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, Circuit Judge

BRIEF OF *AMICUS CURIAE* AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE IN SUPPORT OF RESPONDENT

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Ethics Committee of the ASRM, *The moral and legal status of the preembryo*, 62 Fertility and Sterility 32S (Nov. 1994) 7

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U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, *Infertility Service Use in the United States: Data from the National Survey of Family Growth, 1982-2010*, No. 73 (Jan. 22, 2014) 9

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INTEREST OF *AMICUS CURIAE* AND STATEMENT OF POSITION

Amicus curiae, the American Society for Reproductive Medicine ("ASRM"), is a non-profit, multidisciplinary organization with nearly 8,000 members in all 50 states and more than 100 countries worldwide. ASRM was founded in 1944 as the American Fertility Society, and is dedicated to the advancement of the art, science, and practice of reproductive medicine. It is the specialty society for physicians and other professionals who focus on infertility, including obstetrician/gynecologists, urologists, reproductive endocrinologists, embryologists, mental health professionals, internists, nurses, practice administrators, laboratory technicians, pediatricians, research scientists, and veterinarians. ASRM members pioneered many of the standard procedures used by fertility specialists today, including donor insemination and *in vitro* fertilization.

ASRM provides multidisciplinary research, education, and advocacy, and sets standards of practice and ethics in the field of reproductive medicine. Much of this work is contained in material published in the peer-reviewed ASRM journal, *Fertility and Sterility*, and on the organization's websites (www.asrm.org and www.reproductive facts.org).[1] ASRM's affiliate organization, the Society for Assisted Reproductive Technology, is the member organization for nearly 400

[1] The ASRM materials cited in this Brief are publicly available, and most can be found on these two websites.

member practices performing more than 95% of the assisted reproduction technology cycles in the U.S. Eight of those practices are located here in Missouri, according to the latest federal data, from 2013, and contributed to 869 births that year. U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, *Morbidity and Mortality Weekly Report: Assisted Reproductive Technology Surveillance – United States, 2013*, Vol. 64, No. 11, at 14, table 1 (Dec. 4, 2015) (hereafter, "CDC Surveillance Report").

ASRM regularly testifies on reproductive health issues before Congress and federal agencies, and is active before state legislatures as well. ASRM also has become involved in judicial proceedings as *amicus curiae* to address the many complex legal, technical, and ethical issues that can arise with assisted reproductive technology ("ART") or reproductive health in general. ASRM addresses ethical issues primarily through its Ethics Committee, which is composed of distinguished members from multiple disciplines who are carefully screened for conflicts of interest to assure that ASRM's published ethical guidance always offers a thoughtful, neutral, and trusted resource for practitioners, policymakers, and patients. Of particular note in this case, ASRM publications have been cited in several judicial decisions around the country that have addressed custodial disputes concerning embryos, including *In re Marriage of Findley*, No. FDI-13-780539, Statement of Decision, slip op. at 80-81 (Super. Ct. Cal., San Francisco Co., Jan. 11, 2016) (available at www.sfsuperiorcourt.org); *AZ*

v. BZ, 431 Mass. 150, 151 n.1 (2000); and *Davis v. Davis*, 842 S.W.2d 588, 593-94, 596-97 (Tenn. 1992).

ASRM seeks to participate in this case as *amicus curiae* to offer a perspective that the parties cannot, that of the thousands of medical professionals who assist the millions of people who struggle with infertility. ASRM is deeply concerned that, with little scientific or legal justification, and without benefit of any significant legislative guidance, either, Appellant and her *amici* would have the Court hold that all custodial disputes concerning excess embryos created during assisted reproduction must be resolved with an order that such embryos be treated as "persons" having their own rights, and further, that the embryos' "best interests" require that they be given birth, against the wishes of one and potentially even both of the adults who created them. No court has ever so held, and the notion that a judge might be called upon to decide who should be born – not would-be parents in consultation with their doctors – is truly breathtaking to contemplate. To start down that worrisome path here would have a profound negative impact on patients who seek medical assistance in building their families, and potentially restrict the assistance they may receive (among many other potential consequences impossible at this point to anticipate fully). ASRM urges the Court not to take such a radical step without the clearest of justifications and a full understanding of the implications. We respectfully submit that both are lacking.

STATEMENT OF FACTS

During their marriage, Appellant Jalesia McQueen and Respondent Justin Gadberry created four embryos together through in vitro fertilization. LF71. Two of the embryos were implanted and, as a result, Appellant gave birth to two children. *Id*. The remaining two embryos were cryopreserved. *Id*. When the parties later divorced, a dispute arose concerning the custody and disposition of the cryopreserved embryos. LF77. Holding that the embryos are a "unique" type of marital property, the trial court awarded them jointly to the parties with a restriction that "no transfer, release, or use of the frozen embryos shall occur without the signed authorization of both Husband and Wife." LF 76-78, 80.

POINTS RELIED UPON

Resolving custody disputes over unimplanted embryos with a "best interests of the embryo" analysis threatens a profound negative impact on fertility care that is not grounded in science, nor compelled by law, either, in that it would trigger previously unaddressed conflicts of constitutional magnitude and also require this Court to establish a currently *non-existent* statutory connection between RSMo. § 1.205 and the child custody provisions of RSMo. Chapter 452.

Cases:

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

State v. Knapp, 843 S.W.2d 345 (Mo. banc 1992).

State v. Rollen, 133 S.W.3d 57 (Mo. App. E.D. 2003).

Statutes:

RSMo. § 1.205

RSMo. § 452.705

RSMo. § 452.375.2

Scientific Literature:

Ethics Committee of the ASRM, *The biologic characteristics of the preembryo*, 62 Fertility and Sterility 29S (Nov. 1994).

Ethics Committee of the ASRM, *The moral and legal status of the preembryo*, 62 Fertility and Sterility 33S (Nov. 1994).

ARGUMENT

I. Resolving Embryo Custody Disputes With A "Best Interests Of the Embryo" Approach Would Have Significant Adverse Implications for Fertility Care.

Appellant and her supporting *amici* argue that, because the Missouri legislature has deemed human life to begin at conception and required state laws to be construed consistently with that finding, disputes such as this one over the custody of unimplanted embryos must be resolved according to the "best interests" of the embryos, as if they were children subject to Missouri's child custody statute, RSMo. Chapter 452. *See* Appellant Br. at 28; Thomas More Law Center Br. ("TMLC Br.") at 2-4; Missouri Right to Life, *et al.* Br. ("MRL Br.") at 7-8. The practical implications of that position are profound, particularly because Appellant and her *amici* are arguing that "continued life" or "future life and

development" is the most fundamental of the embryos' "best interests," compelled to be enforced under Missouri law. *See* Appellant Br. at 31-34; MRL Br. at 37-38.

In assisted reproduction, there is no precise way to know, in advance, exactly how many eggs can be successfully extracted and fertilized, or how many of the resulting embryos, assuming they prove suitable for implantation, should be implanted to achieve a successful pregnancy. As a result, it is very common – indeed, typical – for more embryos to be created than are transferred to the woman's uterus at any given time. Practice Committee of the ASRM, *Criteria for number of embryos to transfer: a committee opinion,* 99 Fertility and Sterility 44 (Jan. 2013). In consultation with her patient(s), the physician makes a professional judgment regarding implantation, attempting to maximize the chances of achieving pregnancy without unduly risking multiple births. In assessing the chromosomal soundness and other indications of each embryo's suitability for implantation, depending on the pertinent medical history and genetic makeup of the contributing adults, the physician may also recommend testing those embryos, since genetic predisposition to some very serious child-onset and even adult-onset health conditions can be revealed through such testing – Huntington disease, early onset Alzheimer disease, and breast cancer among them. Ethics Committee of the ASRM, *Use of preimplantation genetic diagnosis for serious adult onset conditions: a committee opinion*, 100 Fertility and Sterility 54 (July 2013).

If Appellant's "best interests" position were to prevail here, however, then in the event of a dispute between the man and woman who contributed their

genetic material to the embryos, courts in such cases would be pressed to decide that, properly speaking, there is no such thing as an "excess" embryo. From that viewpoint, *every* embryo – not just the ones initially selected for implantation – must be considered a child from the moment of fertilization, with interests of its own that require it be implanted and given an opportunity to develop and be born, even if one or both of the adults who created them prefer otherwise. This could mean that excess embryos cannot be placed into long-term storage, much less ever discarded, nor even donated for stem cell research, despite the recognized importance of that work in developing revolutionary treatments for "a wide range of diseases and conditions, including Parkinson disease, Alzheimer disease, cancer, spinal cord injury, and juvenile-onset diabetes." Ethics Committee of the ASRM, *Donating embryos for human embryonic stem cell (hESC) research: a committee opinion*, 100 Fertility and Sterility 935, 936 (October 2013) (discussing federal Executive Order 13505, "permit[ting] embryos remaining after fertility treatment to be used in the creation of [human embryonic stem cell] lines").

Courts could be urged as well to enjoin testing embryos, on grounds that the embryo has a right to life regardless of the prospect of serious disease or that the testing procedure itself poses a risk to the embryo, regardless of the potentially countervailing opportunity to detect and prevent the transmission of genetic disorders to new generations, and to avoid the often crushing emotional and economic impact of managing these illnesses. *See* 100 Fertility and Sterility at 55; Ethics Committee of the ASRM, *The moral and legal status of the preembryo*, 62

Fertility and Sterility 32S (Nov. 1994) ("view of the preembryo as a human subject after fertilization," required to be "accorded the rights of a person," "entails an obligation to provide an opportunity for implantation to occur and tends to ban any action before transfer that might harm the preembryo or that is not immediately therapeutic").

Donating the excess embryos for parenting by others may not be a workable solution, either, because, if the embryos are deemed to be "children," then their donation to infertile recipients might be deemed an "adoption," and thus might entail the home visits, judicial review, and other rigorous procedural requirements that typically must precede the adoption of an existing child. Ethics Committee of the ASTM, *Defining embryo donation: a committee opinion*, 99 Fertility and Sterility 1846-47 (June 2013) ("There is no justification for applying these [adoption procedures] to infertility patients who already face burdensome medical procedures in the pursuit of their fertility goals.").

One can expect serious questions, too, about whether and to what extent those adults who contribute their genetic material to the embryos are deemed to be financially responsible for them, even when brought to birth against the wishes of one or both of those adults as the result of a "best interests of the embryo" approach.[2]

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[2] Appellant alludes to this issue at pages 5-6 and 52-53 of her Brief.

It is difficult to overstate the adverse impact on fertility care from concerns like these. Infertility is a very significant medical problem, affecting about 7.3 million Americans, or about one out of every eight couples of reproductive age.[3] For the many people who consider addressing this problem with assisted reproductive technology,[4] the decision is deeply emotional, fraught with concerns about the intimate, personal nature of the process, its cost, its uncertainty, and the impact on the couple's relationship should the process not yield the hoped-for results.[5]

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[3] U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, *Infertility Service Use in the United States: Data from the National Survey of Family Growth*, 1982-2010, No. 73, at 9-10 (Jan. 22, 2014); ASRM, *Oversight of Assisted Reproductive Technology*, at 4 (2010).

[4] In 2013, assisted reproductive technology contributed to the birth of 66,691 babies, 1.6 percent of all babies born in the U.S. CDC Surveillance Report, at 1.

[5] *See generally* ASRM, *Infertility: An Overview: A Guide for Patients*, at 3-4 (2012); ASRM, *Assisted Reproductive Technologies: A Guide for Patients*, at 17 (2015); RESOLVE: The National Infertility Association, *Emotional Aspects of Infertility*, http://www.resolve.org/support-and-services/managing-infertility-stress/emotional aspects.html/.

If Appellant were to prevail here, couples already facing those challenges would also have to accept that, by seeking this type of medical assistance, their individual choices about what happens to their own genetic contributions may cease to be theirs should they ever have a dispute over the handling of the embryos they create – every one of which, whether initially selected for implantation or not, would have to be treated as if it were already a fully-formed person, with all attendant rights, from the moment of conception. This is a tremendous burden to place on patients seeking fertility care, and one that may cause a significant number of them to just accept their infertility, and possibly abandon hopes for a family altogether, rather than commit to a process in which they may be deemed to have created more people than they ever intended.

If they seek fertility care at all, moreover, couples may face significant pressure to produce fewer embryos than they, in consultation with their doctors, would otherwise conclude are optimal for achieving a successful pregnancy. That is because, according to Appellant and her *amici*, couples who choose to contribute their genetic material to create embryos have *already* exercised their procreative choice in favor of making a child out of every one of them, irrevocably assuming the rights and responsibilities of becoming a parent and waiving any further individual right to choose not to develop any of those embryos into live children.[6]

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[6] Appellant Br. at 14, 24-25. *See* TMLC Br. at 22-23; MRL Br. at 32.

From a patient care perspective, these are all unacceptable results,[7] none of which, ASRM respectfully submits, is required by science or the law.

II. Embryos Are Not Individual "Persons" From The Moment Of Fertilization.

Whatever other asserted basis there may have been for the Missouri legislature's 1986 enactment concerning when life begins, there is no biological basis for treating an embryo, from the moment of conception, as if it were a single human person.[8] It is true that an alive, human, genetically unique entity emerges

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[7] *See* American College of Obstetricians and Gynecologists, "ACOG Statement on 'Personhood' Measures" (Feb. 10, 2012) (available on ACOG website, www.acog.org) ("So-called 'personhood' measures would have a negative impact on fertility treatments, including in vitro fertilization (IVF), that allow otherwise infertile couples to achieve pregnancy and create their families. Such proposals also would invariably ban embryonic stem cell research, depriving all of society potential lifesaving therapies.").

[8] The following overview of embryonic development is taken from Ethics Committee of the ASRM, *The biologic characteristics of the preembryo*, 62 Fertility and Sterility, 29S-30S (Nov. 1994), and from *Davis v. Davis*, 842 S.W.2d 588, 593-94, 596-97 (Tenn. 1992) (quoting from a 1990 report from the American Fertility Society, now known as ASRM). A similar discussion appears in a published opinion by the Committee on Ethics of the American Congress of

at fertilization.[9] At this stage, however, this entity – a zygote – has only a limited chance for development into a living newborn, even under normal conditions, *i.e.*, outside the context of assisted reproduction. Moreover, throughout the course of the next several cell divisions, the entity will lack the "developmental singleness of one person," that is, each cell in this cluster of cells retains the full developmental potential that the zygote had to produce a complete individual human being, and also, importantly, the potential that either more than one individual (in the case of twinning) or less than one individual (in the case of cell fragmentation, fusion, or regression to a non-viable entity) will result. Only sometime later, in an ongoing process that spans about 14 days post-fertilization, do the entity's cells resolve into the differentiated layers of more specialized cells that characterize a developing organism, as opposed to a packet of identical cells.

Obstetricians and Gynecologists, Committee Opinion No. 347, *Using Preimplantation Embryos for Research*, at 5-6 (Nov. 2006, reaffirmed 2008) (hereafter "ACOG No. 347," available on the ACOG website, www.acog.org).

[9] Appellant's *amici*, Missouri Right to Life, *et al.*, similarly comment that the "zygote immediately initiates a trajectory of development." MRL Br. 11. ASRM's focus differs, however, because it seeks to assess and describe the biologic individuality of the embryo, or lack thereof, at its various developmental stages post-fertilization, not just its potential for individuality at the *moment* of fertilization.

An outer, "extraembryonic" layer forms, which is principally involved in placental interaction with the woman's uterus, and also a two-layer inner cell mass, with each of those internal regions themselves separated by a third layer called the "primitive streak." If it survives, this multi-layered inner cell mass, called the "embryonic disc," is what will develop into a child, if and only if the embryo is successfully implanted and there is a pregnancy. Indeed, only now – at a time that corresponds roughly to the initiation of pregnancy-related physiological changes in the mother – is it possible to say that twinning or regression will not occur, such that we now have an entity that is biologically committed to forming a single human being. And only later, of course, will this entity undergo the functional, behavioral, psychic, and social development that many, in ordinary lay terms, would consider to be the hallmarks of human individuality and "personhood."

With these considerations in mind, ASRM has always steered a cautious middle course in defining the status of an embryo. That is, embryos are not mere property, but they are not "people," either. In particular:

> The preembryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, it is not yet established as developmentally individual, and it may never realize its biologic potential.

Ethics Committee of the ASRM, *The moral and legal status of the preembryo*, 62 Fertility and Sterility 33S (Nov. 1994).[10] This position has received judicial endorsement in the context of embryo custody disputes like this one. *See Davis*, 842 S.W.2d at 596-97 (adopting ASRM's "intermediate position" and commenting that, "[t]o our way of thinking, the most helpful discussion on this point is found not in the minuscule number of legal opinions that have involved 'frozen embryos,' but in the ethical standards set by The American Fertility Society [nka ASRM]"); *Findley*, slip op. at 80-81 (citing ASRM Ethics Committee opinion as support for holding that embryos, while they have a "unique" status, are not "individual human beings"). It is also echoed in published statements by other associations of medical professionals, including the American College of Obstetricians and Gynecologists. *See* ACOG No. 347, at 12 (advocating "treatment of the embryo with respect but not the same level of respect that is given to human persons").[11]

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[10] *See also* 100 Fertility and Sterility, at 936 (2013 ASRM Ethics Committee opinion reaffirming stance on "personhood": "The possibility of twinning or regression to a nonviable entity up to the 14th day after fertilization is consistent with the notion that the embryo lacks individuality").

[11] ACOG No. 347 (at p. 2) also discusses a similar conclusion reached by the Ethics Advisory Board of what was then the U.S. Department of Health, Education, and Welfare in 1979, soon after the first in vitro fertilization birth in

ASRM recognizes that the Court has been asked to address the implications of a legislative enactment that defines when life begins and, with certain important exceptions discussed below, requires "acknowledge[ment]," on behalf of unborn children, of the rights possessed by "other persons, citizens, and residents" of Missouri. RSMo. § 1.205. Where it applies at all, however, this required "acknowledgement" is not necessarily the same thing as *equating* the status of the unborn with that of "persons" in every legal context. Because the implications of doing so are so sweeping and serious (*see* Part I above), and because there is no clear biological imperative to do so (as just discussed), ASRM urges the Court to assure itself that there is a *legal* imperative to doing so before taking such a dramatic step. In fact, as shown below, there is no such imperative applicable here.

1978. The Board stated: "The human embryo is entitled to profound respect; but this respect does not necessarily encompass the full legal and moral rights attributed to persons." U.S. Department of Health, Education, and Welfare, *HEW support of research involving in vitro fertilization and embryo transfer,* Washington, DC: U.S. Government Printing Office (1979).

III. Section 1.205 Need Not, And Should Not, Be Construed To Require A "Best Interests Of The Embryo" Child Custody Approach.

A. *Conflict with federal constitutional law*

Section 1.205 is expressly subject to "the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state." With respect to the first exception, it is common ground that the unborn are not "persons" within the meaning of the 14th Amendment to the U.S. Constitution, and thus have no rights of their own to the life, liberty, property, and equal protection of the laws guaranteed there. *See Roe v. Wade*, 410 U.S. 113, 158 (1973); TMLC Br. 15 ("the Supreme Court held that the unborn are not 'persons' under the Fourteenth Amendment and, thus, not [sic] are not entitled to its guarantee of the right to life").

Nonetheless, here, Appellant is asking the Court to enforce these exact rights – "continued life" chief among them – on behalf of constitutionally unrecognized entities, as against the asserted interests of those who *do* have constitutional status as "persons," including Mr. Gadberry in particular. Missouri courts have not had to confront that precise constitutional issue in the cases thus far, which have been limited to holding that the unborn are "persons" for purposes

of criminal and tort liability for harm to those entities, by third parties, while their mothers carried them. *See* Appellant Br. at 15; TMLC Br. at 7-8.[12]

This Court rejected any federal constitutional impediment to such holdings, but on very particular grounds. Specifically, addressing defense-side arguments that liability for harm to the unborn is inconsistent with the acknowledged lack of constitutional protections for them, the Court observed that "as in *Holcomb*, we find a significant distinction between a mother's right to terminate her pregnancy," which was the context for the Supreme Court's holding that the unborn are not persons, "and the prosecution of a third party for murder of an unborn child *without the consent of the mother*, an intentional criminal act." *State v. Rollen*, 133 S.W.3d 57, 63 (Mo. App. E.D. 2003) (emphasis added).[13] An important distinguishing consideration in these cases, then, was criminal or tortious incursion

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[12] Each of the cases cited by Appellant and her *amici*, applying RSMo. § 1.205, involves a pregnant woman, not unimplanted embryos.

[13] *See also State v. Holcomb*, 956 S.W.2d 286, 291 (Mo. App. W.D. 1997) (citations omitted): "*Roe v. Wade*, while holding that the fetus is not a 'person' for the purposes of the 14th amendment, does not mandate the conclusion that the fetus is a legal nonentity. 'The abortion issue involves the resolution of the mother's rights as against the child when the two are in conflict. Whatever may be the determination of the rights in that context, this special relation gives a third-party tortfeasor no comparable rights.'"

on a *parent's* rights concerning her unborn child. It is a much different matter, arguably triggering the express constitutional exception to Section 1.205, to assign independent rights to a constitutionally unrecognized entity (an embryo) and then place that entity in a superior position to the liberties of those who created it, who *are* constitutionally recognized as persons.[14]

Consistent with that observation, it is important to note that not one of the several reported cases around the country that have addressed embryo custody disputes over the last two decades or more has resolved custody by attempting to ascertain the best interests of the *embryo* as an entity with rights of its own. Rather, in various ways, each has sought to determine and balance the competing rights and interests of the adults who created the embryos.[15] ASRM believes that

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[14] Recent Missouri legislative activity confirms that federal constitutional law is perceived as a substantial barrier to supplanting parental rights with the purported rights of an embryo. Specifically, a pending bill called the "All Lives Matter Act," H.B. 1794, simply *repeals* that part of RSMo. § 1.205 which "acknowledg[es] the preemption of state law by the Constitution of the United States and decisions of the United States Supreme Court."

[15] These cases are summarized at length in the recent *Findley* decision from California (slip op. at 28-33), and in the briefs of Appellant's *amici*, which distinguish the cases principally with the argument that Section 1.205 uniquely commands a different result. *See* TMLC Br. at 25-27; MRL Br. at 34-37.

this focus on the wishes of the contributing adults, to the extent those wishes can be fairly determined and weighed, is the appropriate one, consistent with ASRM's consistent ethical guidance that embryos are unique entities worthy of special care and respect, but not people.[16]

B. *State law incompatibility*

Even if there were no federal constitutional impediment to applying RSMo. § 1.205 as Appellant urges, *state law* alone would prevent its application here. This statute is expressly subject to "specific provisions to the contrary" in the Missouri constitution or statutes, and also – by judicial decision – to the inherent limits of *in pari materia*, a rule of statutory interpretation requiring that "statutes should be construed harmoniously *when they relate to the same subject matter*," particularly when they were passed in the same legislative session, and use the same or similar words. *State v. Knapp*, 843 S.W.2d 345, 347 (Mo. banc 1992)

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[16] *See* American Medical Association, AMA Code of Medical Ethics, *Opinion 2.141 – Frozen Pre-Embryos* (issued Mar. 1992, updated June 1994) (available at www.ama-assn.org) ("The country's cultural and legal traditions indicate that the logical persons to exercise control over a frozen pre-embryo are the woman and the man who provided the gametes (the ovum and sperm).").

(construing §1.205) (emphasis added; citations omitted).[17] In the *Knapp* case, for example, the Missouri Supreme Court held that it was "clear that the legislature intended for § 1.205 to apply to § 565.024 [involuntary manslaughter], in particular, because both statutes were passed in the same legislative session, on the same day, and as part of the same act, H.B. 1596. Furthermore, these two statutes, both of which refer to the term 'persons,' are related – one defines the term 'persons' for the other. Therefore, they must be read in pari materia." 843 S.W.2d at 347.

The Missouri child custody provisions have no such connection to Section 1.205. The definition of "child" used in those provisions is contained in RSMo. Section 452.705, which was enacted more than 20 years after Section 1.205. It is not apparent that the legislature intended *any* connection between the two, in that Section 452.705 does not cross-reference or reproduce any of the long-preexisting language of Section 1.205; it is simply Missouri's adoption of a uniform law enacted in many states, called the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). *Ketteman v. Ketteman,* 347 S.W.3d 647, 653 n. 2 (Mo. App. W.D. 2011). In defining the term, "child," moreover, the UCCJEA does not use any of the terms found in Section 1.205 – not "human being,"

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[17] Appellant and her *amici* apparently agree that the *in pari materia* concept governs whatever interplay there may be between RSMo. § 1.205 and other Missouri statutes. *See* Appellant Br. at 14; TMLC Br. at 6-7; MRL Br. at 19-20.

"unborn child," "person," "citizen," or "resident." Rather, Section 452.705(2) defines a child as "an *individual* who has not yet attained eighteen years of age." (emphasis added). Then, below at 452.705(8), the same statute defines the child's "home state" in a way that makes clear that the subject matter of Chapter 452 is not the unborn, much less unimplanted embryos: "'Home state' means the state in which a child has *lived with a parent or a person acting as a parent* for at least six consecutive months immediately prior to the commencement of a child custody proceeding." (emphasis added).

So, too, when it comes to the "best interests of the child" standard articulated in Section 452.375.2. The enumerated factors include, first, the "wishes of the child's parents as to custody,"[18] and then a series of considerations directed to fostering and maintaining the child's relationships with parents and family members, as well as with "home, school, and community." RSMo. § 452.375.2(1)-(5). Embryos have no such relationships.

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[18] Notably, the Missouri Right to Life, *et al.*, *amicus* brief leaves out this first factor in its discussion of the child custody statute. *See* MRL Br. 38. Appellant herself avoids discussing the custody statute, preferring to focus instead on the guardian ad litem's obligation to advocate the child's best interests and neglecting to point out that this duty arises only in the context of custody proceedings, governed by RSMo. § 452.375. *See* RSMo. § 452.423.1.

Holding that a similar custody statute had no bearing on the embryo custody dispute before it, the Iowa Supreme Court similarly observed that "the purposes of the 'best interest' standard set forth in that statute are to 'assure the child the opportunity for the maximum continuing physical and emotional contact with both parents' and to 'encourage parents to share the rights and responsibilities of raising the child.'" *In re Marriage of Witten*, 672 N.W.2d 768, 775 (Iowa 2003) (discussing Iowa Code § 598.41(1)(*a*)). "The principles developed under this statute are simply not suited to the resolution of disputes over the control of frozen embryos," the Court went on, because "[s]uch disputes do not involve maximizing physical and emotional contact between both parents and the child; they involve the more fundamental decision of whether the parties will be parents at all. Moreover, it would be premature to consider which parent can most effectively raise the child when the 'child' is still frozen in a storage facility." *Id.*

This basic incompatibility should be the end of any argument that the concept of *in pari materia* as applied to Section 1.205 requires, or even permits, embryos to be treated as if they were children in a custody dispute. It is apparent, too, however, that some in the Missouri legislature, with Appellant's support,[19]

[19] *See* "In vitro fertilization bill would define embryos as human life," The Missouri Times (Mar. 15, 2016), and "Historic in vitro embryo agreement bill filed in House," The Missouri Times (Mar. 9, 2016) (both available at

must have reached the same conclusion about the limits of current law. A pending bill, H.B. 2558, would amend Section 452.375.1 so that it (1) specifically includes definitions for "human embryos" and "in vitro human embryos," (2) uses the same language as Section 1.205 does concerning the status of such entities, and then, (3) rather than attempt to address those entities using the current "best interests of the child" factors, adds a series of provisions making clear that embryo custody disputes should ordinarily be resolved by placing the embryo with whichever sperm/egg donor "intends to develop the in vitro human embryo to birth" and "provides the best chance for the in vitro human embryo to develop and grow."

This is more-or-less the result that the Appellant and her *amici* seek in this case. The fact that such a substantial proposed revision of the law would be necessary to bring it about should be taken as a further indication that current law in fact does not address the issue – or, at the very least, should give the Court pause about preempting legislative debate about these issues by issuing the ruling Appellant seeks. On this point, ASRM concurs fully with the observation offered by the California court in the *Findley* case (slip op. at 75): "Courts should be cautious to adopt an analysis which may have broad policy implications for other statutory schemes."

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www.themissouritimes.com). ASRM has formally opposed this bill, along with H.B. 1794, discussed at n. 14 above.

CONCLUSION

For the foregoing reasons, ASRM respectfully urges the Court to decline the invitation from Appellant and her *amici* to adopt an approach to embryo custody disputes that treats embryos as "persons" with interests that must be vindicated through the "best interests" standards set forth in RSMo. Chapter 452.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief 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 5426 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; and

4. Pursuant to Local Rule 333(d), *amicus curiae* will file four copies of its Brief (if its motion for leave to participate as *amicus curiae* is granted).

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 2016, a copy of the foregoing Brief was served upon all counsel of record, using the Court's electronic filing system.

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