IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

JALESIA MCQUEEN,	)	
	)	
Petitioner/Appellant,	)	
	)	
v.	)	Appeal No.: ED103138
	)	
JUSTIN GADBERRY,	)	
	)	
Respondent/Respondent.	)	

Appeal from the St. Louis County Circuit Court
Division 65
Commissioner Victoria M. McKee
Division 6
Judge Douglas R. Beach

Brief of Respondent, Justin Gadberry

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JUSTIN GADBERRY,	)	
	)	
Respondent/Respondent.	)	

JURISDICTIONAL STATEMENT

Respondent/Respondent Justin Gadberry ("Gadberry") adopts the jurisdictional statement presented in Petitioner/Appellant Jalesia McQueen's ("McQueen") brief.

STATEMENT OF FACTS

Because the statement of facts in McQueen's brief fails to comply with S. Ct. Rule 84.04(c) in that it does not present a fair and concise statement of the facts relevant to the questions presented and does not include all of the facts supporting the trial court's judgment, Gadberry sets forth the following statement of additional facts:

McQueen and Gadberry were married on September 2, 2005. Legal File ("LF") 7. McQueen initially asked Gadberry to produce semen specimens because Gadberry was in the military service and was about to be deployed, and because she was concerned about her age and about her ability to have children in the future. Transcript ("Tr.") 152-153. While Gadberry was deployed in Iraq, from November, 2005-November, 2006, McQueen

initiated discussions with Gadberry about in vitro fertilization. Tr. 154. McQueen and Gadberry were having these discussions during the time Gadberry was engaged continuously in combat missions. Tr. 154. At some point, Gadberry agreed to have embryos created for the exclusive purpose of having children. Tr. 155. In or around February 2007, while Gadberry was stationed at Fort Bragg, North Carolina, embryos were created. Tr. 155. Gadberry does not recall ever having discussions with the fertility doctor about the creation of embryos. The only time he ever met the doctor was prior to his deployment when he produced the semen specimen. Tr. 155-156.

McQueen has never had a problem getting pregnant. Tr. 88. She conceived her third child, Ivan, through sexual intercourse, at age 41. Tr. 54. McQueen was already in the middle of this dispute over frozen embryos, and still married to Gadberry, when she became pregnant with Ivan. Tr. 53. Gadberry is not Ivan's father. Tr. 88. McQueen has not been diagnosed with any fertility issues, never had to undergo in vitro fertilization, and never had embryos created as the result of her fertility issues. Tr. 91-92. McQueen was not pregnant at the time of trial. McQueen, by her own admission, has not been pregnant since the birth of her son, Ivan, in September, 2013. Tr. 88.

Two of the embryos created in February 2007 were implanted in McQueen. Tr. 80. She became pregnant and, as a result, gave birth to the couple's children, Tristan and Brevin, in November 2007. Tr. 80. After the birth of those two children, two un-implanted cryopreserved embryos remained in storage. Tr.80.

Gadberry did not recall signing documents in 2007 directing what would happen with the frozen embryos in the event of separation or divorce. Tr. 159. No written

evidence was produced at trial of any previous directives or storage agreements with regard to the embryos. Tr. 1-185.

In 2010 a set of consent forms, directives, and agreements dealing with the transfer of the frozen embryos to Fairfax Cryobank in Virginia was mailed to the home of McQueen and Gadberry. Tr. 82. This set of consent forms, directives, and agreements was collectively referred to at trial as Exhibit B. Tr. 103-104. Exhibit B included (among other documents) the Fairfax Cryobank Directive Regarding the Disposition of Embryos ("Directive") and the Agreement for Receipt and Storage of Frozen Embryos ("Storage Agreement"). [Exhibit B is included in the Appendix to Brief of Appellant ("App."), 43-57.] Throughout Exhibit B, the embryos are referred to as, either, "frozen specimens," "specimens," or "embryos." App. 43-57. On the first page of Exhibit B, titled, "Storage Patient Information," the patients are directed as follows:

PLEASE LIST YOUR NAME EXACTLY AS YOU WANT THE SPECIMENS LABELED AND THE ACCOUNT LISTED

App. 43.

The second page of Exhibit B is titled, "**General Information Needed to Transport Specimens to Fairfax Cryobank**." App. 44. The fourth page of Exhibit B is titled, "Frozen Specimen Release." It provides, in part, that the parties authorize the release of :

my frozen (circle) **sperm embryo(s) egg(s)** currently in storage at

App. 46. …

Pages 9 – 14 of Exhibit B are the Storage Agreement, for receipt and storage of the frozen embryos. App. 51-56. The Storage Agreement defines the embryos as

specimens and refers to the embryos, solely, as specimens. App. 51-56. The only reference to the embryos in any of the consents, directives, or agreements among Fairfax Cryobank and McQueen and Gadberry, is as "embryos" or "specimens". App. 43-57. The Storage Agreement refers specifically to the Directive, in several places. App. 52. Paragraph 10 of the Storage Agreement provides:

> Client agrees that in the event of loss or destruction of the client's specimens by any reason whatsoever, damages as a result thereof would be highly conjectural and speculative and would be difficult to determine. Accordingly, pursuant to § 8.7-204(2) of the Virginia uniform commercial code, the client agrees that in the event that my specimens are lost or destroyed by virtue of negligence by Cryobank, the client will be entitled to damages in the amount equal to the storage charge for the particular year in which the loss occurs, plus $400 per embryo lost (maximum compensation to Client not to exceed $2000).

App. 53.

Paragraph 25 of the Storage Agreement provides, in part, that the "agreement shall be construed in accordance with the laws of the Commonwealth of Virginia." App. 55.

Paragraph 7 of the Storage Agreement provides, in part:

> …If client fails to provide Cryobank with a current Embryo Directive, then the most recently executed Embryo Directive on file with Cryobank shall govern the disposition of embryos in storage. Changes made by only one

> partner **shall not** be honored unless no partner exists at the time the embryos were created. Cryobank will comply with *validly executed Embryo Directive. Cryobank will comply with court orders, whether or not Cryobank was a party to the proceedings resulting in the order.* (Emphasis added.)

App. 52.

In May 2010, McQueen presented the Fairfax Cryobank paperwork (Exhibit B) to Gadberry. Tr. 160, 166-167. McQueen completed all the documents contained in Exhibit B while Gadberry only signed, initialed and, in some parts, filled in dates. Tr. 113-114. McQueen even wrote in Gadberry's name in appropriate places. Tr. 168. The Directive was filled out by McQueen and was signed on May 15, 2010. Tr. 166. The signature page of the Directive provides, in part, that "the parties have entered into this Directive this 15th day of May, 2010, …" App. 50. Page 2 of the Directive, which provides for the disposition of embryos in certain contingencies, including "**DISPOSITION IN THE EVENT OF LEGAL SEPARATION OR DIVORCE,**" was initialed at Gadberry and McQueen's home on May 21, 2010, six days after the directive was signed. Tr. 166. There was no notary at their home. Tr. 173. It was presented to Gadberry, by McQueen, on May 21, at which time she told him, "[H]ere is some more transfer paperwork." Tr. 166-167. There had never been any discussions between McQueen and Gadberry, between the birth of their sons in November, 2007 and May 15, 2010, about what would happen to the remaining frozen embryos in the event of a

divorce or separation. Tr. 168. There was no discussion on May 15, 2010, on May 21, 2010, or at any time in between, about what would happen to their embryos in the event of a separation or divorce. Tr. 167-168. Mc Queen presented Gadberry with several pages to sign, and there were pre-printed, yellow "sign here" stickers in various places. Tr. 167-168. The paperwork had previously been filled out. Tr. 167. McQueen hand-wrote the words "used by Jalesia F. Mcqueen," next to the text, "In the event of separation or divorce of the partners, the embryos shall be disposed of by *one of the following actions*," (emphasis added). App. 49. Gadberry does not know whether or not the handwritten words were on the second page of the Directive at the time he initialed the directive on May 21, 2010. Tr. 173. The handwritten words are written in different ink from that used for the dates and initials written in by McQueen and Gadberry on the second page of the Directive. App. 49; Appendix to Brief of Respondent ("Resp. App.") 31. The trial court found there was no credible explanation for why the Directive was signed and notarized on May 15, 2010, but the critical page of that Directive was not completed and initialed until May 21, 2010. L.F. 73. The trial court further found, "[I]n view of the different dates on the two most critical pages of the Directive, … the handwritten words on the right side of page 7 of *Exhibit B* may have been filled in after Husband initialed page 7 of *Exhibit B* on May 21, 2010." L.F. 73.

In September 2010, the parties separated and McQueen initiated divorce proceedings for the first of three times Tr. 86; Deposition of Appellant ("McQueen depo") pp. 53-54. In the petition filed with the action on appeal, McQueen alleged that

two children were born of the marriage, Tristan Gadberry and Brevin Gadberry. L.F. 7. McQueen further alleged that she was not pregnant. L.F. 7.

McQueen did not plead the existence of the frozen embryos in her Petition for Dissolution of Marriage, nor did she file a proposed parenting plan for the frozen embryos. L.F. 1-5, 6-9. McQueen and Gadberry entered into an interim custody order on March 4, 2014, relating to their children, Tristan and Brevin. The interim custody order made no mention of the frozen embryos. Supplemental Legal File ("Supp. L.F") 1. McQueen and Gadberry entered into a parenting plan for Tristan and Brevin on September 10, 2014. L.F. 111-125. On September 10, 2014, McQueen filed Petitioner's Request for Findings of Fact and Conclusions of Law. McQueen did not mention or implicate Section 1.205, RSMO., Section 188.015, RSMo., or Section 452.375 in her Request for Findings of Fact and Conclusions of Law. L.F. 38-39.

On February 4, 2014, the court appointed a Guardian Ad Litem to represent the children of the parties, Tristan and Brevin. L.F. 4. McQueen did not file a Motion to have a Guardian Ad Litem ("GAL") appointed to represent the frozen embryos. L.F. 1-5. However, Commissioner McKee appointed a GAL to represent the frozen embryos, *sua sponte*, over Gadberry's objection, on May 19, 2014. L.F. 4, 36. The GAL appeared at a settlement conference in the case, on that date. Supp. L.F. 2. She met with Gadberry for an hour on July 14, 2014 and met with McQueen for an hour on August 19, 2014. Resp. App. 42. In the interim, she participated in discovery, reviewed and responded to emails, and had a phone call with the attorney for McQueen. Resp. App. 42. She appeared at

trial on two different days, and participated at trial by asking questions of McQueen. Tr. Resp. App. 43; Tr. 129-132.

This appeal followed.

POINTS RELIED ON

I. The action of the trial court in in characterizing the cryopreserved embryos as marital property was correct and was supported by the evidence in that 1) complaints about the court's failure to award custody of the frozen embryos as children are waived by McQueen's failure to preserve the issue for appeal; 2) Virginia law applies to determine the character of the frozen embryos; 3) RSMo. §1.205 does not direct the court in a dissolution of marriage action to treat cryopreserved embryos as persons; and 4) such an application of §1.205 would be unconstitutional.

Cases:

Eisenstadt v. Baird, 405 U.S. 438 (1972)

Griswold v. Connecticut, 381 U.S. 479 (1965)

Statutes:

RSMo. §452.375

RSMo. §452.705

II. The trial court did not err in failing to require more of the guardian ad litem, because: 1) the trial court did not have authority to appoint a guardian ad litem for cryopreserved embryos, which are not children; and 2) if the trial court did have such authority, the guardian ad litem fulfilled her duties under §452.423; 3) purported failures of the GAL had no impact on the court's ruling and 4) McQueen waived her complaints about the GAL's failure to advocate for the best interests of the frozen embryos by failing to raise them in a post-trial motion.

Cases:

Sullivan v. Sullivan, 159 S.W.3d 529 (Mo. App. W.D. 2005)

Statute:

RSMo. § 452.423

RSMo. 452.310

III. The trial court did not err in awarding the cryopreserved embryos jointly to the parties because the court has the authority to award property jointly under Missouri law and because the Directive is not enforceable in a manner that would force Respondent to procreate against his wishes.

1. **The trial court had authority, under §452.330.1, to jointly award marital property to the parties, in appropriate circumstances.**

2. **The Directive is not an enforceable post-nuptial agreement.**

3. **Enforcing the directive in such a manner as to allow McQueen to be implanted with the embryos, against the wishes of Gadberry, would violate the public policy of the State of Missouri and would violate Gadberry's constitutional rights not to be forced to procreate against his wishes.**

Cases:

W.E.F. v. C.J.F., 793 S.W.2d 446 (Mo.Ct.App. 1990)

Bell v. Bell, 360 s.W.3d 270 (Mo.Ct.App. 2011)

Statutes:

Section 452.330.1, RSMo. (Supp. 2010)

ARGUMENT

I.

The action of the trial court in in characterizing the cryopreserved embryos as marital property was correct and was supported by the evidence in that 1) complaints about the court's failure to award custody of the frozen embryos as children are waived by McQueen's failure to preserve the issue for appeal; 2) Virginia law applies to determine the character of the frozen embryos; 3) RSMo. §1.205 does not direct the court in a dissolution of marriage action to treat cryopreserved embryos as persons; and 4) such an application of §1.205 would be unconstitutional.

1) Complaints about the court's failure to award custody of the frozen embryos as children are waived by McQueen's failure to preserve the issue for appeal

As will be more fully developed below, if, in fact, the frozen embryos are children, only § 452.375 can guide the award of their custody. The court must award custody based on the best interests of the child, and the court is required to include, in its judgment, a written finding detailing which relevant factors under § 452.375.2 it found controlling in its determination of the appropriate custodial arrangements for the child. § 452.375.6, RSMo. Since the parties had no agreed-upon custody plan for the frozen embryos, the trial court, if awarding custody of the embryos as children, was required to include in its judgment the written findings required by § 452.375.6. *Wood v. Wood*, 262 S.W.3d 267, 276 (Mo. Ct. App. 2008). "Although these findings are statutorily required,

any alleged error for failing to make them must be included in a motion to amend the judgment in order to preserve the error for appellate review. Rule 78.07(c)." *Id.*

Points I and II of Appellant's brief are wholly dependent on the requirement that the trial court make findings pursuant to § 452.375.2, as required by § 452.375.6. McQueen filed a post-trial motion, but did not complain of the trial court's failure to make these findings and, in fact, didn't even mention § 452.375 in her post-trial motion. Therefore, the errors complained of in Points I and II of Appellant's Brief are not preserved for appellate review and the appeal should be dismissed on that basis.

2) Only Virginia Has Jurisdiction to Make A Custody Determination

If the trial court found that the frozen embryos were children, the only mechanism for dealing with the custody of those children is § 452.375, RSMo. A dissolution of marriage action is an initial custody proceeding, within the meaning of the UCCJEA. Section 452.705.1(9), RSMo. The home state of the frozen embryos, in that circumstance, would unquestionably be Virginia. § 452.705.1(8), RSMo. The trial court would *only* have had jurisdiction to make an initial child custody determination regarding the frozen embryos (if it found the embryos were children) if the courts of Virginia had declined to exercise their home state jurisdiction. § 452.740.1(2). Of course, that did not happen because McQueen did not plead the existence of the frozen embryos, so that neither the trial court nor any court in Virginia had any opportunity to perform an analysis of the appropriate forum under the UCCJEA. The only exception to the home state rules of § 452.740 is temporary, emergency jurisdiction under § 452.755, but emergency jurisdiction requires the child to be present in in this state.

3) Cryopreserved Embryos Are Not Children under Chapter 452[1]

McQueen seeks to have this court find that cryopreserved embryos, frozen since 2007, are children of a marriage, with the same rights, privileges, and protections afforded, pursuant to Chapter 452, RSMo., to children actually born during the marriage. McQueen now seeks to have the court, in this dissolution of marriage proceeding, grant her "custody" of the frozen embryos.[2] To reach that conclusion, this court would first have to invent a heretofore nonexistent connection between the statutes cited by McQueen, i.e., § 1.205, RSMo. and § 188.015(3), RSMo., and the dissolution of marriage statutes (Chapter 452, RSMo.), and would then have to apply those statutes in a manner that would run directly contrary to the requirements and directives of the Missouri and

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[1] The assertion, in McQueen's brief, that frozen embryos are "children," "embryonic children," or "unborn children" is not supported by biology or by the mainstream medical community. Frozen embryos consist of a loose packet of identical cells which lack "the developmental singleness of one person." See the Amicus Brief of Movant – American Society for Reproductive Medicine, filed in this case on March 30, 2016.

[2] Her brief states, "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." Appellant's Brief, p. 23. McQueen asserts that she is entitled to custody of the "embryonic children" without ever mentioning § 452.375, except in passing, as if custody of a child in a dissolution of marriage could be determined in some other way.

United States Constitutions. There is no precedent in Missouri for making such a leap and, in fact, there is no reported precedent in the history of United States jurisprudence in which any court of record treats un-implanted frozen embryos as children in a dissolution of marriage action, or, for that matter, in any other action.

McQueen's own actions throughout this proceeding betray the indisputable fact that frozen embryos are not children for purposes of Chapter 452, RSMo. Section 452.310.2(4) provides that a petition for dissolution of marriage *shall* set forth "the name, age and address of each child, and the parent with whom each child has resided for the sixty days immediately preceding the filing of the petition for dissolution of marriage," (emphasis added). McQueen's petition properly lists the two children of the marriage, Tristan and Brevin, and sets forth certain jurisdictional facts relating to those two children. L.F. 7. There is no mention of any other children in McQueen's petition. L.F. 6-9.[3] Section 452.310 further provides that both parties *shall* submit a proposed parenting plan setting forth "the arrangements that the party believes to be in the best interests of the minor children…" Section 452.310.8 (emphasis added). This section sets forth, with exacting specificity, the manner in which these arrangements are supposed to be detailed in a proposed parenting plan. McQueen did not submit any proposed

[3] This Petition was the third Petition for Dissolution of Marriage filed by McQueen (Tr. McQueen depo. 53-54; L.F. 5, and was not filed until October 11, 2013, nearly seven years after the creation of the frozen embryos.

parenting plan for the frozen embryos.[4]

Section 452.310 has been amended five times since the passage of Sections 1.205 and 188.015. The Missouri legislature has not taken any of those opportunities to express its intent to deem frozen embryos to be children for purposes of the dissolution of marriage statutes. At trial, McQueen was examined about the parenting plan upon which the parties ultimately agreed for Tristan and Brevin. Tr. 8-9. That parenting plan is clearly marked as applying only to Tristan and Brevin. L.F. 111, 120, 121, 125. McQueen never submitted a proposed parenting plan which included the frozen embryos, nor did she offer as an exhibit at trial any parenting plan which would have applied to the frozen embryos. McQueen was specifically asked, at trial, whether the parenting plan for Tristan and Brevin was in their best interests, in a question obviously designed to comply with § 452.375. Tr. 9. Conversely, when asked at trial by her own counsel what should be done with the frozen embryos, McQueen answered as follows:

> Q. And what is it that you're asking the Court to do with the embryos?
>
> A. To uphold the intent of the contract that we had signed, to give them to me.
>
> Q. And what is your intention?

[4] McQueen did not submit a proposed parenting plan for Tristan and Brevin, but she entered into an interim custody order for Tristan and Brevin on March 4, 2014, and ultimately entered into an agreed-upon parenting plan for them. Supp. L.F. 1, L.F. 111-125. Had that issue not been resolved consensually, McQueen certainly could not argue that she had no obligation to submit a proposed parenting plan to the trial court.

A. To implant them.

Tr. 78. Nothing in these questions asked or answers given suggests any involvement of § 452.375. In fact, no action taken by McQueen prior to or at trial suggests that she viewed the frozen embryos as being governed by any of the statutes which relate to the custody of children.

The determination of custody of children in a dissolution of marriage proceeding in Missouri is governed solely by § 452.375, RSMo. McQueen's brief studiously avoids discussing the requirements of § 452.375 because, as McQueen's own actions at trial illustrate, no rational reading of § 452.375 could possibly be applied to frozen embryos. Section 452.375.2 sets forth the factors the court is to consider when determining what is in the best interests of the child. The very first factor in 452.375.2 is: "(1) The wishes of the child's parents as to custody *and the proposed parenting plan submitted by both parties."* Section 452.375.2(1), RSMo. (emphasis added). At trial, a parenting plan for Tristan and Brevin was submitted by the guardian ad litem for Tristan and Brevin. L.F. 11. McQueen did not ask the court for custody of the embryos; she asked the court to award the embryos to her. Tr. 78, 80, see also L.F. 38. No parenting plan was submitted by McQueen, the guardian ad litem, or any other party regarding the embryos. Each and every factor listed in § 452.375 contemplates born, breathing, developing children. Section 452.375 has been amended eight times since the passage of § 1.205. The Missouri legislature has had more than ample opportunity to create some compatibility between these two statutes. They have chosen not to do so.

Section 452.310.2 requires the wife to state whether or not she is pregnant.[5] This reflects an express acknowledgement by the legislature that a fetus or embryo, *in utero*, must at least be acknowledged. There is no such requirement that the wife or husband state whether or not un-implanted frozen embryos exist.

If McQueen believed that the trial court had the authority to determine custody of the frozen embryos in the same manner that the court has jurisdiction to determine custody of born children, then McQueen would have pled the necessary elements to establish jurisdiction under Missouri's version of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), as she did for Tristan and Brevin. Nowhere is the complete disconnect between the interpretation of § 1.205 sought by McQueen and the language of Chapter 452 more apparent than in this Act which governs whether or not a Missouri court has jurisdiction to preside over a child custody determination. The UCCJEA provides that only the "home state" of a child can make an initial child custody determination, except in certain emergency circumstances. § 452.740, RSMo. Home state is defined as follows:

> "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. In the case of a child less than six months of age, the term means the state in which the child has lived *from birth* with any of the persons mentioned.

[5] Wife's petition states that she is not pregnant. L.F. 7.

Section 452.705(8). (emphasis added).

Section 452.740 provides:

> 1. Except as otherwise provided in section 452.755, a court of this state has jurisdiction to make an initial child custody determination *only if*:
>
> (1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months prior to the commencement of the proceeding …
>
> (2) A court of another state does not have jurisdiction under subdivision (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under section 452.770 or 452.775…
>
> 2. Subsection 1 of this section is the *exclusive jurisdictional basis* for making a child custody determination by a court of this state.

Section 452.740. RSMo. (emphasis added). This jurisdictional statute defining when a court has jurisdiction over any child custody matter speaks in clear terms about born children. The UCCJEA became the law of Missouri in 2009, 23 years after Section 1.205

was originally passed.[6]

Even if, setting aside the expressed and implied intent of chapter 452, the trial court in this case considered the frozen embryos to be children who are the subjects of a custody dispute, the trial court in this matter never had jurisdiction to determine their custody. According to the trial record, the frozen embryos have been in Virginia without cessation since May 2010. Tr. 81; McQueen depo. 24. There is no dispute that these embryos have not been in Missouri since that time.[7] If, as McQueen requests, this court were to determine that the frozen embryos are children subject to a child custody determination, no reading of the UCCJEA gives the Missouri court jurisdiction to determine the custody of those frozen embryos. The "home state" (to the extent that concept could apply) of the embryos would be Virginia. Again, McQueen's own actions throughout this litigation belie the notion that the frozen embryos are children over whom the trial court had jurisdiction. McQueen did not fulfill her obligation to inform the court of the existence of these "embryonic children" as she only now calls them, nor did she ever plead any facts necessary to allow the court to make a jurisdictional determination under the UCCJEA, nor a custody determination under Section

[6] The UCCJEA was preceded in Missouri by the UCCJA, whose home state and initial jurisdiction provisions were substantially similar to the UCCJEA.

[7] It is worth noting that McQueen was not certain whether the embryos had been in Virginia or Pennsylvania since 2010. McQueen depo. 24.

452.375. The trial court in this dissolution of marriage action *only* had jurisdiction to determine the disposition of the frozen embryos because the frozen embryos are not children.

To apply § 1.205 in the manner sought by McQueen, this court would have to ignore the limits of the concept of *in pari materia*, the rule of statutory interpretation which requires that statutes should be construed harmoniously when they relate to the same subject matter. *See State v. Knapp*, 843 S.W.2d 345, 347 (Mo. 1992). In the *Knapp* case, for example, the Missouri Supreme Court held that Missouri's involuntary manslaughter statute must be read *in pari materia* with § 1.205, "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." *Id.* The court further noted, considering the express language of subsection 2 of § 1.205, that "it is clear that Section 1.205 is intended to apply to at least some other statutes." *Id.*

Chapter 452 has no such connection or compatibility with § 1.205. Section 1.205 is constrained by its own language, in subsection 2, as well as the concept of *in pari materia*. "Effective January 1, 1988, the 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, subject only 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." Section 1.205.2. The language of

Chapter 452 is so lacking in harmony or continuity with § 1.205 as to be contrary to § 1.205. None of the definitional terms, language or phrases used in § 1.205 are used in Chapter 452. For example, "Child" is defined in § 452.705 as "an individual who has not attained 18 years of age." Section 452.705(8) leaves no doubt that child custody determinations are to be made on behalf of born children - not unborn children, and certainly not frozen embryos. These statutes are not *in pari materia*. *See KC Motorcycle Escorts, L.L.C. v. Easley,* 53 S.W.3d 184, 187 (Mo. App. W.D. 2001) ("When one statute deals with a subject in general terms and another statute deals with the same subject in a more specific way, the two statutes should be harmonized if possible. If the statutes cannot be reconciled, the more specific prevails over the more general. *Citations omitted*); See also *Wolff Shoe Co. v. Dir. Of Rev.*, 762 S.W.2d 29, 32 (Mo. Banc 1988) (rule of statutory construction that the express mention of one thing implies the exclusion of another, *expressio unius est exlusio alterius*). The specific requirements of § 452.375, and §§ 452.705 et. seq., prevail over the general public policy set forth in § 1.205. The express directions of § 452.705(8) in the definition of "home state" exclude unborn children and, certainly, un-implanted frozen embryos.

The appropriate scientific term for a fetus in its first six to eight weeks of development is "embryo." Un-implanted cryopreserved embryos were neither the subject nor the target of §1.205. It was passed as part of a bill (H.B. 1596), each section of which regulated abortion, except for the one section which dealt with involuntary manslaughter. Every single Missouri case cited by McQueen in support of her proposition that § 1.205 must be extended to un-implanted frozen embryos involved the death of a *fetus* as the

result of violent or accidental acts of a third party. No case or statute cited by McQueen in support of this proposition involves un-implanted frozen embryos and no case or statute involves Chapter 452, which is the unavoidable governing law of this case. There is no legislative history or debate upon which we can draw to decipher the exact intentions of the legislature in passing this bill. However, in view of the totality of the bill within which § 1.205 was passed, it is not unreasonable to conclude that the legislature was focused on the stages of life *in utero*, as opposed to frozen specimens outside the body. In addition, for reasons discussed more fully below, in order to construe § 1.205 in a manner which presumes constitutionality, § 1.205 could only be construed *not* to include un-implanted frozen embryos. *See Webster v. Reproductive Health Services*, 492 U.S. 490, 506-07 (1989).

How could a court possibly determine who gets custody of frozen embryos, under § 452.375, without determining when those embryos will be implanted? Will there be a deadline? What happens if the deadline is not met? In whom will the embryos be implanted? If one party is granted sole custody of frozen embryos, does the other party have any say regarding in whom the embryos may be implanted? We will discuss, below, the constitutional implications of these questions, but they highlight the incompatibility of § 1.205, as McQueen wants it to be interpreted, and Chapter 452.[8]

[8] Two bills currently pending in the Missouri legislature expose the weakness in McQueen's argument to connect § 1.205 and § 452.375. One bill, H.B. 2558, would amend § 452.375 to specifically include human embryos created by in vitro fertilization

McQueen asserts that the trial court erred by not considering the frozen embryos to be unborn children entitled to all the rights, privileges and immunities available to any other person. Appellant's Brief, p. 11. She further asserts that the trial court can only award the frozen embryos to her, because she has promised to use them to attempt to have children. She chooses to ignore the fact that this dispute over frozen embryos is part of a dissolution of marriage action, and the only mechanism for the trial court to award "custody" of the frozen embryos to her, were such a thing possible, would be through §§ 452.375 and 452.740. A plain reading of those statutes illustrates that: (1) that they do not apply to frozen embryos; and (2) if they did apply to frozen embryos, Virginia would be the forum to determine "custody" of the frozen embryos.

4) Application of Section 1.205 to Frozen Embryos is Unconstitutional

McQueen seeks to have § 1.205 applied to the un-implanted frozen embryos which are in dispute in this case. McQueen asserts that these un-implanted frozen embryos are unborn children and, as a result, the only course of action available to the court is to award the frozen embryos to McQueen, who intends to implant them. In fact, McQueen makes clear her position that any result other than allowing the implantation of

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and would not allow the court to take any action that would prevent such embryos from being implanted. The other bill, H.B. 1794, repeals that part of § 1.205 which subjects the section to the Constitution of the United States and the decisions of the United States Supreme Court.

the frozen embryos amounts to killing children.[9] This interpretation of § 1.205 would result in an unprecedented governmental intrusion into the private, procreational choices of the citizens of the State of Missouri and flies in the face of nearly a century of United States Supreme Court jurisprudence. "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v Baird*, 405 U.S. 438, 453 (1972) (holding that a statute allowing married persons to obtain contraceptives but prohibited single person from doing so violated the equal protection clause of the 14th Amendment). McQueen apparently seeks to re-cast the individual constitutional rights upheld in *Roe v. Wade*, 410 U.S. 113 (1972) and its progeny as based purely on a woman's right to control her bodily integrity. This interpretation simply does not stand up to scrutiny. "The constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co., v. Botsford*, 141 U.S. 250 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of

[9] "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***…" Appellant's Brief, p. 24. (emphasis supplied). Appellant's brief gives the impression that this statement or rule comes from *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). Respondent respectfully submits that case stands for no such proposition, nor anything close to it.

privacy, does exist under the Constitution." *Roe v. Wade*, at 152. A married couple's decision whether or not to use contraception, to avoid procreation, is protected by and "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Griswold v. Connnecticut*, 381 U.S. 479, 484-86 (1965). "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptive? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." *Id.* In *Bowers v. Hardwick*, 486 U.S. 186, 190 (1986), the Supreme Court notes that the Due Process Clause confers "a fundamental individual right to decide whether or not to beget or bear a child." See also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015), in which the Court observed that "choices concerning contraception, family relationship, procreation, and childrearing" are "protected by the Constitution." The right of privacy "denotes not merely freedom from bodily restraint but also (for example)…the right to marry, establish a home, bring up children." *Meyer v. State of Nebraska*, 262 U.S. 390, 399 (1923).

McQueen's brief implies that *Webster, supra*, supports the constitutionality of § 1.205. *Webster* specifically declined to pass on the constitutionality of § 1.205. 492 U.S. 490, 506-507. The court in *Webster* declared that the state can make a legitimate value judgment as embodied in § 1.205. *Id.* However, the court also observed:

> We think the extent to which the preamble's language might be used to interpret other state statutes or regulations is something that only the courts of Missouri can definitively decide. *State law has offered protections to unborn children in tort and probate law (citations omitted)*

> *and Section 1.205 can be interpreted to do no more than that...*
>
> It will be time enough for federal courts to address the meaning of the preamble *should it be applied to restrict the activities of appellees in some concrete way*.

Id. (emphasis added). McQueen is asking this court to interpret § 1.205 in a manner which will fundamentally affect not only Gadberry, in an immediate and permanent manner, but would also affect untold thousands of medical professionals, fertility patients and other citizens. This would appear to be exactly the kind of restriction about which the Supreme Court was warning.

McQueen essentially asserts that Gadberry has no rights in the decision-making process about whether or not to implant the frozen embryos. This assertion, again, completely miscasts the U.S. Supreme Court decisions. It is true that, when a woman is *carrying* a child, she has a greater right in the decision-making process than does the father of that child. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 896 (1992). *See also Planned Parenthood of Central Missouri*, *supra*, 428 U.S. 52, 69 (The state cannot "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy"). The *Casey* court also found that the requirement that a wife notify her husband before having an abortion was unconstitutional. *Id* at 898. *Casey*, however, reaffirmed the genesis of the right to privacy which underpins *Roe v. Wade*. "The *Roe* Court itself placed its holding in the succession of cases most prominently exemplified by *Griswold v. Connecticut* (citation omitted)." *Id*. at 857. "*Roe*, however, may be seen not

only as an exemplar of *Griswold* liberty but as a rule of personal autonomy and bodily integrity…" *Id*. "The constitution protects men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses." *Id*. at 896. So long as a woman is not pregnant, the right to avoid undesired procreation is a fundamental constitutional right applied equally to men and women. *See Griswold*, *Roe*, *Eisenstadt*, *supra*. In *Eisenstadt*, the court expressly extended this constitutional protection to individuals, not just married couples. *Eisenstadt v. Baird*, *supra*, at 454.

McQueen specifically (and illogically) asserts that the rights of the un-implanted frozen embryos are superior to the rights of Gadberry. Justin Gadberry is a person. He has a fundamental constitutional right, recognized in a line of Supreme Court cases, not to be forced to have a child, so long as a pregnancy has not already occurred. (There is no dispute, in this case, that McQueen is not pregnant. Tr. 88. The un-implanted frozen embryos have no constitutionally unrecognized status as entities. They are not unborn children because, of course, we have no idea whether they will ever become children. However, even if a court were to find that frozen embryos are unborn children, an unborn child is not afforded federal constitutional protection. "[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe v. Wade*, *supra*, at 158. McQueen cannot point to any case, in any U.S. jurisdiction, that accords rights to an un-implanted frozen embryo.

Perhaps the most frightening part of McQueen's position is that, under her strained and overreaching interpretation, no dispute would be required to cause the oppressive

power of the state to intrude on the uniquely private decisions of individuals and couples to beget children, or not to beget children. If McQueen's interpretation of § 1.205 were upheld, every frozen embryo would have to be implanted. The destruction of any frozen embryo would be killing. Appellant's Brief, p. 24. Laws are presumed not to be absurd, and laws are to be construed in such a manner as to not have absurd consequences. *See Rothschild v. State Tax Commission of Missouri*, 762 S.W.2d 35, 37 (Mo. 1988). The cavalcade of absurdities which would result from Appellant's application of §1.205 to un-implanted frozen embryos is nearly endless. If every frozen embryo is to be considered a child from the moment of fertilization, then how could excess embryos be placed into long-term storage, much less discarded? They could not be donated for stem cell research, even though the National Institutes of Health is specifically authorized by federal Executive Order to fund stem cell research.[10] If prospective parents went through in vitro fertilization and had excess frozen embryos, as did McQueen and Gadberry, those embryos would have to be implanted, *even if neither prospective parent* wanted to use those embryos to have children. What if there are six, or eight, or ten frozen embryos?[11] The parents would be required to have them all implanted.

If one parent is awarded sole custody of embryos, is there a deadline by which that parent must have the embryos implanted? How would the court make such a

[10] U.S.Executive Order 13505, March 9, 2009.

[11] It is 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).

determination? What if the parent being awarded custody of frozen embryos is the father? Can he have the embryos implanted in anyone? Does the mother have any say? Can the mother be forced to have the embryos implanted in her, so that children might be born? What court has the power to make such determinations?

What if there has been a laboratory error, and the frozen embryos are not the genetic material of the parties to the divorce action? Are the divorcing husband and wife required to have those embryos implanted and then, ***if children are born***, raise those children as their own?

Rational statutory interpretation requires a construction that does not lead to absurd results. *See Rothschild. supra*, at 37. A narrow construction of the statute (§ 1.205) is appropriate where that narrow construction is necessary avoid violating the constitution. *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 741-742 (Mo. banc 2007). "It is a well-accepted canon of statutory construction that if one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional the constitutional interpretation is presumed to have been intended." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-839 (Mo. Banc 1991) (citations omitted); *See also Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 577 (1988) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary..").

Infertility is a significant national health issue, affecting approximately 12% of

couples of reproductive age.[12] If frozen embryos are ruled to have the same rights and privileges as breathing, sentient human beings, fertility treatment in Missouri will grind to a screeching, and tragic, halt. No fertility clinic could possibly afford to remain open and many infertile couples would remain childless.[13]

Frozen embryos are frequently donated to infertile individuals or couples so that they can implant the embryos and bear children. However, if un-implanted frozen embryos are persons, then the donation of embryos would have to be governed by Missouri's adoption statute, Chapter 453, RSMo. Chapter 453 does not permit the filing of a petition for adoption prior to the birth of the child sought to be adopted. *See* §§ 453.010, 453.020, RSMo. If McQueen's interpretation of §1.205 were to prevail, prospective parents could not possibly take custody of embryos for the purpose of

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[12] 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).

[13] Eight medical practices which are members of the Society for Assisted Reproductive Technology Society (the affiliate organization of the American Society for Reproductive Medicine) are located here in Missouri, according to the latest federal data (from 2013), and contributed to 869 births in 2013 alone, U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, *Assisted Reproductive Technology Surveillance – United States, 2013*, Vol. 64, No. 11, at 14, table 1 (Dec. 4, 2015) (hereafter, "CDC Surveillance Report").

implanting them, because they would have to wait until the child is born in order to petition to adopt the embryos. Infertile couples would be denied access to another avenue for having children.

What happens to the many children who have already been born in Missouri as the result of donated embryos? Do their parents have to go back and adopt them, pursuant to Chapter 453? Whose children are they? From whom can they inherit? Who can make decisions about their upbringing? Could the donors of frozen embryos take away the children born to the recipients of their frozen embryos, because no adoption took place?

Do child abuse hotline calls need to be made against all of the fertility patients in Missouri who are having frozen embryos stored with no immediate plans for their use? Are the clinics guilty of child abuse? Suppose a couple signs a Directive just like the one signed in this case, but chooses to have the embryos "thawed with no further action." *See* Appendix to Appellant's Brief, p. 41. Suppose McQueen failed to pay the storage fee required by the Storage Agreement in this case. Under the clear terms of that Storage Agreement, the frozen embryos would then be abandoned to Fairfax Cryobank, and the Cryobank would then be free to dispose of the embryos in any manner it saw fit. Appendix to Appellant's Brief, p. 40.

The frightening prospect of police, prosecutors, and government agencies being thrust into the private decisions of couples and individuals with regard to whether or not to bear or beget a child would the disturbing but inevitable consequence if § 1.205 were held to apply to un-implanted frozen embryos. This is exactly the notion that the Supreme Court found to be "repulsive," in *Griswold*. 381 U.S. 479, 486.

In yet another absurdity, if McQueen's view prevails under Missouri law, does that law even apply to the frozen embryos which are the subject of this case? According to the trial record, the frozen embryos have been in Virginia since 2010.[14] Under Virginia law, frozen embryos are property. *York v. Jones*, 717 F. Supp. 421, 425 (Dist. Court, ED Virginia, 1989); See also V.C.A. § 20-156 et seq. Under what authority does the Missouri court determine the character of an entity that has solely been in Virginia for six years? Why wouldn't Virginia law apply to this determination? If these frozen embryos are being stored in a freezer with other frozen embryos, does McQueen assert that her frozen embryos are persons, while all of the other frozen embryos in the same freezer are property? If the embryos were shipped back to Missouri, would they suddenly become persons with constitutional rights? If they are taken back across the Mississippi river into Illinois, do they become property again? See *Szafranski v. Dunston*, 34 N.E.2d 1132 (Ill. App. Ct. 2015).

Quite obviously, Fairfax Cryobank does not consider the frozen embryos to be children. They are uniformly referred to as "specimens" in the Fairfax Cryobank documents. They are never referred to as children, persons, embryonic children, or children at the embryonic stage of development. The reproductive physicians running Fairfax Cryobank, who presumably know more about the character of the embryos than the rest of us, refer to these frozen embryos as specimens.

[14] The embryos may actually be stored at a Fairfax Cryobank facility in Pennsylvania, but that it not reflected in the trial record.

In fact, the term "embryonic children" used by McQueen throughout her brief, is a term unsupported in science or in law. As McQueen well knows, this issue of the disposition of cryopreserved embryos has been litigated in at least twelve other courts of record. There is no reference, anywhere, to the term "embryonic children." Those cases have cited to many medical texts and journals. No case has chosen to use the term "embryonic children," or anything that implies that the embryos are persons.

The only cases in the history of U.S. jurisprudence which use the term "embryonic children" are cases, all more than 60 years old, referring to fetuses. Cryopreserved embryos did not exist the last time this term was used in a reported case in the United States.

If Appellant's position were correct, then agreements such as the one McQueen and Gadberry voluntarily and consensually entered into would be completely irrelevant. Patients all over the state seeking treatment for infertility (and patients outside the state seeking treatment in Missouri), a profoundly private matter, would be subject to unwarranted governmental intrusion into their decisions about whether or not to have children.

McQueen claims that her rights are superior to Gadberry's, under *Roe v. Wade* and its progeny. As discussed above, her rights are superior to his *if she is pregnant* with his child and he wants to be able to veto the decision to have an abortion. *See Planned Parenthood of Southeastern Pennsylvania*, *supra*. McQueen is not pregnant, so Gadberry's right to avoid unwanted procreation is at least equal to her right to procreate. These rights are individual. *See Eisenstadt v. Baird*, supra. In *Davis v. Davis*, 842

S.W.2d 588 (Tenn. 1992), the seminal case of frozen embryo disputes, the Supreme court of Tennessee specifically discussed the competing constitutional rights to procreate and to avoid procreation in the context of disputes over the disposition of frozen embryos. Citing *Griswold, Roe, Eisenstadt* and *Carey v. Population Services International*, 431 U.S.678, 685 (1977), the court noted:

> [T]he right of procreational autonomy is composed of two rights of equal significance-the right to procreate and the right to avoid procreation.

842 S.W.2d 588, 601.

> The equivalence of and inherent tension between these two interests are nowhere more evident than in the context of *in vitro* fertilization. None of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions is applicable here…
>
> As they stand on the brink of potential parenthood, [husband and wife] must be seen as entirely equivalent gamete-providers.

Id. The *Davis* court held, in balancing the conflicting constitutional interests of the parties, that, "ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other

than use of the preembryos in question." *Id.* At 603-604.[15]

The fallacy of McQueen's contention is exposed simply by reversing the positions of the parties. Suppose Gadberry wanted to have the frozen embryos implanted, but McQueen did not. Would McQueen still have the superior right under the U.S. Constitution to decide the fate of the embryos? Of course not. Gadberry's equal protection guarantees and his constitutional right to privacy do not shrink because he is male.

If, as McQueen requests, § 1.205 is applied to include cryopreserved embryos, that application of the statute will be unconstitutional, and it will violate Gadberry's Fourteenth Amendment rights, as well as his rights under Article I, Section 2 and Article 1, Section 10 to the Missouri Constitution.

II.

The trial court did not err in failing to require more of the guardian ad litem, because: 1) the trial court did not have authority to appoint a guardian ad litem for cryopreserved embryos, which are not children; and 2) if the trial court did have such authority, the guardian ad litem fulfilled her duties under §452.423; 3) purported failures of the GAL had no impact on the court's ruling and 4) McQueen

[15] The *Davis* court opined that the gamete providers should be the ones who determine what happens to the embryos and that, if an unambiguous written agreement provided for the disposition of the embryos, that agreement should prevail. *Id.* At 597.

waived her complaints about the GAL's failure to advocate for the best interests of the frozen embryos by failing to raise them in a post-trial motion.

McQueen complains that the guardian ad litem's failure to advocate for the best interests of the frozen embryos requires reversal or remand of this court's judgment. This complaint fails for several reasons.

1) The trial court had no authority to appoint a guardian ad litem for frozen embryos

The trial court had no authority to appoint a guardian ad litem for the embryos. As a result, the court's appointment of a guardian ad litem for the frozen embryos was a nullity. Section 452.423.1 provides that where *the custody, visitation, or support of a child is a contested issue*, the court may appoint a guardian ad litem (emphasis added). Neither McQueen nor Gadberry pled the existence of any child in this dissolution of marriage other than Tristan and Brevin. How can there be contested issues of custody, visitation, or support for a child whose existence is not acknowledged in any pleading? This failure goes to the fundamental question of whether or not the frozen embryos are children under Missouri law and undermines McQueen's claim that the court erred in not treating the frozen embryos as if they were children of the marriage. Section 452.310.2 requires the wife to state whether or not she is pregnant. There is no similar requirement that she state whether or not frozen embryos exist. McQueen's petition does state that she is not pregnant. L.F. 7. There is no mention of frozen embryos, or any allegation that could possibly allude to other children, born or unborn. L.F. 6-9.

The frozen embryos are not "children" for purposes of Chapter 452. "Child" is

defined in only one place in Chapter 452. Section 452.705(2) defines "child" as an individual who has not attained 18 years of age. For the reasons set forth in detail in Point I of this brief, a frozen embryo is not a "child" within the meaning of Chapter 452. No reasonable or rational construction of the plain meaning of the provisions of Chapter 452 includes un-implanted frozen embryos as children. The court instinctively recognized this fact when it appointed a guardian ad litem to represent only the born children of the parties, Tristan and Brevin, L.F. 4, and excluded the frozen embryos from that appointment. The trial court then made a mistake when it acted on its own to appoint a guardian for the embryos, not in response to any motion by any party, and over the objection of Gadberry. L.F. 1-5, 36. The trial court corrected its mistake by not treating the frozen embryos as children in its judgment. L.F. 76. Since § 452.423 requires a contested issue of custody, visitation, or child support for a *child*, in order to appoint a guardian, and no such issue existed, the trial court had no authority to do so. Its appointment of the guardian had no effect, and the guardian had no responsibilities.

2) If the trial court had the authority to appoint a GAL, the GAL fulfilled her duties

Even if the trial court had the authority to appoint a guardian ad litem for frozen embryos, the guardian ad litem ("GAL") fulfilled her duties. The GAL was appointed by the court on May 19, 2014. L.F. 4. She appeared at the settlement conference on May 19. Supp. L.F. 2. She met with Gadberry for an hour on July 14, 2014 and met with McQueen for an hour on August 19, 2014. Resp. App. 42. In the interim, she participated in discovery, reviewed and responded to emails, and had a phone call with the attorney for McQueen. Resp. App. 42-43; Tr. 129-132. She appeared at trial on two

different days, and participated at trial by asking questions of McQueen. *Id*.

McQueen cites several cases in support of her complaint. Each case, of course, involves a GAL who has been appointed to represent born children, because there are no reported cases in which a GAL has been appointed to represent frozen embryos. The three principal cases relied on by McQueen all involve sexual abuse or physical abuse allegations against a parent. These cases have no precedential value in relation to the case at bar. The statute authorizing the appointment of a GAL reveals the impossibility of applying this statute to the representation of frozen embryos. 452.423.3 states:

> 3. The guardian ad litem shall:
>
> (1) Be the legal representative of the child at the hearing, and may examine, cross-examine, subpoena witnesses and offer testimony;
>
> (2) Prior to the hearing, conduct all necessary *interviews with persons having contact with or knowledge of the child in order to ascertain the child's wishes, feelings, attachments and attitudes.* If appropriate, the child should be interviewed.

It should go without saying that complying with this language was an impossibility in this case. What McQueen ignores is that, in the case at bar, there was no traditional custody dispute. The testimony adduced at trial, *irrespective of the party adducing it*, did not include the traditional facts and circumstances that are usually the subjects of testimony when parties cannot agree on a parenting plan and have a trial as a result. There were no competing parenting plans or custody schedules. McQueen did not, at any time, offer a proposed parenting plan for the

frozen embryos. She did not submit one before trial or at trial, as she well knows is required by the court in a case in which custody of a child is at issue. (See § 452.310.8: "The petitioner and the respondent shall submit a proposed parenting plan … within thirty days after service of process…" and St. Louis County Circuit Court Rule 68.11(3): "In all cases in which the custody … of children is at issue, each party shall exchange any updated proposed parenting plans … at least seven days prior to the hearing.") It is unreasonable for McQueen to now complain that the GAL did not take steps that a GAL might take in a traditional custody dispute involving born children whose wishes, feelings, attachments, and attitudes could be ascertained, when McQueen herself did not take the steps necessary to put those issues before the court.

McQueen complains that the GAL did not advocate for the best interests of the frozen embryos, nor did the GAL make a recommendation as to what the court should do, in the best interests of the frozen embryos. If we ignore, for the moment, that there was no custody dispute under § 452.375 at issue before the court, McQueen is still faced with the fact that there is no evidence that the GAL did not make a recommendation to the court. The GAL's recommendation is not required to be on the record. There is no evidence that the GAL did not recommend to the court that the embryos be awarded to McQueen. The GAL was present at trial and available to testify. McQueen had the opportunity, then, to examine the GAL under oath to determine what she had done, what analysis she had undertaken, and what recommendations she had for the court. McQueen

chose not to take advantage of that opportunity. She cannot now complain that these things were not done, when she did not take the steps necessary to preserve the record. "Invited error at trial cannot serve an appellant on appeal." *Sullivan v. Sullivan*, 159 S.W.3d 529, 541 (Mo.App. W.D. 2005).

Finally, McQueen complains that the GAL did not file a Memorandum of Compliance with the court at the end of the case. (This is not a statutory or Supreme Court requirement. It is a purported requirement listed on the standard order for the appointment of GALs in St. Louis County. Appendix to Brief of Appellant, p. 38.) It should be noted the GAL for McQueen and Gadberry's children, Tristan and Brevin, also did not file a Memorandum of Compliance. L.F. 1-4.

3) Purported failures of the GAL had no impact on the court's ruling

In this case, facts relating to traditional custody issues were not in dispute. Neither party made any attempt at trial to adduce facts relating to the relative parenting merits of the parties. As a result, the trier of fact had all the necessary facts at her disposal to make an appropriate judgment about the disposition of the frozen embryos without additional investigation or examination by the GAL. Any recommendation made by the GAL would constitute the GAL's opinion based upon the facts available to the judge. In a child custody case, the trial court is already required to examine and analyze the facts in the context of the best interests of the child. Any alleged failure of the GAL to advocate for the best interests of the frozen embryos is not an error justifying reversal or remand.

4) McQueen waived her complaints about the GAL's failure to advocate for the best interests of the frozen embryos by failing to raise them in a post-trial motion

As explained in Point I above, the crux of McQueen's complaint with regard to the GAL is that the court did not require the GAL to advocate for the best interests of the frozen embryos. That complaint is wholly dependent on the requirement that the trial court make findings pursuant to § 452.375.2, as required by § 452.375.6. McQueen failed to address this issue in her post-trial motion. *See* Point I above. As a result, the errors complained of in Point II of Appellant's Brief are not preserved for Appellate review and the appeal should be dismissed.

III.

The trial court did not err in awarding the cryopreserved embryos jointly to the parties because the court has the authority to award property jointly under Missouri law and because the Directive is not enforceable in a manner that would force Respondent to procreate against his wishes.

4. **The trial court had authority, under §452.330.1, to jointly award marital property to the parties, in appropriate circumstances.**

5. **The Directive is not an enforceable post-nuptial agreement.**

6. **Enforcing the directive in such a manner as to allow McQueen to be**

implanted with the embryos, against the wishes of Gadberry, would violate the public policy of the State of Missouri and would violate Gadberry's constitutional rights not to be forced to procreate against his wishes.

1) The trial court had authority, under §452.330.1, to jointly award marital property to the parties, in appropriate circumstances

McQueen asserts that § 452.330.1 prohibits the trial court from awarding the frozen embryos jointly to McQueen and Gadberry, in that such an award does not comply with the requirement to "divide the marital property and debts." However, there is ample precedent, in Missouri and specifically in this court, to award property jointly, in unusual circumstances, particularly when the property cannot be divided in kind. *See Glosier v. Glosier*, 817 S.W. 2d 580, 583-584 (Mo. Ct. App. 1991) (court did not err in a buyout procedure that could result in leaving parties as tenants in common, unusual circumstances justified the result); *W.E.F. v. C.J.F.*, 793 S.W.2d 446, 457-458 (Mo. Ct. App. 1990) (court did not err in awarding a complex financing instrument jointly to the parties, 80% to husband and 20% to wife); *Murray v. Murray*, 614 S.W.2d 554, 556 (Mo. Ct. App. 1981) (allocation of marital home 60% to husband and 40% to wife was <u>not</u> prohibited by Section 452.330); *Reeves v. Reeves*, 768 S.W.2d 649, 652 (Mo. Ct. App. 1989) (court did not err in distributing several pieces of property to the parties as tenants in common).

In the case at bar, there is no reasonable manner in which to divide the frozen embryos in kind.[16] Even if it were possible, McQueen would still be complaining, as she made clear in her testimony, if the trial court awarded one embryo each to her and to Gadberry. Tr. 131. The trial court in this case adequately explained why it awarded the frozen embryos jointly. Since all parties agree that this is a case of first impression in Missouri, it hardly needs explaining that the circumstances are "unusual." Section 452.330.1 did not prohibit the trial court from awarding the frozen embryos jointly and the court did not err in doing so.

2) The Fairfax Cryobank Directive is not an enforceable postnuptial agreement

Postnuptial agreements in Missouri are held to the same standard as prenuptial agreements. *Lipic v. Lipic*, 103 S.W.3d 144, 149 (Mo. Ct. App. 2003). Prenuptial agreements will not be enforced unless they are entered into "freely, fairly, knowingly, understandingly and in good faith with full disclosure." *quoting McMullen v. McMullen*, 926 S.W.2d 108, 110 (Mo. Ct. App. 1996). In *Lipic*, the parties signed a post-nuptial agreement apportioning to each party their previously-held separate assets, with the parties subsequently-acquired property to be divided equally. In consideration for signing the agreement, husband agreed to pay Wife $5,000 at the time of execution of the agreement, and a sum of between $10,000 and $30,000 upon dissolution of the marriage. Both parties were represented by counsel. 103 S.W.3d at 146. *If*, and only if, these requirements have been met, then the agreement is binding upon the trial court unless the

[16] It may not be possible to safely separate the two remaining frozen embryos.

court finds the agreement unconscionable. *Darr v. Darr*, 950 S.W.2d 867, 871 (Mo. Ct. App. 1997). It is extremely doubtful that the Fairfax Cryobank Directive is a postnuptial agreement, at all, as that term is understood, defined, and applied by the courts of the state of Missouri. "A postnuptial agreement is '[a]n agreement entered into during marriage to define each spouse's property rights in the event of death or divorce.'" *Bell v. Bell*, 360 S.W.3d 270, 279 (Mo. Ct. App. 2011) quoting *Black's Law Dictionary* 1286 (9th ed. 2009). Every written transaction which takes place between a husband and a wife is not a postnuptial agreement. If Husband writes a check to Wife and Wife deposits that check in a bank account in her name, that is not a post-nuptial agreement which takes the funds represented by that check out of the realm of marital property to be distributed by the court. If Wife signs waivers of marital rights to real estate during a marriage, is that real estate no longer marital property? The simple answer is no. See *Bell v. Bell*, 360 S.W.3d at 280. Section 452.330.2 provides, in part, that marital property is all property acquired by either spouse subsequent to the marriage except "…(4) Property *excluded* by valid written agreement of the parties…" Section 452.330.2(4). The Fairfax Cryobank Directive does not define any property as non-marital, nor does it *exclude* any property from the marital estate. The relevant part of the Directive simply says "used by Jalesia F. McQueen," written next to the text. These five words are not remotely sufficient to remove the frozen embryos from the estate of marital property which the court is obligated to distribute in the event of a dissolution of marriage. Section 452.330, RSMo.

If the Directive is a post-nuptial agreement, it is neither valid nor enforceable under Missouri law. The circumstances of the signing of the Directive, as found by the

trial court, preclude any finding that the Directive was entered into freely, fairly, knowingly, understandingly and in good faith with full disclosure. These critical facts, found by the court, are:

> 21. Pages 6-8 of Exhibit B comprise the …Directive.
>
> 22. Page 8 of Exhibit B is the signature page of the Directive. Page 8 was signed by Husband and Wife on May 15, 2010…
>
> 23. Wife presented page 7 of Exhibit B to husband on May 21, 2010, along with certain other documents which were part of the Embryo Transfer and Storage Documents. Wife instructed Husband where to sign. Wife had "sign here" stickers placed in the appropriate places on page 7, as well as the other pages. On page 7, which is the second page of the Directive, Husband and Wife initialed the page. Wife's initials are in bluish ink, as is her signature on page 4 of the Embryo Transfer and Storage Documents. Page 4 was signed by Wife on May 15, 2010, indicating that Wife's initials on page 7 may have been placed there on May 15, 2010.
>
> 24. …Wife acknowledged she wrote the words on the right side of page 7 of Exhibit B. These words include the instructions that, in the event of legal separation or divorce, the embryos shall be "used by Jalesia F. McQueen." This handwriting is in black ink, a different color than the ink in which Wife wrote her initials on the left side of the page. …

25. Husband testified that he was not sure if the handwritten words "used by Jalesia F. McQueen" were on the page at the time he initialed page 7 of Exhibit B on May 21, 2010.

…

26. Wife testified…that she didn't write the words "used by Jalesia F. McQueen" …until May 21, 2010.

27. Wife was in control of the documents when they were sent to the parties in 2010. Wife filled out the documents. …Most important, Wife offered no credible explanation for why the Directive was signed and notarized on May 15, 2010, but the critical information for the Directive – directing what is to happen to the frozen embryos in the event of a divorce – was not completed and initialed until May 21, 2010.

28. This Court finds, in view of the different dates on the two most critical pages of the Directive, that the handwritten words on the right side of page 7 of Exhibit B may have been filled in after Husband initialed page 7 of Exhibit B on May 21, 2010.

…

30. When Wife handed the documents to Husband for Husband to sign, she told him that the documents consisted of more transfer paperwork for the frozen embryos.

31. Husband and Wife did not have a discussion at any time in May, 2010 about what would happen to the frozen embryos in the event of

> a divorce. Husband and Wife had no discussions between the birth of Tristan and Brevin in 2007 and the time Wife filed for divorce on October 1, 2010 about what should happen to the unused frozen embryos in the event of a divorce.

L.F. 72-74.

These factual findings made by the trial court, which are entitled to great deference from this court, *McAllister v. McAllister*, 101 S.W.3d 287, 290-291 (Mo.Ct.App. 2003), illustrate why the Directive, even if it were a post-nuptial agreement intended to exclude property from the marital estate, does not come close to meeting the basic standards required for enforcement under Missouri law.

McQueen handed Gadberry form documents, which she had control of and which she completed. She had him sign the Directive ***before*** she wrote in the words "used by Jalesia F. McQueen." These facts are not in dispute. L.F. 72-73. The court found that they had no discussions between October 2007 and their separation in September 2010 about what would happen to the frozen embryos in the event of a divorce. She simply told him, on May 21, "Here is more transfer paperwork." L.F. 73. As a result, the Directive was not entered into fairly, or in good faith, or with any disclosure, much less full disclosure. *Bell v. Bell*, *supra*. The directive is unenforceable under Missouri law as a post-nuptial agreement.

3) Enforcing the directive in such a manner as to allow McQueen to be implanted with the embryos, against the wishes of Gadberry, would violate the

public policy of the state of Missouri and would violate Gadberry's constitutional rights not to be forced to procreate against his wishes

Regardless of whether or not the Directive constitutes a post-nuptial agreement under Missouri law, the directive is not an agreement amenable to current enforcement against Gadberry, for numerous reasons. First and foremost, the circumstances surrounding the execution of the Directive, as found by the trial court, militate against its enforcement.

This is a case of first impression in Missouri. Accordingly, it is appropriate to look at the manner in which courts of other states have addressed this issue. Schembre v. Mid-America Transplant Ass'n, 135 S.W.3d 527, 531 (Mo.Ct.App. 2004). Twelve courts of record have been called upon to rule in disputes between gamete providers about what should be done with their frozen embryos. Four courts have held that unambiguous provisions in IVF consent forms should be enforced as written, but in each of those cases, the court was ruling in favor of the party who wished to avoid procreation. *Litowitz v. Litowitz*, 48 P.3d 261, 270 (Wash. banc 2002) (if the couple couldn't give specific direction to the IVF program within five years, the embryos would be "thawed out and not allowed to undergo further development"); *Kass v. Kass*, 696 N.E.2d 174, 182 (N.Y. 1998) (if the parties couldn't agree, the embryos would be donated for research); *Roman v. Roman*, 193 S.W.3d 40, 55 (Tex.App. 2006) and *In re marriage of Dahl*, 194 P.3d 834, 840 (Or. 2008) (the embryos should be destroyed in the event of divorce). The Supreme Courts of Tennessee, in *Davis*, *supra*, held that in the absence of an express agreement

between the parties, frozen embryos should be awarded based on a balancing of the parties' interests. "Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than the use of the pre-embryos in question." 842 S.W.2d at 604. In *J.B. v. M.B. and C.C.*, 783 A.2d 707 (N.J. 2001), the Supreme Court of New Jersey held, in the absence of a clear and binding agreement, the court would not violate the wife's fundamental right not to procreate by forcing her to become a genetic parent against her will. Id. The Supreme Courts of Iowa and Massachusetts have both held the embryo disposition agreements which would cause a person to become a parent against their will are unenforceable as against public policy. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-1058 (Mass. 2000); *In re Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa 2003).[17] The Iowa Supreme Court relied on the principal of contemporaneous mutual consent, holding that such an agreement which could cause a party to have to become a parent against his or her will is only enforceable subject to the right of either party to change his or her mind about the disposition of the embryo, up to the point of use or destruction of the embryo. *Id*. at 784. The only cases which have held that, in a dispute over frozen embryos, a

[17] The Iowa Supreme Court specifically rejected the attempt by the wife in that case to impose a best interest of the child argument, holding that the best interest standard is intended to assure a child already born the opportunity for the best physical and emotional development. The *Witten* court relied on the principal of contemporaneous mutual consent. 672 N.W.2d 768, 782.

person can be forced to become a parent against his or her will, have done so in the context of uniquely compelling circumstances. In *Reber v. Reiss*, 42 A.2d 1131, 1136-1137 (Pa.Super.Ct. 2012), the Pennsylvania superior court found that the balancing of interests was the appropriate test, and further found a compelling circumstance that did not exist in any of the previous reported appellate decisions. After treatment for cancer, the wife had no ability to procreate biologically without the use of the disputed embryos.. In *Szafranski, supra*, the Illinois court of appeals reached a similar result, where the woman had received a cancer diagnosis and was likely to be rendered infertile by her treatment. 34 N.E.2d 1132, 1152-1153.

In the case at bar, not only has McQueen already had children with Gadberry, she was able to have a third child, in 2013, at age 41. Tr. 53-54. There is no compelling circumstance here that would justify allowing McQueen to proceed with the implantation of frozen embryos against Gadberry's wishes. Gadberry's fundamental constitutional right not to procreate will be extinguished if McQueen is allowed to implant the frozen embryos and if she then becomes pregnant.[18] See *J.B. v. M.B. and C.C.*, *supra*, at 26. McQueen has no fundamental right to have children *with Gadberry*. She can choose to have children with other partners, as she has chosen in the past.

In addition, McQueen's conduct in connection with the execution of the Directive

[18] This would deprive Gadberry of his rights, among others, under the Fourteenth Amendment to the U.S. Constitution, as well as his rights under Article I, Section 2 and Article I, Section 10 of the Missouri Constitution.

creates significant doubt, as found by the trial court, as to whether the Directive represented the intentions of both parties at the time of its execution. *See J.B. v. M.B.*, *supra*, at 159. That conduct, alone, justifies not enforcing a Directive which could have permanent and irrevocable consequences for Gadberry.

The trial court did not err in finding that the Directive was unenforceable, so long as both parties are not in agreement as to its enforcement. The trial court's judgment should, therefore, be affirmed.

CONCLUSION

McQueen's appeal is based upon incomplete facts and inapplicable law.

Consequently, this court should affirm the trial court's judgment in all of its aspects.

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IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

JALESIA MCQUEEN,	)	
	)	
Petitioner/Appellant,	)	
	)	
v.	)	Appeal No.: ED103138
	)	
JUSTIN GADBERRY,	)	
	)	
Respondent/Respondent.	)	

CERTIFICATE OF COMPLIANCE
WITH RULE 84.06

Counsel for Respondent certifies to this court as follows:

1. Respondent's Brief complies with the limitations contained in Rule 84.06(b).

2. Respondent's Brief contains 12,422 words.

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