missouri law, which holds that the embryonic children are *already* ñhuman beings,ò the ñunborn childrenò of Justin Gadberry and Jalesia McQueen, with ñprotectable interests in life, health, and well-being.ò RSMo. § 1.205, Appx. 16.

Despite this, the trial court inexplicably held that ñMissouri Courts and Legislature provide no guidance concerning these issues.ò Judgment ¶ 46 (LF78, Appx. 11). In fact, RSMo. § 1.205 provides clear guidance to courts:

> [***T*]*he laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons***, citizens, and residents of this state . . . .

RSMo. § 1.205.2, Appx. 16 (emphasis added). And if the statute alone were not clear enough, the Missouri Supreme Court has observed that:

> § 1.205.2 does set out a ***canon of interpretation*** enacted by the general assembly directing that ***the time of conception and not viability is the determinative point at which the legally protectable rights, privileges, and immunities of an unborn child should be deemed to arise***. Section 1.205(2) further sets out the intention of the general assembly that ***Missouri courts should read all Missouri statutes*** **in pari materia** ***with this section***.

Connor v. Monkem Co., 898 S.W.2d 89, 92 (Mo. 1995) (emphases added).

Following these clear instructions of § 1.205, Missouri case law recognizes the rights of unborn children in actions for wrongful death, manslaughter, and murder. *See, e.g.*, *Connor*, 898 S.W.2d at 92 (holding that a parent can state a valid wrongful death claim under RSMo. § 537.080 for an unborn child any time after conception); *State v. Knapp*, 843 S.W.2d 345, 350 (Mo. 1992) (ñ[W]e hold that the provisions of § 1.205ð that unborn children are to be considered personsð apply to define the term ópersonôin the involuntary manslaughter statute. Under [RSMo.] § 565.024, causing the death of an unborn child is causing the death of a óperson.ôö); *State v. Rollen,* 133 S.W.3d 57, 64 (Mo. Ct. App. 2003) (ñ[T]he provisions of Section 1.205, namely that an unborn child is to be considered a person, apply to define the term ópersonôin the felony murder in the second degree statute [RSMo. § 565.021]. Thus, . . . causing the death of an unborn child is causing the death of a óperson.ôö); *State v. Holcomb*, 956 S.W.2d 286, 290 (Mo. Ct. App. 1997) (holding, based on § 1.205 and *Connor*, that an ñunborn child is a person for purposes of [RSMo.] § 565.020 [the first degree murder statute],ò before or after the point of viability).

But instead of following Missouri law including § 1.205, the trial court looked to ñthe Courts in the State of *Iowa* who have decided this issue.ò Judgment ¶ 47 (LF78, Appx. 11) (emphasis added). Iowa lawð and the law of any other state but Missourið is irrelevant here. Iowa courts are bound by a completely different state constitution and set of statutes and cases. In *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003), the Supreme Court of Iowa recognized the absence of an overarching principle of Iowa law governing the status and treatment of embryonic children in Iowa. *Id.* at 775. In Missouri, by contrast, RSMo. § 1.205 establishes the precise principle of Missouri law governing the treatment of embryonic children. In addition to being contrary to Missouri law, *Witten* is distinguishable on a number of other grounds. For example, unlike the present case, *Witten* did not involve an agreement that contemplated custody of embryonic children in the event of divorce. *Witten*, 672 N.W.2d at 773. See also Point III below, discussing Gadberry and McQueenôs agreement.

Because the trial court ignored Missouri law establishing that the embryonic children are human beings entitled to all the ñrights, privileges, and immunities available to other persons,ò this Court should reverse the trial courtôs order and award the embryonic children to McQueen. *See* RSMo. §§ 1.205, Appx. 16, 188.015, Appx. 17.

B. The trial court failed to consider the embryonic children's "protectable interests in life, health and well-being."

ñUnborn children have protectable interests in life, health, and well-being.ò RSMo. § 1.205.1(2), Appx. 16. Thus, the trial court should have considered *at least* the embryonic childrenôs interests in life, health, and well-being. The trial court did not

consider *any* of those statutorily-defined interests, and accordingly, this Court should reverse the trial courtôs decision.

Consistent with § 1.205, the court initially, implicitly acknowledged that the embryonic children have interests when it appointed (over Gadberryôs objection) a guardian ad litem (ñGALò) to serve as the ñLegal Representativeò of the embryonic children in the dissolution proceedings. LF36, Appx. 37. But after appointing a GAL for the embryonic children, the record provides no evidence that the court gave any consideration to the interests or rights of the embryonic children. *See generally* Judgment (LF68-81, Appx. 1-14) & Trial Transcript (making no mention of the embryonic childrenôs lives, health, well-being, interests, rights, privileges, or immunities of any kind). The trial courtôs judgment contains no finding as to what would be in the best interests of the embryonic children. Instead, in reference to the embryos, the court considered only (a) the content and purported circumstances of execution of the Cryobank Agreement, *see* Judgment ¶¶ 18-35 (LF71-76, Appx. 4-9); (b) the expressed wishes of the embryonic childrenôs parents, *id.* ¶¶ 42-43 (LF77, Appx. 10); and (c) the courtôs own unsubstantiated speculations about the emotional consequences that might result from permitting McQueen to implant and gestate the embryonic children, *id.* ¶ 45 (LF77, Appx. 10).

In the context of this latter factor, the court noted that ñ[b]oth parents, *newborn children* and the twins would be emotionally impacted by the use of the embryos,ò *id.* (emphasis added), suggesting that the emotional impact on the embryonic children themselves were part of its calculus. But the court did not make any determination of

how the alleged negative ñemotional impactò could somehow override the manifestly positive impacts of being gestated and born, and of growing up with their biological mother and siblings. Nor did the court explain how this speculative negative ñemotional impactò of being gestated and born would negate the substantial, legally-recognized interests of the embryonic children in ñlife, health, and well-being,ò RSMo. § 1.205.2, Appx. 16. Nor did the court refer to any investigation or assessment of the embryonic childrenôs interests provided by the Embryosô GAL, because she provided none. *See also* Point II herein. Because the trial court failed even to consider the statutorily conferred ñprotectable interestsò of the embryonic children ñin life, health and well-being,ò this Court should reverse the trial courtôs decision.

C. The trial court failed to consider McQueen's "protectable interests in the life, health, and well-being of [her] unborn child[ren]."

Section 1.205 also confers legal interests on the *parents* of unborn, embryonic children, stating that ñ[t]he natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.ò RSMo. § 1.205.1(3), Appx. 16. The Legislature thus instructed Missouri courts to extend the legal prerogatives formerly reserved for parents of born children to the parents of *all* unborn children, as early as their conception. *See* RSMo. § 1.205.3, Appx. 16 (defining ñunborn childò as ñthe offspring of human beings ***from the moment of conception until birth at every stage of biological development***ò) (emphasis added). In a variety of contexts, Missouri courts have followed the Legislatureôs directive to protect unborn children.

For example, in *Connor*, the Missouri Supreme Court applied § 1.205 to hold that a parent can state a valid claim for wrongful death of his or her unborn child, even if the unborn child is not yet viable. In so deciding, the Court observed, based on § 1.205, that ñ***the legislature intended the courts to interpret "person" within the wrongful death statute to allow a natural parent to state a claim for the wrongful death of his or her unborn child, even prior to viability***.ò *Connor*, 898 S.W.2d at 92 (emphasis added); *see also id.* at 92-93 (ñEspecially persuasive to this conclusion is the language of § 1.205.1(3), which provides that ôthe natural parents of unborn children have protectable interests in the life, health and well-being of their unborn child.ôò).

The Supreme Court recognized that its decision in *Connor* may have controversial public policy implications, but it stressed that a clear statement of the Missouri Legislature must take precedence over a courtôs ñown evaluation of policy considerations,ò noting that:

> the legislatureôs clear expression in § 1.205 that ***parents and children have legally protectable interests in the life of a child from conception onward must be accorded greater weight*** than the many other and obvious difficulties associated with the type of claim here asserted.

Id. at 93 (emphasis added). The trial court here was under the same obligation to set aside its personal opinion about the validity of the interests of McQueen, as the mother of the embryonic children, in their ñlife, health, and well-being,ò and to defer to the Missouri Legislatureôs ñclear expressionò that those interests are valid and entitled to legal protection. Instead, the trial court did not even acknowledge McQueenôs interests

under RSMo. § 1.205.3 and weighed only the trial courtôs own purely speculative beliefs that the birth of the embryonic children might have effects on their already-born siblings. *See* Judgment ¶ 45 (LF77, Appx. 10).

Because the trial court ignored McQueenôs ñprotectable interests in the life, health, and well-being of [her] unborn child[ren]ò under RSMo. § 1.205.3, this Court should reverse the trial court.

D. The trial court's balancing of interests omitted critical interests of the embryonic children, their brothers, and their parents.

In its brief analysis of the likely ramifications of permitting McQueen to implant and give birth to the embryonic children, the trial court made wholly unsubstantiated assumptions about the likely negative effects, while completely ignoring just-as-likely positive consequences of their birth; the trial court additionally failed to consider the foreseeable negative consequences of letting them die. According to the court:

> The subsequent use of the frozen embryos to create a child would é impose tremendous emotional tolls on a parent who now has a child that he really did not desire. It would have a toll on the twins who now have a good relationship with their parents. They would have to navigate why one parent did not want to actively parent the new child. How difficult would it be for one parent to pick up the twins and not take an active role in the life of a new child standing right beside them? How difficult would it be for the newborn child? Both parents, newborn children, and the twins would be emotionally impacted by the use of embryos.

Judgment ¶ 45 (LF77, Appx. 10). The trial court pointed to no evidenceð and the record contains noneð to support any of the following speculative assumptions it made: (a) that a parent who is reluctant during a childôs gestation typically remains reluctant or distant towards that child after its birth; (b) that the choice to keep his distance from an unwanted child after it is born would take ñtremendous emotional tollsò on the parent, who has, after all, *chosen* that course of action and can later choose to embrace and have a relationship with that child, a possibility the trial court did not consider; (c) that the birth of a sibling, or two, against the wishes of one of their parents would ñhave a tollò on the quality of their older brothersô relationships with either parent; and (d) that the parents could not create circumstances that would mitigate the ñdifficult[y]ò of picking up the older siblings and not the younger. *See generally* Judgment (LF68-81, Appx. 1-14).

At the same time, the trial court either failed to consider, or entirely discounted, certain equally or more likely consequences of the birth of the embryonic children, for example: (a) the tremendous emotional *benefits* to mother, older brothers, and likely even father, of rearing and growing up with one or two new family members; (b) that having one or two new siblings would improve the family dynamic or enhance the older boysô relationships with either or both of their parents; (c) that allowing their father the power to deny their mother the opportunity to give birth to their younger siblingsð in effect, allowing their father to destroy their younger siblingsð will take a ñtollò on the quality of the older brothersô relationships with one or the other parent. Ironically, the courtôs judgment increases the likelihoodð to a virtual certaintyð that the Gadberry children will someday (perhaps immediately, if they are aware of these proceedings)

ñhave to navigate why one parent did not want to actively parent the new child[ren].ò But the court also ensured that the boys will have none of the offsetting benefits of actually knowing their siblings, and that they will have to navigate the murky psychological waters of knowing that they had similarly-situated siblings who died at the hand of their father despite being created by the very same IVF process at the very same time. Equally perverse, the court chose to spare the embryonic children the ñdifficultyò of being passed over by their father by denying them all of the innumerable virtues of being born and cared for by, at least, their mother and older brothers.

Further, Missouri law mandates a presumption that children should be raised by their parents or at least one parent, and not third party couples. RSMo. § 452.375.5(5)(a) (ñWhen the court finds that ***each*** parent is unfit, unsuitable, or unable to be a custodian, or the welfare of the child requires, and it is in the best interests of the child, then custody, temporary custody or visitation may be awarded to any other person or persons deemed by the court to be suitable and able to provide an adequate and stable environment for the child.ò) (emphasis added). The court cannot deny McQueen custody of the embryonic children because Gadberry asserts the presence of two additional children may cause him discomfort. McQueen is the only parent of these embryonic

children who is willing to take custody of them and raise them.[4] The trial court erred in refusing to grant custody of the embryonic children to McQueen.

In sum, the courtôs weighing of interests was speculative, one-sided, and contrary to fact and law. Its decision to leave the embryonic children in indefinite limbo until their inevitable demise was based on rank speculation. This Court should reverse.

E. Neither federal nor state law gives the biological father the right to direct the death of his children—embryonic, gestational, or otherwise—yet the trial court gave the father here that unprecedented right.

The trial court gave the father the unprecedented right to direct the death of his embryonic children. The trial court held that a mother such as McQueen should not give birth to such children because of the ñemotional tollò it may take on the reluctant father and any other siblings. Judgment, ¶45 (LF77, Appx. 10). In making its dire and groundless predictions, the trial court missed the fact that many families already face these precise scenarios, for example when a pregnant woman chooses to bring a baby to term over the biological fatherôs objections. The laws of the United States and the State of Missouri do not permit the emotions or wishes of the father or of anyone else to trump a motherôs interest in the welfare of her child. *See Planned Parenthood of Cent. Missouri*

[4] McQueen seeks custody of both embryonic children and, as discussed herein, is the only parent who asserts their interests pursuant to and in accordance with Missouri law.

v. Danforth, 428 U.S. 52, 71 (1976) (fathers have no rights in the abortion decision). In other words, ***neither federal nor state law gives the biological father or anyone else the right to direct the death of his children—embryonic, gestational, or otherwise—yet the trial court gave the father here that unprecedented right***. *Id.*; *see also* RSMo. § 188.027 (prohibiting doctors from performing an abortion unless the mother consents ñwithout coercion.ò); RSMo. §§ 565.020 ï 565.027 (criminalizing murder and manslaughter); RSMo. § 563.061 (enacting a defense of justification to use force to prevent another from committing suicide); RSMo. § 190.615.1 (permitting medical providers to honor a do-not-resuscitate order, but forbidding euthanasia and assisted suicide); RSMo. § 565.023.1(2) (criminalizing assisted suicide). This Court must reverse.

F. Recognition of embryonic children as legal persons does not violate procreative rights.

The trial court held that Gadberry and McQueenôs constitutional rights will be violated if either is ñforced to procreate against his or her wishes.ò Judgment ¶48 (LF78, Appx. 11). But Gadberry and McQueen both *already* procreated by voluntarily creating embryonic childrenð legal personsð through IVF. RSMo. § 1.205, Appx. 16. *See also* Maureen L. Condic, *When Does Human Life Begin? The Scientific Evidence and Terminology Revisited*, 8 ST. THOMAS J. LAW & PUB. POL. 44, 44 (2014) (ñ[T]he life of a new human being commences at a scientifically well-defined event; the fusion of the plasma membranes of sperm and egg.ò). It is undisputed that Gadberry and McQueen consented to the procreation of the embryonic children. Judgment ¶12-14 (LF70-71, Appx. 3-4). They thereby exercised their procreative liberty. Gadberry cannot now

ñundoò the creation of the legal persons at issueð just as a father of born or gestational children cannot ñundoò their creation. *Cf. Danforth*, 428 U.S. at 71 (fathers have no rights in the abortion decision); RSMo. § 188.027 (prohibiting doctors from performing an abortion unless the mother consents ñwithout coercion.ò); RSMo. §§ 565.020 ï 565.027 (criminalizing murder and manslaughter); RSMo. § 563.061 (enacting a defense of justification to use force to prevent another from committing suicide); RSMo. § 190.615.1 (permitting medical providers to honor a do-not-resuscitate order, but forbidding euthanasia and assisted suicide); RSMo. § 565.023.1(2) (criminalizing assisted suicide). *See also* Section I.E. above.

In addition, unlike a pregnancy resulting from sexual intercourse, where both parties may or may not be deliberately attempting to become pregnant, the IVF process is for the purpose of creating life and becoming a parent. Through IVF, Gadberry and McQueen previously decided to, and did successfully, procreateð creating four embryonic children, including the two born who are now 8-year-olds and the two who are at issue in this case.

II. THE TRIAL COURT ERRED IN FAILING TO REQUIRE THE EMBRYOS' GAL TO PERFORM HER LEGAL DUTIES, BECAUSE THE GUARDIAN AD LITEM DID NOT ADVOCATE FOR THE BEST INTERESTS OF THE EMBRYONIC CHILDREN, IN THAT SHE NEITHER INVESTIGATED WHICH OUTCOME WOULD BEST SERVE THE EMBRYONIC CHILDREN'S "LIFE, HEALTH, AND WELL-BEING" NOR PROVIDED INPUT TO THE COURT EITHER FORMALLY OR THROUGH ACTIVE PARTICIPATION IN THE DISSOLUTION PROCEEDING.

The trial court failed to require the Embryosô GAL to perform her duties. Missouri statute and case law, as well as in a set of standards the Missouri Supreme Court promulgated, clearly establish the duties of a GAL. *See* RSMo. § 452.423, Appx. 21 (laying out conditions for appointment and disqualification of a GAL in proceedings for dissolution of marriage where custody is a contested issue); LF36, Appx. 37 (ñIt is the Courtôs expectation that the Guardian ad Litem complies with the Supreme Courtôs Standards for Guardians ad Litem as follows . . .ò); Missouri Supreme Courtôs Standards for Guardians ad Litem (ñGAL Standardsò), Appx. 23-36 (listing GAL Standards together with commentary on each from the Supreme Court of Missouri); *see also, e.g.*, *Guier v. Guier*, 918 S.W.2d 940, 950 (Mo. Ct. App. 1996) (evaluating the performance of a GAL); *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 385 (Mo. Ct. App. 1993) (discussing the responsibilities of a GAL).

It was the trial courtôs responsibility to require a GAL to perform her duties:

> The appointing judge shall require the guardian ad litem to faithfully discharge such guardian ad litemôs duties, and upon failure to do so shall discharge such guardian ad litem and appoint another.

RSMo. § 452.423.4, Appx. 21; *see also McCreary v. McCreary,* 954 S.W.2d 433, 448 (Mo. App. W.D. 1997) (ñThe trial court is mandated under the law to monitor the guardian ad litem to insure that he or she does what is necessary to protect the best interests of the minor children.ò) (citing *Guier,* 918 S.W.2d at 950); *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 386 (Mo. Ct. App. 1993) (ñThe appointing court is required by statute to supervise the guardianôs faithful performance and to discharge him if he fails to perform competently.ò).

Consistent with § 1.205, the trial courtôs Order appointing the EmbryosôGAL expressly ordered her to comply with these requirements. LF36-37, Appx. 37-38. The Order, among other requirements, recited the Supreme Courtôs standards for GALs, expressed ñthe Courtôs expectation that the Guardian ad Litem complies with the Supreme Courtôs Standards for Guardians ad Litem,ò and required the appointed GAL to submit both (a) an ñAcknowledgment of Obligation to Comply with the Missouri Supreme Court Standards of Guardians ad Litemò at the outset of the case, LF36, Appx. 37, and (b) a ñMemorandum of Compliance,ò ñindicating the Guardianôs compliance with the Missouri Supreme Court Standards for Guardians ad Litemò at the conclusion of the case, LF37, Appx. 38. Despite these clear requirements, the trial court failed to require the EmbryosôGAL to perform her duties.

The interpretation of rules and statutes is a question of law that courts of appeal review *de novo*. *See Lorenzini*, 312 S.W.3d at 470 (ñOur interpretation of Missouri Supreme Court Rules and statutes involves questions of law which we review de novo.ò).

A. The trial court erred in allowing the GAL not to advocate for the best interests of the embryonic children.

Under Missouri statutes and rules governing guardians ad litem, the Embryosô GAL should have acted, but failed to act, in the best interests of the embryonic children. ñ[T]he laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state.ò RSMo. § 1.205.2, Appx. 16. GAL Standard 3.0 states that ñ[t]he GAL shall be guided by the best interests of the child(ren) in all matters . . . .ò LF36, Appx. 37; *see also,* GAL Standards, Standard 3.0, Appx. 24. ñ[H]is function is to advocate what he believes to be the best interests of the children.ò *McCreary v. McCreary,* 954 S.W.2d 433, 448 (Mo. App. W.D. 1997); *see also, e.g.*, *Guier*, 918 S.W.2d at 950 (ñThe duty of a guardian ad litem is to protect the best interests of a child.ò). The Missouri Supreme Court elaborates in its commentary on GAL Standard 3.0: ñThe guardian ad litem ***must recommend only what is in the best interests of the child*** on each issue and must maintain an objectivity that preserves a clear focus on the childôs best interest.ò GAL Standards, Comment to Standard 3.0, Appx. 25 (emphasis added). As to GAL Standard 4.0, the Court reiterates that ñ[t]he guardian ad litem shall provide not only factual information to the court but also shall ***diligently advocate a position in the best interests of the child***.ò GAL Standards, Comment to

Standard 4.0, Appx. 26 (emphasis added); *see also* LF36, Appx. 37 (ñso as to advocate a position designed to serve the best interests of the child(ren)é ò). The record in this matter reveals no evidence that the Embryosô GAL made any attempt act in the ñbest interestsò of the embryonic childrenð or even attempted to file a Memorandum of Compliance as she was required to do under the Courtôs appointment order.

As discussed above, § 1.205.1(2) confers on the embryonic children "protectable interests in life, health, and well-being.ò The trial court implicitly recognized that the embryonic children had such protectable interests when it appointed a GAL to protect them, and only them.[5] But throughout the proceedings below, the Embryosô GAL made no mention of the embryonic childrenôs interests in life, health, well-being, or anything else. She did not, for example, question any witnesses about how their intentions for the embryonic children would affect the embryonic children themselves. *See* Tr. 129:9-132:11 (her sole examination of a witness). She did not call the courtôs attention to how the parentsô rival proposals would affect the ñlife, health, and well-beingò of their embryonic children. When the attorneys and witnesses discussed the possible consequences for the mother, father, and brothers of the implantation and birth of the embryonic children, she offered nothing whatsoever about how *the embryonic children*

[5] The trial court appointed separate GALs for the children in being. LF 3-4 (docket sheet showing David Betz was appointed as GAL on February 4, 2014, separate from the appointment of the Embryonic Childrenôs GAL on May 19, 2014).

themselves would be affected by growing up with their mother and siblings. *See, e.g.*, Tr. 123:1-10; 125:21-29:4, 170:2-173:8.

According to the trial transcript, the EmbryosôGALôs only contribution to the proceeding below was to examine McQueen as to (a) how long the embryonic children could survive in cryopreservation; (b) the terms of the agreement between her and Gadberry; (c) whether McQueen would be comfortable with dividing the embryonic children up between McQueen and Gadberry if, hypothetically, Gadberry wanted to implant one in another woman; and (d) whether McQueen would be willing to donate the embryonic children to someone else. *See* Tr. 129:9-132:11. But the EmbryosôGAL had a legal duty to advocate for the best interests of the embryonic children. ñA guardian ad litemôs . . . function is to advocate what he believes to be the best interests of the *child* by providing the court requisite information bearing on those interests *untainted by the parochial interests of the child's parents*.ò *Davis v. Schmidt*, 210 S.W.3d 494 (Mo. Ct. App. 2007) (emphasis added).

The failure of the EmbryosôGAL even to *mention*, never mind advocate for, the interests of the embryonic children failed to fulfill her principal responsibility under Missouri law:

> [T]he role of the guardian ad litem involves more than perfunctory and shadowy duties. The guardian ad litem is supposed to collect testimony, summon witnesses and ***jealously guard the rights of infants, which is the standard of duty in this state. It is the guardian ad litem's duty to stand in the shoes of the child and to***

weigh the factors as the child would weigh them if his judgment were mature and he was not of tender years.

Sutton v. McCollum, 421 S.W.3d 477, 482 (Mo. App. S.D. 2013) (quoting *In re Marriage of Sisk,* 937 S.W.2d 727, 733 (Mo. Ct. App. 1996)) (emphases added); *see also In Interest of J.L.H.*, 647 S.W.2d 852, 861 (Mo. Ct. App. 1983) (same); *State ex rel. Bird*, 864 S.W.2d at 385 (ñ[U]nder our statutory scheme for adjudication of custody disputes, it is imperative that the guardian ad litem investigate and present its perspective to the trial judge, thereby enabling the court to render a decision in accordance with the statutory standard of ñbest interests of the child.ò). If the embryonic children ñwere mature . . . and not of tender years,ò *Sutton*, 421 S.W.3d at 482, they necessarily would choose life over death, and certainly would not take *no position at all*, as their GAL did. Therefore, the trial court failed to require the GAL to fulfill her obligation to advocate for the best interests of the embryonic children.

B. The trial court erred in failing to require the GAL to consider the best interests of the embryonic children to be transferred into their mother's uterus, gestated, and born.

It is in the best interests of the embryonic children to be given to a mother who wants to provide for their future life and development, rather than to be left in suspended animation until they eventually die. RSMo. § 1.205, Appx. 16; *Webster*, 492 U.S. at 506. The EmbryosôGAL should have recognized that the laws of the State of Missouri compel that conclusion. As discussed in Point I, the Missouri Legislature has expressed a clear value judgment in favor of the lives of unborn children, taking pains to emphasize that

even at the very earliest stages of their development, unborn children such as the embryonic children here have legally-protectable interests in ñlife, health, and well-being.ò *See* RSMo. § 1.205, Appx. 16; *see also Webster*, 492 U.S. at 506 (recognizing § 1.205ôs legitimate ñvalue judgmentò); RSMo. § 188.010 (ñIt is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn . . . .ò).

In addition, § 1.205.2 dictates that unborn children are to be granted ñall the rights, privileges, and immunities available to other persons, citizens, and residents of this state.ò The citizens of the State of Missouri enjoy a strong presumption, cutting across every legal context, in favor of the protection of their lives and potential future development. Most obviously, the law contains prohibitions on ending the lives of persons, whether intentionally or unintentionally, by act or omission, for any reason. *See, e.g.*, RSMo. §§ 565.020 ï 565.027 (homicide and manslaughter statutes); *see also* RSMo § 565.023 (voluntary manslaughter statute). RSMo. § 563.061 (enacting a defense of justification to use force to prevent another from committing suicide); RSMo. § 190.615.1 (permitting medical providers to honor a do-not-resuscitate order, but forbidding euthanasia and assisted suicide); RSMo. § 565.023.1(2) (criminalizing assisted suicide). These laws express a consistent commitment, on the part of the State of Missouri, to protect and preserve human life. *See also* RSMo. § 459.055(1) (ñEach person has the primary right to request or refuse medical treatment subject to *the state's interest in protecting innocent third parties, preventing homicide and suicide* . . .ò) (emphasis added); RSMo. § 459.055(5) (ñSections 459.010 to 459.055 do not condone, authorize or approve mercy

killing or euthanasia *nor permit any affirmative or deliberate act or omission to shorten or end life*.ò) (emphasis added); *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 335 (1990) (ñThe stateôs interest in life embraces two separate concerns: an interest in the prolongation of the life of the individual patient and an interest in the sanctity of life itself.ò). *See also* Section I.A., above.

Other Missouri statutes and case law require those who impair a personôs life, health, or potential for future development to compensate the injured person (or his representative) for that loss. *See, e.g.*, RSMo. § 537.069 (wrongful death statute); § 538.210 (statutory cause of action against health care provider for personal injury or death); Mo. Const. art. I, § 14 (guaranteeing that the Missouri courts will provide remedy for personal injuries). And at the same time, Missouri law rejects the notion that certain lives are no longer worth living, or that for some persons it would have been better to have never existed. *See* RSMo. § 565.023.1(2) (criminalizing assisted suicide); RSMo. § 188.130 (prohibiting torts for wrongful life or wrongful birth).[6]

When it comes to a choice between life and death, the laws of the State of Missouri take a very clear position on the ñbest interestsò of its citizens: It is in a personôs ñbest interestsò to be alive and able to develop; it is contrary to a personôs interests to be killed or disabled. Under § 1.205, the embryonic children are entitled to

[6] Missouri law also expressly recognizes the rights of ñunbornò children to be represented by a guardian ad litem in trust and probate proceedings. RSMo. § 472.300(4).

the same protections under the law as all other Missouri citizens. Therefore, the trial court failed to require the Embryosô GAL to consider the best interests of the embryonic children, *i.e.*, being awarded to their mother for the purposes of gestation and birth.

C. The trial court erred in permitting the GAL to fail to perform her duties of (a) actively participating in the proceedings below, and (b) filing an adequate recommendation with the court.

In addition to her duty to advocate for the best interests of the embryonic children, the Embryosô GAL also had specific procedural duties to perform:

> The guardian ad litem shall participate actively and fully in all court proceedings. The guardian ad litem shall present evidence, file pleadings, and call witnesses when appropriate to ensure all information relevant to the childôs best interests is presented to the court for consideration.

GAL Standards, Standard 11.0, Appx. 32-33; LF37, Appx. 38. The GAL Standards also require a GAL to ñpresent a recommendation to the court when authorized by law or requested by the court . . . .ò GAL Standards, Standard 13.0, Appx. 34; LF37, Appx. 38.

A GAL is not required to perform these duties according to a rigid formula. For example, a GAL is not required to make an ñexplicitò or ñformalò recommendation to the appointing court. *See, e.g.*, *Halford v. Halford*, 292 S.W.3d 536, 543 (Mo. Ct. App. 2009); *State ex rel. State of Kansas Soc. & Rehab. Servs. v. R.L.P.*, 157 S.W.3d 268, 278 (Mo. Ct. App. 2005); *Baumgart v. Baumgart*, 944 S.W.2d 572, 579 (Mo. Ct. App. 1997); *Guier v. Guier*, 918 S.W.2d 940, 952 (Mo. Ct. App. 1996). But the GAL *must*

investigate and provide input to the trial court in one form or another, whether in a formal recommendation or by actively participating in the lower court proceedings:

> While the GAL is not required to make an explicit recommendation as to child custody, ***it is imperative that he investigate and have input on the perspective of the child's best interest and that this be presented to the trial court***. Such presentation can be made, however, through active participation in the proceedings without the necessity of a formal, explicit recommendation.

State ex rel. State of Kansas Soc. & Rehab. Servs., 157 S.W.3d at 278 (citations omitted); *Halford*, 292 S.W.3d at 543 (same); *Baumgart*, 944 S.W.2d at 579 (same); *see also, e.g.*, *Guier*, 918 S.W.2d at 951-52 (no ñformal, explicit recommendationò required where the GAL had been ñvery activeò and ñhad input and perspective on the best interests of the Guier children and . . . conveyed such to the trial judge through his active participation in the modification proceedingsò).

Here, the record reflects inadequate activity on the part of the Embryosô GAL. There is no record of her taking any steps to advocate for the best interests of the embryonic children. There is no evidence that she conducted adequate interviews or research or any other kind of investigation to discern what might be in the best interests of the embryonic children. There is no evidence that she interviewed anyone who might be able to shed light on how best to serve their statutorily-defined interests in ñlife, health, and well-being,ò such as IVF experts, scientists or social scientists who have studied long-term outcomes for children of IVF. There is no record that she interviewed the parents of the embryonic children about what they considered to be in the best

interests of the embryonic children themselves. In fact, according to the transcript of the dissolution proceeding, she examined only one witness (McQueen) and, in her brief examination, she did not ask a single question that had anything to do with the interests of the embryonic children. *See* Tr. 129:9-132:11. There is no record that the trial court requested any input from the Embryosô GAL, or that the Embryoôs GAL provided any input to the trial court.

When compared to GALs whose conduct courts have upheld, the Embryosô GAL was plainly inadequate. For example, the *Guier* court defended the conduct of a GAL as follows:

> The guardian ad litem in this case was very active in cross-examining witness, especially Father, Mother, and the counselors for the parents and children, took part in pre-hearing depositions, and recommended that the court interview the [*sic*] Karla and Bobby in chambers after the close of the second day of evidence as a result of some of the evidence elicited during testimony. He performed an adequate pre-hearing investigation of the facts and circumstances surrounding the motion to modify, as discussed in the preceding section of this opinion. The guardian had input and perspective on the best interests of the Guier children and we believe he conveyed such to the trial judge through his active participation in the modification proceedings.

Guier, 918 S.W.2d at 952. Similarly, in *In re Marriage of Sisk*, a court found that a diligent GAL had performed an adequate investigation:

> At trial, the GAL testified at length regarding the steps she took to investigate the allegations of sexual abuse. She interviewed both of the childôs play therapists, the psychiatrist who evaluated the child at St. Lukeôs Hospital, as well as a social worker at the same hospital. She reviewed the childôs medical records, participated in the deposition of the psychiatrist who evaluated the child, and reviewed an evaluation of the child conducted by another psychologist. The GAL also interviewed Mother and Father, took an active role in the trial, and made recommendations to the court at the end of the trial.

In re Marriage of Sisk, 937 S.W.2d 727, 733 (Mo. Ct. App. 1996).

There is no comparison between the GALs in *Guier* and *In re Marriage of Sisk*, on the one hand, and the EmbryosôGAL, on the other. Here, there was no ñactiveò cross-examination of witnesses; no recommendations to the court to interview certain witnesses; no ñpre-hearing investigation of the factsò; no input and perspective. *See Guier*, 918 S.W.2d at 952. There were also no interviews of relevant experts; no participation in depositions; no ñactive role in the trialò; and no recommendations. *See In re Marriage of Sisk*, 937 S.W.2d at 733. There is no evidence in the record that the EmbryosôGAL even submitted the paperwork required by the Order appointing her. *See* LF37, Appx. 38 (requiring the GAL to submit a ñMemorandum of Complianceò with the Missouri Supreme Court Standards). ñIf a guardian ad litem is to err, it should be on the side of investigating too much rather than too little.ò *Hemphill v. Quigg,* 355 S.W.2d 57, 64 (Mo. 1962). Here, the trial court erred by permitting the EmbryosôGAL to *not investigate at all* and to provide no input to the trial court.

D. In the alternative to an outright reversal (Point I above), remand is the appropriate remedy for the trial court's failure to require the Embryo's GAL to perform her duties.

Where a GAL has *not* actively investigated and provided input on the best interests of the child in some form, Missouri appeals courts have remanded for further proceedings with the same GAL or a new one. *See, e.g.*, *Baumgart v. Baumgart*, 944 S.W.2d 572, 579-80 (Mo. Ct. App. 1997), *as modified* (May 27, 1997) (reversed and remanded for appointment of new GAL where ñthere [was] nothing in the record to indicate that the guardian ad litem conducted any investigation or interviews with people having contact with [the child] or took any role outside the hearing in determining the best interests of the children, as required by statuteò); *McCreary v. McCreary*, 954 S.W.2d at 448 (observing that the ñrecord here is very sketchy as to exactly what investigation the guardian ad litem did to protect the best interests of the children and reflects little input from or advocacy by her on behalf of the children,ò the court remanded, ñdirecting the trial court on remand to examine what the guardian ad litem did doò); *Davis v. Schmidt*, 210 S.W.3d 494 (Mo. Ct. App. 2007) (remanded with direction to receive substantive evidence from GAL after the GAL provided óno meaningful evidenceô at the trial level).

The Embryosô GAL failed to perform her duties under Missouri law, Missouri Supreme Court standards, and the plain terms of the Order appointing her. The record suggests that the Embryosô GAL was not even aware of the legally-defined interests of her charges under RSMo. § 1.205 and did nothing to protect them. Therefore, and only in

the alternative to an outright reversal as explained in Point I, this Court should reverse and remand for appointment of a new GAL with instructions to follow Missouri law that requires advocating for the best interests of the embryonic children.

III. THE TRIAL COURT ERRED IN AWARDING THE PARTIES JOINT "OWNERSHIP" OF THE EMBRYONIC CHILDREN AS "MARITAL PROPERTY" BECAUSE THE AWARD CONTRAVENED THE PARTIES' AGREEMENT AND MISSOURI LAW IN THAT THE PARTIES AGREED THAT MCQUEEN WOULD HAVE CUSTODY OF THEM IN THE EVENT OF DIVORCE AND, EVEN IF THE EMBRYONIC CHILDREN WERE "MARITAL PROPERTY," MCQUEEN IS ENTITLED TO SOLE "OWNERSHIP."

Assuming, *arguendo*,[7] that the trial court was correct in treating the embryonic children as ñproperty,ò the trial court erred in failing to enforce the valid postnuptial contract of the parties regarding the disposition of the embryos in the event of a divorce. The trial court is required, under RSMo. § 452.330, to set apart all nonmarital property and to divide all ñmarital property.ò RSMo. § 452.330.1, Appx. 19. That statute allows the parties to designate property that otherwise would be marital property to be property of one spouse through a written agreement. RSMo. § 452.330.2(4), Appx. 19. Here, the

[7] McQueen argues Point on Appeal III in the alternative. For purposes of this Point, McQueen herein sometimes refers to ñownershipò of the embryonic children as ñpropertyò or ñmarital property.ò. As discussed in Sections I and II above, the embryonic children are livesð not propertyð with protectable interests under Missouri law, but if the embryonic children were (contrary to law) deemed ñproperty,ò the embryonic ñpropertyò should be awarded to McQueen as sole ñownerò or ñcustodian.ò

parties entered into such an agreement and the trial court erred in failing to enforce it. The trial courtôs course of action, to award joint custody of the embryos, is not authorized under RSMo. § 452.330. Specifically, the trial court erred when it held the Cryobank Agreement lacked consideration, when it held that the Cryobank Agreement ñmay have been filled inò after Gadberry signed it, and when it listed numerous other grounds to invalidate the Cryobank Agreement. Judgment, ¶¶ 28, 35 (LF73, 75, Appx. 6, 8). The trial court erred in relying on these grounds.

This Point raises mixed questions of fact and law. Questions of the interpretation of a contract are questions of law and are subject to *de novo* review. *Newco Atlas, Inc.*, 272 S.W.3d at 891 (ñInterpretation of a contract is a question of law and is subject to *de novo* review.ò). The trial courtôs finding of fact regarding the circumstances of the adoption of the Cryobank Agreement will be reversed if ñthere is no substantial evidence to support it.ò *Murphy,* 536 S.W.2d at 32.

A. The trial court failed to distribute all "property" pursuant to RSMo. § 452.330.1.

After determining (however incorrectly) that the embryos are marital property, the trial court erred in failing to ñdivideò it as required by RSMo. § 452.330.1. ñIn a proceeding for dissolution of the marriage or legal separationé the court shall set apart to each spouse such spouseôs nonmarital property and ***shall divide the marital property*** and marital debts.ò RSMo. § 452.330.1, Appx. 19. The trial court failed to follow the marital property statute when it awarded the embryos to McQueen and Gadberry *jointly*. Judgment, ¶ 58 (LF80, Appx. 13). It is reversible error to fail to divide marital property.

Silverstein v. Silverstein, 943 S.W.2d 300, 303 (Mo. Ct. App. 1997) (reversing in part where ñthere was passive loss carry-forward generated during the marriage and as such it is a marital asset which the trial court must divide.ò).

The same statute, RSMo. § 452.330, allows the Court to treat property as nonmarital property, and to set it apart in favor of one of the parties, pursuant to a ñvalid written agreement of the parties.ò RSMo. § 452.330.2(4), Appx. 19. As discussed below, the trial court also erred by failing to recognize the valid written agreement between McQueen and Gadberry that set the embryos apart in favor of McQueen. But even if the trial court were correct in refusing to recognize the written agreement and refusing to recognize the embryonic children as human beings, it failed to ñdivideò the ñpropertyò pursuant to § 452.330.1ð *i.e.*, award the embryonic ñpropertyò to either McQueen or Gadberry.

Under Missouri law, the Court is required to consider all relevant factors in dividing marital property, including but not limited to:

> (1) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children, (2) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker, (3) The value of the nonmarital property set apart to each spouse, (4) The conduct of the parties during the marriage; and (5) Custodial arrangements for minor children.

Sullivan v. Sullivan, 159 S.W.3d 534-35 (Mo. App. 2005). *See also id.* at 535 (value of marital property is also relevant to its proper division).

As an initial matter, these factorsð contemplating the division of inanimate property such as a ñfamily homeò and other ñacqui[red]ò propertyð demonstrate the absurdity of calling embryonic children ñpropertyò (see Points I and II). But, again, assuming the embryos are ñpropertyò as the court held, the court failed to address *any* of these factors in its assessment of who should be awarded the embryonic ñproperty.ò The court failed to consider the obvious fact that Gadberry assessed a zero value to the embryos because he testified that he did not want them. Tr. 170:8-14 (ñThey can be donated to an infertile coupleé . They can be donated for scientific purposesé . They can simply be destroyed.ò). McQueen, on the other hand, demonstrated to the court that the embryos were invaluable to her. Tr. 131:1-6; 131:21-132:3. The court also failed to mention or consider the respective contributions of McQueen and Gadberry to the ñacquisitionò of the embryos, and which party was maintaining them. McQueen has paid for storage fees for the embryos. Tr. 132:4-7. She also contributed more time and effort towards their ñacquisitionò in that she had multiple doctorôs appointments and procedures in order to create the embryos, compared to Gadberryôs one visit to the doctor. Tr. 77:10-14; 158:4-6; Exhibit J 14:14-19.

Accordingly, insofar as the trial court determined the embryos were ñproperty,ò in ruling on who is entitled to ownership of them, the court should have considered the critically relevant facts that Gadberry did not want the embryos, that McQueen had contributed the most towards their acquisition, that McQueen continued to maintain the

embryos financially, and that the embryos were invaluable to McQueen. The Court failed to do so. McQueen is entitled to the embryos under Missouri law.

B. The Cryobank Agreement is an enforceable postnuptial contract.

The Cryobank Agreement is an enforceable postnuptial contract, supported by mutual consideration, governing the disposition of a discrete subset of the partiesô ñproperty.ò The trial court held that the Cryobank Agreement was not a postnuptial agreement because: ñThere was no consideration between [Gadberry] and [McQueen] for the Directive.ò Judgment, ¶ 35 (LF75, Appx. 8). The partiesô mutual consideration supports the Cyrobank Agreement because both McQueen and Gadberry gave up claims to the embryos under specific conditions.

McQueen and Gadberry pledged mutual consideration in the Cryobank Agreement because they made reciprocal promises granting custody of the embryos to each other on the condition of predeceasing the other. *See Bankers Capital Corp. v. Brummet*, 637 S.W.2d 424, 429 (Mo. App. 1982) (promise to sell, even though conditional, is sufficient consideration for purchase contract). Additionally they made reciprocal promises granting custody of the embryos to a third-party couple in the event both died. That Gadberry made the additional promise, in the event of divorce, that McQueen shall have custody of the embryos does not destroy the consideration pledged elsewhere in the contract.

The Cryobank Agreement instructed McQueen and Gadberry to make decisions regarding the disposition of the embryos in three situations: 1) the death of one individual; 2) the death of both individuals; and 3) legal separation or divorce. Exhibit B,

at 6-7. Appx. 48-49. McQueen and Gadberry agreed that in the event of either of their deaths, the living partner would have custody of the embryos. *Id.* Through this mutual promise they each forfeited the claims of their estates in the embryos. *See Matter of Soper's Est.*, 598 S.W.2d 528, 536 (Mo. App. 1980) (ñThe mutual releases constituted consideration.ò) This promise further involved granting the embryonic children, should they be born, a right to inheritance from the estate. Exhibit B, at 6, Appx. 48 (ñIf the embryos are used by my partner after my death, it is my desire and stated intention that the child be recognized in law as my child and is entitled to inheritance from my estate and all rights of survivorship no provision in my will to the contrary.ò). McQueen and Gadberry also agreed, in the event that they both died, the embryos would be donated to another couple. *Id.* at 7, Appx. 49. Once again, through this promise they each forfeited the claims of their estate in the embryos. As additional consideration, Gadberry agreed that in the event of a divorce or legal separation, the embryos would be ñ[u]sed by Jalesia F. McQueen.ò *Id.*

Contracts require mutual consideration, not equal consideration. ñIf the requirement of consideration is met, there is no additional requirement of é (b) equivalence in the values exchanged; or (c) ómutuality of obligation.ôò Restatement (Second) of Contracts, § 79. ñAccordingly, any bargained-for exchange will supply the consideration needed to form a contract, regardless of whether a court believes (with the benefit of hindsight) that the promisor gave a promise that was worth moreð even far moreð than the benefit or detriment received in the exchange.ò *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 782 (Mo. 2014) (citing the restatement). It is entirely irrelevant

that Gadberry, by agreeing to give McQueen custody of the embryos in the event of divorce, may have provided additional consideration beyond that provided by McQueen. The amount of consideration promised by each party need not be equal; the only concern is whether they each provided consideration. *Id.* They did.

C. Completion of the Cryobank Agreement after its notarization does not implicate its validity.

The Court erred in considering whether the Cryobank Agreement was improperly notarized. Judgment, ¶ 29 (LF73-74, Appx. 6-7). Notarization only serves to authenticate signatures; where, as here, there is no question of the authenticity of the signatures, notarization of only the signatures but not the initials does not affect the validity of the agreement.

Gadberry admitted that he signed his initials on the second page of the Cryobank Agreement where he agreed to the embryoôs disposition in the three situations provided. Tr. 173:9-11; Exhibit B, at 7, Appx. 49. Gadberry admitted that he too signed the third page of the Cryobank Agreement. Tr. 140:20-22; *id.* at 165:7-9; Exhibit B, at 8, Appx. 50. McQueen acknowledged that she signed her initials on the second page of the Cryobank Agreement where she agreed to the embryoôs disposition in the three situations provided. Tr. 114:12-18; Exhibit B, at 7, Appx. 49. McQueen acknowledged that she signed the third page of the Cryobank Agreement. Tr. 84:8-12; *id.* at 110:14-19; Exhibit B, at 8, Appx. 50. Accordingly, McQueen and Gadberry authenticated their signatures and initials.

ñ[T]he purpose of a notary is to prove the authenticity of the signature.ò *Herrero v. Cummins Mid-Am., Inc.*, 930 S.W.2d 18, 21 (Mo. Ct. App. 1996). In *Herrero*, an individual challenged the enforceability of a document that she signed outside the presence of a notary, though she did not contest the authenticity of her signature. *Id.* Citing a federal court discussing a statute that required a notarized act, the *Herrero* Court stated:

> However, it further noted that the purpose of a notary is to prove the authenticity of the signature. The purpose of the statute is, thus, satisfied when the spouse does not dispute the authenticity of his or her signature on the form, although it may have been signed outside the presence of any notary public or plan representative. In such a situation, the consent may be accepted as valid without defeating any substantive statutory objective.

Id. (citations omitted). As with *Herrero*, Gadberry does not contest the authenticity of his signature and initials. Therefore, his consent to the Cryobank Agreement is valid despite the questions he raises regarding the notarization of the Agreement. *Id.*

ñNotarization is an acknowledgment of the signerôs identity and is not essential to a documentôs validity.ò *In re Mi Arbolito, LLC*, No. ADV 09-90507-LT, 2010 WL 3829660, at *17 (Bankr. S.D. Cal. Sept. 23, 2010). In *In re Mi Arbolito*, the court considered whether a deed was invalid because after it was notarized, it was amended with the addition of an exhibit. *Id.* After amendment, the deed was not re-notarized. *Id.* There, the court held that the failure to notarize the amended deed was not fatal to its enforcement:

> The Committee misunderstands the notarization process. Notarization is an acknowledgment of the signerôs identity and is not essential to a documentôs validity. In California, notarization is evidentiary in nature and required to entitle a document to be recorded. Where, as here, the Debtor consented to the addition of the completed Exhibit A after execution and acknowledgment, re-notarization is not required and the lack of re-acknowledgment does not render the 2006 Trust Deed invalid.

Id. (citation omitted). Consistent with *Mi Arbolito*, the Eighth Circuitð applying Missouri lawð held that notarization is evidentiary in nature and not a requirement for effectiveness: ñ[T]he notaryôs duty is [merely] to acknowledge the authenticity of the signature.ò *Dickey v. Royal Banks of Missouri*, 111 F.3d 580, 584 (8th Cir. 1997).

In light of these undisputed signatures and initials, any alleged irregularity regarding notarization is irrelevant. In the *Dickey case*, Dickey signed an assignment of his annuity, and his signature was later improperly notarized by a bank that accepted his annuity as collateral for a loan. *Id.* at 582. Dickey invested the loan proceeds, and when he then fell victim to his co-investorôs scam, he sought recovery from the bank under a theory of unjust enrichment and from the notary under a theory of misconduct. *Id.* Applying Missouri law, the Eighth Circuit reversed the trial court judgment for Dickey because Dickey admitted that his signature was authentic. *Id.* at 584 (ñThere is more than one difficulty in the way of this theory, not least the fact that Mr. Dickey admits that the signature on the assignment is his.ò). ñ[T]he notaryôs duty is [merely] to acknowledge the authenticity of the signature.ò *Id.* (first bracket added, second bracket in original).

The bank was not liable for acting on the document that Dickey had actually signed. *Id.* (ñ[T]his transfer of money to the bank cannot be called unjust in light of the fact that it merely satisfied a debt that ***was concededly owed***.ò) (emphasis added). *See also United Labor Comm. of Missouri v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. 1978) (ñIf the validity of the votersô signatures can be otherwise verified, their signatures should not be invalidated by the notaryôs negligence or deliberate misconduct.ò)

This case does not involve any allegation of misconduct by a notary. To the contrary, and as in *Dickey*, McQueen and Gadberry each admitted at trial that their signatures and initials on the Cryobank Agreement are authentic. McQueen and Gadberryôs initialing but not re-notarizing the Cyrobank Agreement after they completed the agreement on May 21, 2010 does not affect the validity of the Cryobank Agreement as completed. *Herrero*, 930 S.W.2d at 21; *Dickey*, 111 F.3d at 584; *Kirkpatrick*, 572 S.W.2d at 454; *Mi Arbolito,* 2010 WL 3829660, at *17. They each admitted at trial that their signatures and initials in the Cryobank Agreement are authentic. The Court erred in finding the notarization of only the signatures and not the initials impaired the validity of the document.

D. The trial court erred in concluding that the Cryobank Agreement may have been modified after Gadberry signed it.

The Courtôs conclusion that the Cryobank Agreement ñmay haveò been modified is not supported by any evidence presented at trial and is contrary to the legal principle that one who signs a contract has read the contract. ñThe standard of review in divorce proceedings is the same as in any other court-tried case. The trial courtôs judgment

should be affirmed unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law.ò *Wood v. Wood*, 361 S.W.3d 36, 38 (Mo. Ct. App. 2011) (internal citations omitted). Here, the trial courtôs findings have no evidentiary supportð and are not supported by substantial evidence but instead are directly contrary to the weight of the evidence. *Wood*, 361 S.W.3d at 38.

The form of the Cryobank Agreement clearly and unambiguously requires the parties to handwrite one of six possible dispositions for each of the three scenarios listed on the second page. Exhibit B, at 6-7, Appx. 48-49. Gadberry admits to signing his initials where requested, on the second page immediately after the space provided for the parties to fill in handwritten responses. Tr. 173:9-11; Exhibit B, at 7, Appx. 49.

Having signed the Cryobank Agreement, Gadberry is held to have knowledge of the contents of the Cryobank Agreement, including that it calls for a handwritten response regarding the disposition of the embryos. *Young v. Allstate Ins. Co.,* 685 F.3d 782, 785 (8th Cir. 2012) (ñUnder Missouri law, a person who has an opportunity to read a document but signs it without doing so is held to have knowledge of its contents.ò); C.J.S., Contracts, § 193. ñA signerôs failure to read or understand a contract is not, without fraud or the signer's lack of capacity to contract, a defense to the contract.ò *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 228 (Mo. 2013)

It is not reasonable to conclude that Gadberry would have initialed the three scenarios unless the required handwriting was present. Had it been blank, Gadberry would have initialed the following incomplete statement:

DISPOSITION IN THE EVENT OF LEGAL SEPARATION OR DIVORCE

In the event of separation or divorce of the partners, the embryos shall be disposed of by one of the following actions:

(Note: write-in one choice listed above and both parties initial.)

Exhibit B, at 7, Appx. 49 (bolding, small caps, and parenthetical in original). Because the law treats Gadberryôs signature of his initials as evidence that he read the contract, and because it was unreasonable for Gadberry to have initialed immediately next to a blank section requiring the parties to fill in a response, Gadberryôs initials on the second page of the Cryobank Agreement are evidence that the page was filled out with custodial preferences at the time that McQueen and Gadberry documented their assent. As importantly, there is no evidence to the contrary.

The Courtôs conclusion that the Cryobank Agreement ñmay haveò been filled out after Gadberry signed his initials is, furthermore, against the weight of the testimony at trial. McQueen testified that it was not possible for the handwritten responses to have been filled in after she and Gadberry initialed the page. Tr. 119:13-25. She later confirmed the objective interpretation argued above: there would be no reason to place her initials on the page without filled-in responses. Tr. 134:1-4. Gadberry, in response to examination by his own attorney, stated ñI do not rememberò when asked whether the handwritten responses were filled in when he signed his initials. Tr. 173:15-18. No witness testified that the handwritten responses were absent when McQueen and Gadberry placed their initials on the second page of the Cryobank Agreement.

Gadberry is charged with having knowledge of the terms of the contract when he signed his initials on page two. That it would have been completely unnecessary, highly illogical, and rather unusual for him to have signed his initials on page two before the handwritten responses were drafted, combined with the unrebutted testimony that the handwritten language ñUsed by Jalesia F. McQueenò had been written in *before* Gadberry initialed the page, proves that the handwritten responses pre-dated his initials on the page. The trial courtôs ruling to the contrary is manifestly against the weight of the evidence presented at trial.

E. The trial court erred in holding that Gadberry was not apprised of his child support obligations and his right to consult an attorney.

The Court erred when it refused to enforce the contract on the basis that Gadberry was unaware 1) of his rights and obligations to the embryonic children, 2) that his wifeôs interests in the embryonic children might be adverse to his own, and 3) that he could consult an attorney prior to signing the Cryobank Agreement. Judgment, ¶ 35 (LF75, Appx. 8). The Court, however, ignored the undisputed evidence that the Cryobank Agreement, which Gadberry admittedly signed and initialed, expressly apprised Gadberry of each of these points.

The second page of the Cryobank Agreement prominently provides:

> **NOTICE:** Even if you chose to make the embryos available to your divorcing partner, you may be legally responsible for child support obligations. The law is unsettled as to whether a child would be eligible for support and custody by the

divorcing or divorced partners, if an embryo transfer procedure that resulted in its birth occurred during the legal separation or after divorce.

Exhibit B, at 7, Appx. 49 (bold, capitalization, and underlining in original). This notice is immediately below where he signed his initials agreeing that McQueen shall have custody of the embryonic children in the event of a separation or divorce. *Id.* The Cryobank Agreement put Gadberry on notice that he might be responsible for child support or child custody obligations. It further stated that the law is unsettled, therefore making Gadberry aware he may have been taking a legal risk, as well. Finally, by notifying Gadberry that he may be responsible for child support and child custody obligations, it notified him that McQueenôs interests were adverse to his own as she would be the one seeing that he fulfilled his child support and child custody obligations.

The Cryobank Agreement prominently, just above his signature, gives Gadberry notice of his right to seek the advice of counsel: ñThis Directive has been entered into freely and without coercion or duress. **Each party has had the opportunity to be represented by an attorney and to ask questions about this Directive**.ò Exhibit B, at 8, Appx. 50 (emphasis added).

The trial court ignored the undisputed evidence contained in the very exhibit Gadberry himself offered into evidence. The trial courtôs rulings in this regard lack any evidentiary support.

F. The trial court erred in concluding the Cryobank Agreement was unilaterally rescindable.

The trial court erred in concluding that Gadberry had the right to modify or rescind the Cryobank Agreement unilaterally and that Gadberry exercised that right when he executed a ñRevocation of Consentò the day before trial. In its Judgment, the trial court stated:

> This indication on the Directive that the embryos should go to [McQueen] was just that, a directive. This directive could later be changed by [Gadberry]. [Gadberry] did rescind this Directive orally and in writing after the first dissolution was filed between the parties. This designation in the Directive was an instruction to the facility where the embryos were kept. This instruction could be withdrawn at any time upon notice to the facility.

Judgment, ¶ 35 (LF75-76, Appx. 8-9). These findings are contrary to both the express terms of the Cryobank Agreement and Missouri law.

Specifically, the Cryobank Agreement allowed the parties to modify it only upon the mutual agreement of the parties, in a signed writing:

> We understand and are aware that we may change this Directive. However, ***any and all changes must be mutually agreed to between both named partners***. One person cannot use the embryos to create a child (whether or not he or she intends to rear the child) without the explicit written agreement of the other person. ***All changes must be in writing and signed by both parties. Unilateral changes shall not be honored by Cryobank.*** We must provide a certified copy of any changes

> regarding our intentions regarding our embryos to Cryobank. ***In the event that we cannot reach a mutual agreement with respect to disposition of embryos, the most recently executed Directive held by Cryobank will govern the disposition of any embryos.***

Exhibit B, at 7, Appx. 49 (emphases added). By its own terms, the Cryobank Agreement prohibits unilateral revocation and any attempt to unilaterally revoke ñshall not be honored by Cryobank.ò *Id.* Gadberryôs attempts to revoke the Cryobank Agreement on the literal eve of trial are unenforceable under the Cryobank Agreement. *Id.* (Cryobank Agreement forbidding unilateral revocations); Exhibit H (trial exhibit showing Gadberry signed the ñRevocation of Consentò on September 9, 2014); Tr. 2 (transcript showing that trial began on September 10, 2014).

The court cannot rewrite the express terms of the contract, particularly when doing so would afford Gadberry a right that he does not have. *See Brewer v. Devore*, 960 S.W.2d 519, 522 (Mo. App. 1998) (ñThis court cannot make a contract for the parties they did not make or impose upon them obligations not assumed in the contract.ò) (quoting *Dalton v. Rainwater,* 901 S.W.2d 316, 318 (Mo.App.1995). *Cf. Danforth*, 428 U.S. at 71 (fathers have no rights in the abortion decision). RSMo. § 188.027 (prohibiting doctors from performing an abortion unless the mother consents "without coercion."); RSMo. §§ 565.020 ï 565.027 (criminalizing murder and manslaughter); RSMo. § 563.061 (enacting a defense of justification to use force to prevent another from committing suicide); RSMo. § 190.615.1 (permitting medical providers to honor a do-not-resuscitate order, but forbidding euthanasia and assisted suicide); RSMo.

§ 565.023.1(2) (criminalizing assisted suicide). These actions have no effect and the Cryobank Agreement continues to govern.

CONCLUSION

For the foregoing reasons, Appellant McQueen respectfully requests that this Court reverse the trial courtôs disposition of the embryonic children as marital property and hold (i) that the embryonic children are ñunborn childrenò under Missouri law, RSMo. § 1.205.3, (ii) that the embryonic children have ñprotectable interests in life, health, and well-being,ò *id.* § 1.205.1(2), and (iii) that it is in the best interests of the embryonic children to be awarded to their mother, McQueen. Appellant McQueen further and alternatively requests that this Court hold that the Cryobank Agreement is enforceable and award custody of the embryos to McQueen according to its terms. In the alternative, Appellant McQueen respectfully requests that this Court remand for appointment of a new guardian ad litem for the embryonic children and further proceedings to determine what custody arrangement is in the best interests of the embryonic children.

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Dated: December 22, 2015

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Brief on Appeal for Appellant McQueen complies with the requirements of Rule 84.06(c), and that:

1. The signature block includes the information required by Rule 55.03;

2. The brief complies with the limitations contained in Rule 84.06(b);

3. The brief contains 13,779 words, excluding those portions excluded from the word count by Rule 84.06(b) and Local Rule 360, as determined by the word-count feature of Microsoft Word 2010; and

4. Pursuant to Local Rule 333(d), Respondents will file four paper copies of the Brief.

/s/ Stephen Robert Clark

CERTIFICATE OF SERVICE

I hereby certify that, on December 22, 2015, a true and correct copy of the foregoing was filed electronically with the Court, to be served by operation of the Courtôs electronic filing system upon the following:

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