IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ED103138

JALESIA MCQUEEN,

Plaintiff-Appellant,

v.

JUSTIN GADBERRY,

Defendant-Respondent.

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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Missouri's unique statute protecting all life from "conception until birth at every stage of biological development," RSMo. § 1.205—consistent with the parties' agreement—compels ruling in favor of McQueen. In an attempt to shift focus away from the merits of the case, Gadberry asserts meritless procedural objections to McQueen's appeal and raises arguments he never presented to the trial court and therefore waived. Gadberry's strained attempts to avoid application of § 1.205 and the enforceability of the Agreement likewise fail, and this Court should reverse.

ARGUMENT

I. McQueen preserved all points on appeal—and parents can never waive their children's rights to a best-interest determination.

McQueen preserved her objections to the trial court's treatment of the embryonic children and the court's failure to require their GAL to perform her duties. Respondent's Brief ("Resp.") 12. Gadberry mischaracterizes McQueen's objections. Rule 78.07(c)'s requirement that objections be raised in a motion to amend applies only to "allegations of error relating to the ***form or language*** of the judgment, including the failure to make statutorily required findings." Rule 78.07(c) (emphasis added). McQueen does not object to the "form or language" of the judgment.

Rather, McQueen challenges the trial court's ***substantive*** legal errors, most notably (I) the court's treatment of the embryonic children as property, rather than human beings, in violation of Missouri law, and (II) the court's failure to require the GAL to perform her duties to investigate and advocate for the embryonic children's best interests.

App. Br. 11-39. Unlike form or language errors, a party need not raise substantive errors in a motion to amend. *Boone v. Boone*, 438 S.W.3d 494, 496-97 (Mo. App. 2014). Because McQueen's objections are substantive, not formal, she was not required to raise them in a post-trial motion to preserve them for appeal. The case on which Gadberry relies, *Wood v. Wood*, 262 S.W.3d 267 (Mo. App. 2008), is inapposite, because it involved allegations of error relating to mere failure to make findings, rather than substantive legal errors.

In any case, McQueen *did* raise her objections to the trial court, including in her May 4, 2015 Motion to Correct and/or Amend. *See* Motion, LF 82-83, ¶¶ 5-7 (*e.g.*, "This Court fails to define the embryos according to the Statutes of the State of Missouri"; "[t]he Constitutional rights of the unborn children and natural mother were ignored in this Judgment"; the embryonic children's "Guardian ad litem failed to recommend to the Court that it be in the best interest of the unborn children that they be given a chance to become born children"). Indeed, McQueen asserted and preserved her arguments throughout the proceeding—at trial, in her proposed order, and in her post-trial motions. Tr. 126-27, 131-32; LF 45, 85. *See also* Rule 78.09 ("Formal exceptions to rulings or orders of the court are unnecessary . . . ."). McQueen preserved all of her arguments.

Gadberry also argues McQueen waived her rights, *and* the embryonic children's, by not treating the embryonic children precisely the same as she would have treated born children. Resp. 14-15. Specifically, Gadberry claims McQueen did not offer a requisite proposed parenting plan for the embryonic children and thereby somehow waived her

right to object to the court's and GAL's failure to consider the embryonic children's best interests.[1] *Id.* at 14-15, 38-39.

Gadberry is mistaken. Under Missouri law, even "in the absence" of a submitted parenting plan, the custody determination nevertheless "shall be in the best interest of the child." RSMo. § 452.375.9. *See also Cutting v. Cutting*, 39 S.W.3d 540, 542-43 (Mo. App. 2001) ("Whether or not appropriate plans are filed by one or both parties, the final plan ordered by the court 'shall be in the court's discretion and shall be in the best interest of the child.'") (quoting § 452.375.9). Thus, no parent can waive—specifically, McQueen did not waive—the rights of her children to a best-interest determination. *Id.*

II. Missouri courts have jurisdiction to determine custody.

Gadberry waived his argument that the trial court lacked authority, and Virginia courts had authority, to determine custody of the embryonic children—an argument he raises for the first time on appeal. *See Brown v. Brown*, 423 S.W.3d 784, 787 (Mo. 2014) (party cannot make new argument on appeal). The trial record is devoid of any mention of Virginia law. *See generally*, LF. Therefore, this Court should ignore Gadberry's novel arguments. *Brown*, 423 S.W.3d at 787. *See also Schaeffer v. Schaeffer*, 471 S.W.3d 367 (Mo. App. 2015) (holding wife could not contest Missouri was "home state" of child—even after moving to dismiss on that basis in trial court—where she had

[1] Gadberry concedes but does not object to the lack of a parenting plan for Tristan and Brevin, two other children of the marriage. Resp. 15 n.4.

answered her husband's petition, filed a counter-petition, appeared by counsel, and accepted a preliminary custody award, all without complaint).

Even if Gadberry had somehow preserved his argument, it fails. While Missouri is not the current "home state" of the embryonic children under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), neither is Virginia, because the embryonic children do not live "with" either parent in either state. § 452.705(8). Where children have no "home state" under the statute, a state court has jurisdiction to determine custody if:

> (a) The child and the child's parents, or the child and at least one parent or person acting as a parent have a ***significant connection*** with this state other than mere physical presence; and
>
> (b) Substantial evidence is available in this state concerning the ***child's care, protection, training and personal relationships***.

§ 452.740.1(2) (emphasis added). Missouri has jurisdiction under this standard. The parents, and thereby the embryonic children, "have a significant connection with this state other than mere physical presence," and all of the available evidence relating to the embryonic children's "care, protection, training and personal relationships" is in Missouri alone. § 452.740.1(2);[2] *see also State ex rel. R.P. v. Rosen*, 966 S.W.2d 292, 301 (Mo.

[2] Because the UCCJEA provides for children who do not fit into the "home state" rubric, there is no interpretive significance to the Legislature not specifically mentioning *embryonic* children. *See* Resp. 18-19. Indeed, "it is speculative to infer legislative

App. 1998) (applying an earlier, similar version of § 452.740.1 to find Missouri jurisdiction where no "home state" and family had significant Missouri contacts). No factors favor Virginia. Gadberry's argument fails.

III. Section 1.205 applies to and protects embryonic children.

The plain terms of § 1.205 require protection of embryonic children[3] as human lives. Under § 1.205.1(1) a "life" begins at "conception." Gadberry does not deny

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approval from legislative inaction." *Med. Shoppe Int'l, Inc. v. Dir. of Revenue*, 156 S.W.3d 333, 334 (Mo. 2005). It would be especially imprudent to infer anything from the Legislature's alleged inaction here. As Gadberry concedes, Resp. 19 n.6, the child-custody, home-state, and initial-jurisdiction provisions have been in place, substantially unchanged, since long before the UCCJEA's enactment (2009) or even § 1.205's enactment (1986). *See, e.g.*, *Elliott v. Elliott*, 612 S.W.2d 889, 893 (Mo. App. 1981) (applying UCCJEA's substantially similar "home state" provision).

[3] Contrary to Gadberry's assertion, both science and law support the use of the term "embryonic children." *See* § 1.205.3 ("unborn children" includes "unborn children … at every stage of biological development"); Maureen L. Condic, *When Does Human Life Begin? The Scientific Evidence and Terminology Revisited*, 8 St. Thomas J. Law & Pub. Pol. 44, 44 (2014). Notwithstanding the clinical terminology used by the "reproductive physicians running Fairfax Cryobank" (who have an economic interest in dehumanizing embryonic children), Resp. 32, Gadberry and ASRM both concede embryos are individual, genetically distinct, human lives in the earliest "stage of

conception has occurred and conspicuously makes no mention of the "conception" provision, § 1.205.1(1). The embryonic children—undisputedly "conceived"—are human lives under Missouri law. Indeed, Gadberry's amicus concedes: "It is true that an alive, human, genetically unique entity emerges at fertilization." ASRM Br. 11.

Moreover, § 1.205.1(2) protects **all** "unborn children." Gadberry cannot dispute the embryonic children are "unborn." Gadberry claims the statute applies only to lives *in utero*, not to unimplanted embryonic children, but the statute provides otherwise. The statute protects "***all*** unborn child or children or the offspring of human beings . . . at ***every stage*** of biological development." *Id.* § 1.205.3. Gadberry does not and cannot dispute that the embryonic children are human lives at the embryonic stage of biological development. This specific statute is a legitimate "value judgment," not inconsistent with *Roe v. Wade*, 410 U.S. 113 (1973), and subsequent cases. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 501, 504-07 (1989).[4]

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biological development." § 1.205.3; s*ee* Resp. 2-7; *id.* at 21 ("The appropriate scientific term for a fetus in its first six to eight weeks of development is 'embryo.'"); ASRM Br. 11 (the fertilized ovum is "an alive, human, genetically unique entity").

[4] The parties agree this is a case of first impression in Missouri, and no party has argued that the Missouri Legislature's value judgment about unborn life is identical to any other jurisdiction's. Therefore, the putative dearth of judicial decisions treating "un-implanted frozen embryos as children" is not surprising or even relevant here. Nevertheless, Gadberry's suggestion that no court has ever treated embryonic children

Further, § 1.205 is in the chapter of Missouri statutes titled "Laws in Force and ***Construction of Statutes***," and it explicitly provides that "the laws of this state shall be interpreted and construed" to provide full legal protection for unborn children, absent "specific provisions to the contrary." § 1.205.2. As the Missouri Supreme Court held, "Missouri courts should read **all** Missouri statutes *in pari materia* with this section." *Connor v. Monkem Co., Inc.*, 898 S.W.2d 89, 92 (Mo. 1995) (emphasis added). The laws of this state include, among many others, the child-custody statutes, Chapter 452 RSMo. Gadberry does not and cannot argue that the child-custody statutes contain "specific provisions" contradicting § 1.205's mandate to afford unborn children "all the rights,

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created by IVF as children is exaggerated. *See, e.g.*, *Davis v. Davis*, No. E-14496, 1989 WL 140495, at *1 (Tenn. Cir. Ct. Sept. 21, 1989) (holding divorcing couple's frozen embryos were human beings, and awarding custody to their mother for implantation, based on best-interest determination), *rev'd*, No. 180, 1990 WL 130807 (Tenn. App. Sept. 13, 1990); *see also Miller v. Am. Infertility Grp. of Illinois, S.C.*, 897 N.E.2d 837, 839 (Ill. App. 1st Dist. 2008) (describing circuit court's holding that "a 'pre-embryo is a 'human being' within the meaning of [wrongful death statute] and that a claim lies for its wrongful destruction whether or not it is implanted in its mother's womb"). In both examples, appellate courts reversed trial courts that treated unimplanted embryonic children as children, but those reversals were based on state statutory schemes that contained no canon of interpretation similar to § 1.205.

privileges, and immunities available to other persons." § 1.205.2. Therefore, the child-custody statutes apply to all unborn children, including embryonic children.[5]

Gadberry, however, claims the concept of *in pari materia* somehow prohibits interpretation of § 1.205 consistent with the child-custody statutes, because the statutes were not adopted at the same time. Resp. 20. The timing of statutory adoption is irrelevant here. The principle of *in pari materia* mandates that statutes should be "construed harmoniously" when they "involv[e] similar or related subject matter." *State v. Knapp*, 843 S.W.2d 345, 347 (Mo. 1992). Missouri courts have interpreted multiple

[5] Gadberry speculates about the legislature's "intent" to include all life, including embryonic life. Section 1.205 itself reflects the clear intent of the legislature—that all laws shall be construed to protect all "unborn" life "at every stage of biological development." *See Fisher v. Waste Mgt. of Missouri*, 58 S.W.3d 523, 526 (Mo. 2001) ("Legislative intent is derived from the statute's words used in their plain and ordinary meaning.") (internal quotation marks omitted). Gadberry also asserts that unenacted legislative *bills* somehow demonstrate a disconnect between § 1.205 and the child-custody statutes. Resp. 22 n.8. To the contrary, unenacted bills "are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001).

statutes that were *not* passed simultaneously with § 1.205 in light of its provisions. *See, e.g.*, *Connor*, 898 S.W.2d at 92 (interpreting the term "person" in the wrongful death statute—§ 537.080, a statute not passed at the same legislative session as § 1.205—to include a pre-viable unborn child pursuant to § 1.205); *State v. Holcomb*, 956 S.W.2d 286, 291 (Mo. App. 1997) (involving murder statute, § 565.020, and following *Connor* in holding "a statute not passed at the same legislative session as § 1.205" includes unborn children pursuant to § 1.205). The child-custody statutes must likewise be construed harmoniously with § 1.205.

IV. Section 1.205 protects human life consistent with the Constitution and the Agreement.

Gadberry states that people have the constitutional right to procreate and to not be forced to procreate. Resp. 24 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 434 (1972) (dictum). But Gadberry and McQueen ***have already procreated***. As parents of the embryonic children, McQueen and Gadberry made the very conscious decision to create embryonic children. As Gadberry testified:

> Q: And at some point, did you agree with [McQueen] to have embryos created?
>
> A: Yes.

Tr. 155. McQueen and Gadberry expressly agreed in writing that McQueen, as mother, would have custody in the event of divorce. Exhibit B, Appx 48-50. (See also Section VIII below.) Now that the parents have divorced, the mother is entitled to custody in accordance with that agreement. Gadberry warns against "unwarranted governmental

intrusion" into the parties' decision. Resp. 33. But that is precisely what he wants. He asks the Court to "intrude" into the parties' agreement—to not enforce it.

Notwithstanding the parties' agreement, under Missouri law, embryonic children and their parents have protectable constitutional rights—rights consistent with any rights to abortion, contraception, homosexuality, and marriage as recognized by the United States Supreme Court. § 1.205.1-.3; *Webster*, 492 U.S. at 504-07. Gadberry cites a litany of Supreme Court cases, none of which supports his position. *Roe v. Wade*, for example, expressly declined to hold when life begins. *See* 410 U.S. 113, 159 (1973). In addition to *Webster*, Gadberry disregards another Supreme Court cases that provides clear guidance—*Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 71 (1976), which held fathers have no rights in the abortion decision.

Citing Supreme Court rulings regarding contraception, Gadberry contends men and women have the "right to privacy" and specifically the "right to decide whether or not to beget or bear a child." Resp. 24-28, 31. Gadberry misses the point. Gadberry and McQueen have already "begotten," *i.e.*, conceived, the embryonic children, and only McQueen, as their mother, has the right and ability to "bear" them. *See Beeler v. Astrue*, 651 F.3d 954, 965 (8th Cir. 2011) ("As generally used, the word 'beget' means to procreate, to produce…. B.E.B. was not 'begotten' before Bruce Beeler died, because she was not ***conceived*** until more than a year after his death.") (emphasis added) (internal citation omitted); *Danforth*, 428 U.S. at 71 (the right whether to bear a child is the woman's alone).

The right to contracept, as recognized by the Supreme Court, is a couple's *mutual* right to have sex and to use artificial means to try to *prevent* the conception or bearing of a child. *Griswold v. Connnecticut*, 381 U.S. 479, 484-86 (1965); *Eisenstadt*, 405 U.S. at 453. Gadberry tries to transform a right to contracept into a father's *unilateral* veto of a mother's right to bear children they have *already* conceived. This is not the law. § 1.205; *Danforth*, 428 U.S. at 71 (the right whether to bear a child is the woman's alone).

Gadberry concedes that if the embryonic children were already *in utero* he would have no right to prevent McQueen from bearing them. He claims McQueen and the embryonic children have no rights, and that he alone has ALL rights, however, because they are currently *in vitro*. Missouri law is clear that "each human being" "at every stage of biological development" is deemed fully human and afforded full rights under the law. § 1.205.1-.3; *Webster*, 492 U.S. at 504-07. These rights are "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." § 1.205.2 (emphasis added). Gadberry does not and cannot point to a single such provision of the United States or Missouri Constitution, a United States Supreme Court decision, or a Missouri statute that purports to negate the rights of *in vitro* embryonic children. Embryonic children have full rights under Missouri law. *Id.*

Gadberry cites some[6] cases from other states involving disputes over embryonic children, Resp. 48-51, that have no precedential authority. Gadberry admits this is a case of first impression in Missouri. Resp. 43. No reported decision has ever applied § 1.205 or any similar statute to embryonic children. And *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992), the "seminal" case permitting destruction of embryonic children, according to Gadberry, Resp. 34, acknowledged that "if there is dispute, then their prior agreement concerning disposition should be carried out." This is precisely the present situation—the Agreement awards custody to McQueen. Indeed, several of the cases Gadberry cites hold likewise. *See Szafranski v. Dunston*, 34 N.E.3d 1132, 1143 (Ill. App. 1st Dist. 2015) (court will honor couple's agreement); *Litowitz v. Litowitz*, 48 P.3d 261, 270 (Wash. 2002) (same); *Kass v. Kass*, 696 N.E.2d 174, 182 (N.Y. 1998) (same); *Roman v. Roman*, 193 S.W.3d 40, 55 (Tex. App. 2006) (same); *In re marriage of Dahl*, 194 P.3d 834, 840 (Or. 2008) (same); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001) (same).

Moreover, the state law applicable in *Davis* and the other non-Missouri cases provided no protection for embryonic children comparable to § 1.205. Missouri law compels treatment of the embryonic children as human lives with protectable interests. § 1.205.1-.3. Indeed, none of these non-Missouri cases involved a state statute that requires

[6] Gadberry claims "twelve" or "at least twelve" other cases involve embryonic children, Resp. 33, 48, but he cites only *ten* cases. Resp. 48-50.

protection of all life from conception *and* a contract granting one parent custody. Missouri statutory and contract law *both* compel a decision in McQueen's favor.[7]

V. The public policy in favor of life compels a decision in favor of McQueen.

The fundamental public-policy question here is whether the two human lives at issue—the embryonic children—will be protected in accordance with the law. As the United States Supreme Court has held, § 1.205.1(1) establishes the constitutional public policy that life begins at conception. *See Webster*, 492 U.S. at 504-07 (the provisions of § 1.205 are a legitimate "value judgment," not inconsistent with *Roe v. Wade* and subsequent cases). Under Missouri law, the embryonic children are human lives.

Gadberry, however, ignores Missouri law and resorts to a speculative parade of horribles, dwelling in particular on how a ruling in McQueen's favor could impact the

[7] Gadberry states in conclusory fashion that application of § 1.205 to the embryonic children would violate his "rights" under Article I, Sections 2 and 10, of the Missouri Constitution. Resp. 35. This is Gadberry's first and only such invocation of the Missouri Constitution—and it is unavailing. *Nelson v. Nelson*, 25 S.W.3d 511, 520 (Mo. App. 2000). He waived the argument by failing to raise and develop it in the trial court, and the reference here appears without explanation or citation of applicable or relevant authority. *Id.* at 520. In any case, those constitutional provisions support McQueen's position, not Gadberry's. *See* Mo. Const. Art. I, Sec. 2 ("…all persons have a natural right to life…"); Sec. 10 ("…no person shall be deprived of life…").

fertility industry. Fertility treatment often involves the creation of "excess embryos." Gadberry and his amici contend that recognizing embryonic children's protectable legal interests under § 1.205.1(2) would prevent fertility specialists from disposing of those "excess embryos" in the various ways they currently do (*e.g.*, long-term storage, destruction, or donation for stem cell research). Resp. 28; ASRM Br. 5-11; ACLU Br. 20-25. This argument is both exaggerated and misplaced.

It is by no means obvious—and this Court is in no position to decide—whether the myriad practices of the fertility industry are consistent with § 1.205. Those questions are not presented and have not been briefed.[8] There is no basis for Gadberry's prediction that the "cavalcade of absurdities" would be "nearly endless." Resp. 28.

For example, one of Gadberry's alleged "absurdities" is that embryos "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." Resp. 28. But nothing in Executive Order 13505 *requires* states to provide couples who undergo IVF with the option to donate "excess embryos" for stem-cell research. *See* U.S. Exec. Order 13505 (Mar. 9, 2009). On the contrary, the Order does not mention reproductive technologies, or states, or even embryos. It simply *permits* NIH to fund embryonic stem-cell research. *Id.* Moreover, there is nothing "absurd" about a state taking a negative view of the destruction of embryonic children in the service of stem-cell research. Several states prohibit such research altogether. *See* National Conference of State Legislatures, *Embryonic and Fetal Research Laws*,

[8] See Section II and note 7 above.

http://www.ncsl.org/research/health/embryonic-and-fetal-research-laws.aspx (last visited May 5, 2016).[9]

In any case, the Court cannot disregard the plain terms of a statute based on speculative public-policy consequences. *Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622, 624 (Mo. 1995). If Gadberry and his amici have concerns about § 1.205's public-policy implications, this Court is not the appropriate forum in which to air them. *State ex rel. Jackson v. Dolan*, 398 S.W.3d 472, 478 (Mo. 2013). The Legislature established Missouri's "value judgment" in favor of life by enacting § 1.205, "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." *Webster*, 492 U.S. at 506 & 504 n. 4 (quoting § 1.205.2). The Legislature may pass "specific provisions to the contrary," if it deems necessary. *See MSD v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 917 (Mo. 2016) ("In effect, MSD asks this Court to act as a legislature . . . because it would be good public policy. But that is not a role this Court can undertake."). Unless and until the Legislature revises § 1.205, this Court cannot rewrite the law or disregard the rights of legally-recognized human beings thereunder. *See Emerson Elec. Co. v. Marsh & McLennan Cos.*, 362 S.W.3d 7, 18 (Mo. 2012) ("It is not for this Court to substitute its own view of public policy for that expressly stated by the legislature.").

[9] South Dakota, for example, expressly prohibits destruction of *in vitro* embryos. S.D. Laws § 34-14-16 *et seq.*

Gadberry asks if McQueen would still assert rights if the situation were reversed—if Gadberry wanted the embryonic children and McQueen did not. Resp. 35. This is obviously not the situation before the Court; of the two parents, only McQueen is concerned for the viability of their embryonic children. Under Missouri law, custody determinations are based on the best interests of the child, and embryonic children have legally protectable interests in "life, health, and well-being." § 1.205.1(2). There may be cases in which those legal principles dictate that fathers should be awarded custody. But the correct custody decision is clear here, where the parents have signed a legal agreement awarding custody of the embryonic children to the parent who intends to further their "life, health, and well-being" by gestating and giving birth to them.[10] Under the present facts, McQueen manifestly is entitled to custody.[11]

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[10] Gadberry stops short of asking if McQueen would disavow the Agreement if it provided for destruction of the embryonic children, in violation of § 1.205. These are not the facts here; the Agreement and § 1.205 are consistent. Meanwhile, Gadberry seems to argue agreements are enforceable *only* if they call for the destruction of embryonic children, and that agreements that provide for the preservation of embryonic children are unenforceable. See Resp. 51 (asserting that "so long as both parties are not in agreement" the Agreement is unenforceable). This is illogical, and he cites no authority in support. See also Section IV above.

[11] Gadberry asks numerous other rhetorical questions that he contends show the absurdity of McQueen's position—*e.g.*, "If one parent is awarded sole custody of

Gadberry also seems to deny the enforceability of the parties' contract, as a matter of public policy. This case not only involves the rights of the embryonic children under § 1.205.1(2)—though that statute alone is sufficient to protect them—but also the parties' written agreement by which the parties agreed McQueen has custody. (See also Section VIII below.) Public policy favors enforcement of contracts. *See Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 610 (Mo. 2006) ("[T]he law favors the freedom of parties to value their respective interests in negotiated contracts."). Gadberry, however, advocates ignoring § 1.205 *and* an enforceable contract—all because of the speculative negative impact on fertility industry participants. The Court cannot disregard the law and the parties' contract.

VI. The trial court erred in not requiring the GAL to advocate for the embryonic children's best interests.

The GAL did not advocate for the best interests of the embryonic children. Despite Gadberry's claims—and notwithstanding his failure to raise the issue in the trial

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embryos, is there a deadline by which that parent must have the embryos implanted?"; "What if the parent being awarded custody of frozen embryos is the father? Can he have the embryos implanted in anyone?" Resp. 28-29. None of these questions is relevant here. McQueen intends to implant the embryonic children and is entitled to do so under the law and the parties' agreement. In any event, these are the types of questions couples should ask *before*, not after, creating embryonic children.

court[12]—the court had authority to appoint a GAL for the embryonic children. Section 452.423.1 permits the trial court to appoint a GAL "where custody, visitation, or support of a child is a contested issue" in a divorce. § 452.423.1. As established above and in McQueen's initial Brief ("App. Br.", at 12-16), the embryonic children are "children" under Missouri law, § 1.205.3. The trial court properly exercised its authority to appoint a GAL for them.[13]

The GAL has a critical, "imperative" role, as advocate for the best interest of the children. *State ex rel. State of Kansas Soc. & Rehab. Servs v R.L.P.*, 157 S.W.3d 268, 278 (Mo. App. 2005). The GAL need not provide a "formal, explicit recommendation" if her "active participation" in the proceedings presents the trial court with the children's best interest. *Id*. Here, the GAL did not actively participate. At most, she briefly asked McQueen about the viability of the embryonic children and McQueen's intentions for them. Tr. 129:8-132:11. She failed to question Gadberry.

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[12] See Section II and note 7 above.

[13] Although Gadberry claims there have been no "reported cases in which a GAL has been appointed to represent frozen embryos," Resp. 38, Gadberry cites no reported case where a court *refused* to appoint one either. The parties agree this is a case of first impression. Moreover, most domestic disputes go unreported; no such conclusion can be drawn based on reported cases alone. Furthermore, at least one state explicitly provides for the appointment of a "curator" to advocate for an embryo created by IVF. *See* LA. REV. STAT. § 9:126.

The GAL in no sense communicated the embryonic children's best interests to the court. This left the court without an advocate for the embryonic children, and the court in turn failed to properly consider their best interests.

Gadberry baldly asserts the GAL "participated in discovery, reviewed and responded to emails, and had a phone call with the attorney for McQueen." Resp. 37. Nothing in the trial transcript (including the pages Gadberry cites, Tr. 129-132) supports Gadberry's claims. Gadberry cites a recent (March 10, 2016) document he filed with his brief. The document—a self-serving bill the GAL filed after McQueen filed her initial Brief—is not a part of the record on appeal and cannot be considered. *State v. Tokar*, 918 S.W.2d 753, 762 (Mo. 1996) ("A party may not supplement the record on appeal with documents never presented to the trial court and to which the opposing party has had no opportunity to respond."). Besides, the document provides no evidence the GAL advocated for the best interests of the embryonic children. The GAL failed to meet her statutory duties, and the trial court erred in failing to hold her to them.

VII. If the embryonic children are treated as property, Missouri law requires they be awarded to one party: McQueen.

Even if, in the alternative, the court sees the embryonic children as property,[14] Gadberry does not want them and McQueen does want them. Section 452.330.1 requires the trial court to award each item of marital property to one spouse or the other. See App.

[14] The embryonic children are *not* property. *See* App. Br. 40 n. 7. Even Gadberry's amicus admits "embryos are not mere property." ASRM Br. 13.

Br. 41-44. The Court should award the embryonic children to the party that wants them: McQueen. *See Hulsey v. Hulsey*, 550 S.W.2d 902, 903 (Mo. App. 1977) (trial court erred by not considering, *inter alia*, "what each party wanted" in dividing property under § 452.330). Gadberry fails to cite any authority for his position that awarding property to the party who intends to *destroy* property is the proper course.

Gadberry cites four cases involving irrelevant exceptions to this rule, where both parties wanted possession of the property at issue: *Glosier v. Glosier*, 817 S.W.2d 580 (Mo. App. 1991) (temporary joint award of a bull farm); *Murray v. Murray*, 614 S.W.2d 554 (Mo. App. 1981) (temporary joint award of land); *W.E.F. v. C. J. F.*, 793 S.W.2d 446 (Mo. App. 1990) (third-party interest in a promissory note); *Reeves v. Reeves*, 768 S.W.2d 649 (Mo. App. 1989) (joint award of intangible, fungible property). These cases have no bearing on how the embryonic children should be awarded, whereas § 452.330.1 does.

VIII. The Agreement is fair and enforceable.

Contrary to Gadberry's contention, the Cryobank Agreement is fair and enforceable. Resp. 47. The Agreement unambiguously required McQueen and Gadberry to handwrite one of six possible dispositions in the event of divorce. Exhibit B, at 6-7, Appx. 48-49. Gadberry admits to signing it. Tr. 173:9-11; Exhibit B, at 7, Appx. 49. Having signed, Gadberry is held to have knowledge of the contents of the Agreement, including that it calls for a handwritten response regarding disposition of the embryonic

children.[15] *Young v. Allstate Ins. Co.,* 685 F.3d 782, 785 (8th Cir. 2012); *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 228 (Mo. 2013). Although Gadberry self-servingly claims that the couple *never* discussed what would happen to the embryonic children in the event of separation or divorce, Resp. 6, McQueen testified that they "went through the document, and then . . . talked about how [they] would dispose of the embryos in particular circumstances" and the instructions reflected "what [they] decided [they] wanted to do for that particular issue," Tr. 82:22-24, 83:7-8, 18. While Gadberry claimed he could not remember whether the form was filled out before he initialed the form, McQueen testified that the form was filled out before Gadberry initialed it. Tr. 119:13-25; 173:15-18. McQueen's account of these events is the only credible one. Gadberry's account is incredible on several levels: it would have been absurd for Gadberry to initial a blank form; to not remember doing so; and to initial page 7 of the Directive *at all*, given its contents, without having discussed with McQueen what to do with the embryonic children in the event of their deaths, separation, or divorce.[16] He does not and cannot argue otherwise.

Gadberry disregards the relevant evidence. *See* Resp. 44-47. Instead, he quotes the trial court's findings, which McQueen has already shown to be groundless. *See* App.

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[15] Gadberry earned both undergraduate and masters degrees, belying any argument he did not understand the concept of child custody or what he signed. Tr. 138.

[16] Gadberry signed a similar agreement with the same provision in 2007. Ex. J, 28:14-17, Appx. 60. See also App. Br. 4.

Br. 49-52. The few "facts" Gadberry mentions are misleading. *See* Resp. 47. For example, it is irrelevant to the validity of the contract that McQueen filled out paperwork that *Gadberry knowingly and willingly signed and initialed*. *Young,* 685 F.3d at 785; *Chochorowski*, 404 S.W.3d at 228. Likewise, it is undisputed that Gadberry signed page 3 before McQueen filled in the handwritten phrase "used by Jalesia F. McQueen" on page 2, Resp. 47, but it is a red herring. Gadberry admits to signing his initials on page 2 separately on a later date, *see* Tr. 173:9-11, and he does not and cannot contest McQueen's testimony that the handwriting was there when he initialed it, *see* Tr. 134:1-4; 173:15-18. Thus, apart from misrepresenting some irrelevant facts, Gadberry does not even attempt to undermine McQueen's credible account of the parties' mutual execution of the Agreement. *See* App. Br. 49-52. The Agreement is enforceable—and consistent with § 1.205.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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

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

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

3. The brief contains 5,634 words, excluding those portions excluded from the word count by Rule 84.06(b) and Local Rule 360, as determined by the word-count feature of Microsoft Word 2010; and

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

/s/ Stephen Robert Clark

CERTIFICATE OF SERVICE

I hereby certify that, on May 6, 2016, a true and correct copy of the foregoing was filed electronically with the Court, to be served by operation of the Court's electronic filing system upon the following:

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