IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
ED103138

JALESIA MCQUEEN-GADBERRY,

Plaintiff-Appellant,

v.

JUSTIN GADBERRY,

Defendant-Respondent.

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

BRIEF OF AMICI CURIAE MISSOURI RIGHT TO LIFE, LAWYERS FOR LIFE, AND AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS

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INTRODUCTION

In February, 2007, Justin Gadberry and Jalesia McQueen-Gadberry used in vitro fertilization (IVF) to produce four human embryos. Two of them were implanted in Jalesia immediately, were brought to birth, and are now eight-year-old boys named Tristan and Brevin. The other two were cryo-preserved. They still remain unthawed and unborn, because Justin's and Jalesia's marriage broke down in 2010, and since then Justin and Jalesia have not agreed on how to treat them. In the divorce case that is now on appeal to this Court, the trial court treated the two cryopreserved embryos as property, not children. But current scientific knowledge has advanced since the early days of IVF and cryopreservation procedures. The advances demonstrate that the two frozen embryos are human beings.

Moreover, Missouri law protects the rights of human beings from their very beginning pursuant to Mo. Rev. Stat. § 1.205. The trial court did not mention § 1.205 in its judgment.

The consequences of this appeal to these embryonic human beings are life and death. They are not lifeless property; they are living siblings of two boys who were conceived at the same time as they were. This brief will describe current science, analyze the key Missouri statute and case law on the subject, and recommend that this Court consider the best interests of these young human beings in determining this appeal.

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STATEMENT OF INTERESTS OF THE AMICI

Missouri Right (MRL) to Life is an organization of thousands of pro-life citizens from all areas of the State of Missouri. Founded in 1974, MRL is the oldest and largest pro-life organization in Missouri that is dedicated solely to abortion, infanticide, euthanasia, and related life issues. MRL is affiliated with the National Right to Life Committee and operates through its state office, six regions, and several dozen local chapters. MRL educates people concerning the scientific and public policy bases for pro-life principles, provides the tools for pro-life citizens to urge their legislators and other governmental officials to enact and maintain pro-life positions in Missouri's laws and policies, and sponsors a political action committee to enable pro-life citizens to have a voice in the election of their representatives in state and federal government. Missouri Right to Life joined with other like-minded organizations to support the enactment of what is now Mo. Rev. Stat. § 1.205, which is directly applicable to the case of the frozen embryos who now await the judgment of this the Court.

Lawyers for Life, Inc. is a Missouri Not-for-Profit corporation representing hundreds of Missouri attorneys, formed for the purpose of education, research and dissemination of information relative to a human being's right to life from conception to death, and particularly to those matters relating to lawyers and the legal profession; to serve attorneys and courts by research in matters of right to life; to educate lawyers and others on the right to life issue and peripheral issues; and to foster and encourage the study of the social, economic, legal and philosophical issues regarding the right to life.

American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a nonprofit professional medical organization consisting of approximately 2,500 obstetrician-gynecologist members and associates who practice in the United States. The members of AAPLOG work to reaffirm the unique value and dignity of individual human life in all stages of growth and development from fertilization onward.

Because the parties did not offer any scientific testimony, exhibits, or studies into the record and also because the trial court failed to address Mo. Rev. Stat. § 1.205, the *amici curiae* seek to offer this Court the results of scientific research on the question of when a human being is formed, and in the light of current scientific knowledge, to indicate how § 1.205 and other law applies to the issues raised in this appeal.

STATEMENT OF FACTS

Petitioner, Jalesia McQueen-Gadberry, now Jalesia McQueen ("Jalesia"), and Justin Gadberry ("Justin") were married in September, 2005. (Transcript of trial, p. 4. Citations to the transcript will be abbreviated in the form, "Tr. 4," hereinafter.) At the time, Justin was on active duty in the U. S. Army at Fort Bragg, North Carolina. (Tr. 79, 152.) Jalesia lived and worked in the St. Louis area. (Tr. 78.) Jalesia asked Justin to consider storing semen even before they were married (Tr. 77, 151-52), because she was older than Justin and they wanted to have children. (Id.) Also, when they were married, Justin was facing deployment in the Middle East. (Tr. 77, 153.)

At some point after the marriage, Justin provided a sperm specimen to Jalesia's physician, Dr. Ronald Wilbois in the St. Louis area. (Tr. 80, 154-155.) Justin met with Dr. Wilbois before his deployment overseas, gave him the sperm specimen to freeze, but never met with him again. (Tr. 155.) While Justin was overseas, Jalesia attempted to become pregnant by artificial insemination from the frozen sperm, but the attempts were not successful. (Tr. 78, 153.)

In February, 2007, after Justin returned to Fort Bragg from Iraq, Justin consented to the use of in-vitro fertilization (IVF). (Tr. 155.) His intention was to have children. (Id.) Four embryos were created using Jalesia's eggs and the sperm that Justin had provided in 2005. (Tr. 79, 154-155.) Two of the embryos were transferred to Jalesia's womb and implanted, and as a result she gave birth to twin boys, Tristan and Brevin, in November, 2007. (Tr. 80, 155.) The remaining two embryonic children were cryopreserved by Dr.

Wilbois and stored by him in the St. Louis area. (Tr. 80.)

In May, 2010, Dr. Wilbois notified Jalesia and Justin that he was retiring, and arrangements would need to be made in respect to the two frozen embryonic children that he held in storage. (Tr. 80, 160.) At that time, Justin and Jalesia were living in Fenton, Missouri. (Tr. 160.) Jalesia was practicing law out of a home office, and Justin was taking courses for a Master's degree. (Jalesia Depo. Tr. 32.) Jalesia and Justin decided to have the embryos moved to another facility that was referred to in testimony as the "Fairfax cryo facility" and "Fairfax Cryobank." (Tr. 81-82.) That facility sent documents for the parties to complete and sign regarding the storage and possible disposition of the two embryos. (Tr. 82, 160.) At the time of trial, the two embryos and some remaining semen in the specimen that Justin had provided remained in storage at Fairfax Cryobank. (Tr. 81.)

Much of the testimony at trial concerned the sequence of signing and initialing the Fairfax Cryobank documents, particularly the directive regarding the disposition of the embryonic children. (See, e.g., Tr. 81-86, 104-120, 159-167.) The trial court found that a binding contract was not created by the parties' signatures and initials on these documents. (Judgment/Decree of Dissolution ["Judgment"], ¶ 35.)

The parties separated in September, 2010 (Tr. 4). Although the parties' relations afterward were apparently quite acrimonious, by the time of trial in September, 2014, the parties had agreed on the disposition of certain property and upon conditions for joint custody and visitation of Tristan and Brevin, who were then six years old. (Tr. 7-9, 13-14, 176-77.)

However, after they separated, the parties disagreed on what should happen with the two embryonic children at the Fairfax Cryobank facility in the event of divorce. (Tr. 160, 168-69.) At trial, Jalesia testified that she wanted to implant them and bring them to birth. (Tr. 78.) The guardian ad litem for these two children pressed her on her wishes, asking whether she would accept one and allow Justin to have one, or whether she would allow one or both to be donated to another couple. (Tr. 131.) Jalesia rejected the first alternative on the ground she knew Justin would destroy whichever one he received. (Id.) She rejected the other alternative on the basis that these were her children and both were siblings of Tristan and Brevin. (Id.) She said that personally she would agree not to hold Justin financially responsible for the two children, but she also opined that course of action may be against public policy. (Tr. 122.) She would be willing to discuss financial support with Justin. (Id.)

Justin completely rejected ever allowing the two embryonic children to be turned over to Jalesia. (Tr. 170.) He suggested they could be donated to an infertile couple or to a scientific research laboratory, or they could be destroyed. (Tr. 171.) If the only choice were between himself and Jalesia, he would take them. (Id.)

He testified that the environment between himself and Jalesia was too broken to bring more children into it; notwithstanding the agreement on custody and visitation previously submitted to the Court for approval, he asserted they could not co-parent Tristan and Brevin. (Id.) He would find it “absurd” and “offensive” to bring more children into the broken environment between him and Jalesia. (Tr. 171-72.) The parties did not have

the financial and emotional resources, he claimed, to deal with two more born children. (Id.)

The Guardian ad Litem (GAL) for the two embryonic children did not ask any questions of Justin. (Tr. 174.) The record does not reflect that she submitted any report or recommendation to the Court in respect to the best interests of their frozen offspring.

The Family Court Commissioner who tried the case received proposed findings of fact and conclusions of law from the parties after trial. The Commissioner signed the Judgment on April 7, 2015, and the Circuit Judge entered it on April 13, 2015.

The trial court declared that the embryonic children "are not minor children as defined in RSMo. 452." (Judgment, ¶ 39.) It concluded that "Missouri Courts and Legislature provide no guidance concerning these issues." (Id., ¶ 46.) It ruled that the embryonic children are marital property (Id., ¶ 40.), but of a unique type, because what one party does with them in the future may impose unwanted obligations on the other, and the parties' intentions expressed in the courtroom did not bind them in the future. (Id., ¶¶ 41, 44.) Finding the approach taken in Iowa on this issue to be persuasive, the trial court awarded the embryonic children as marital property jointly to the parties with a restriction that "no transfer, release, or use of the frozen embryos shall occur without the signed authorization of both Husband and Wife." (Id., ¶ 58.) However, either one could renew the storage contracts and pay the storage fees for them unilaterally. (Id., ¶ 59.)

POINTS RELIED ON

I. The trial court erred in concluding that the frozen embryos produced by in-vitro fertilization (IVF) were not children and in awarding them as marital property, because the court had a duty to make a determination of custody of the embryos according to their best interests, in that scientific research establishes that upon fertilization, unique human beings have been produced who cannot care for themselves.

State v. Stavricos, 506 S.W.2d 51, 57 (Mo. App. 1974)

Maureen L. Condic, *When Does Human Life Begin: Scientific Evidence and Terminology Revisited,* 8 Univ. of St. Thomas J. Law & Pub. Policy 44 (2014)

Maureen L. Condic, *When Does Human Life Begin, A Scientific Perspective,* Westchester Institute for Ethics and the Human Person, 3, 6-7, 14 (White Paper, October, 2008)

Ronan O'Rahilly & Fabiola Muller, *Human Embryology & Teratology* 87, 88 (3d ed. 2001)

II. The trial court erred in concluding that the frozen embryos produced by in-vitro fertilization (IVF) were not children and in awarding them as marital property, because the court had a duty to make a determination of custody of the embryos according to their best interests, in that the laws of Missouri acknowledge that upon fertilization, unique human beings have been produced who have the rights of human beings but cannot care for themselves, and other states' jurisprudence beginning with *Davis v. Davis* have not assimilated current scientific research.

Connor v. Monkem Co., Inc., 898 S.W.2d 89 (Mo. banc 1995)

State v. Holcomb, 956 S.W.2d 286 (Mo. App. 1997)

Webster v. Reproductive Health Services, 492 U.S. 490 (1989)

Mo. Rev. Stat. § 1.205

III. The trial court erred in concluding that a constitutional right "not to procreate" requires both parties' agreement in the future to allow the frozen embryos to live and also in failing to protect the best interests of the embryos, because the court had a duty to make a determination of custody of these human beings, in that such a right not to procreate is moot when procreation has already occurred, and the best interests of the embryonic children include fostering their care, growth, and relationships with their parents and siblings.

Connor v. Monkem Co., Inc., 898 S.W.2d 89 (Mo. banc 1995)

State v. Hansen, 449 S.W.3d 781 (Mo. banc 2014)

Mo. Rev. Stat. § 1.205

Mo. Rev. Stat. §452.375.2

ARGUMENT

SUMMARY OF THE ARGUMENT

Although the trial court called the characteristics of the frozen embryos "unique" *Judgment*, ¶ 41, it did not make any factual findings on the physical characteristics of the embryos except to describe them as cryopreserved ("frozen"). *Judgment*, ¶ 15. Rather, what the court actually described as "unique" were the legal consequences to the parents of unfreezing the embryos. (Id.) The court, without any mention of the key Missouri statute and other law acknowledging that unborn humans have protectable rights (to which the Appellant had directed its attention), referred to the embryos as mere property, not as two living human beings who are now kept in stasis (or nearly so) by cryopreservation. *Judgment*, ¶ 39.

The consequences to the embryonic human beings are life and death. They are not lifeless property. This brief will set forth the scientific basis for recognizing the living human status of the embryos created by the parties, describe the Missouri statute and other law that the trial court ignored, examine relevant holdings from other jurisdictions, and ask this Court to award custody of these helpless embryonic human beings according to their best interests as vulnerable human individuals.

I. The trial court erred in concluding that the frozen embryos produced by in-vitro fertilization (IVF) were not children and in awarding them as marital property, because the court had a duty to make a determination of custody of the embryos according to their best interests, in that scientific research establishes that upon fertilization, unique human beings have been produced who cannot care for themselves.

The question as to when a human being comes into existence can and should be answered based on the most recent scientific evidence relating to the inception of human life. It is not a debate for ethicists, theologians, politicians or journalists; it is a question of demonstrable scientific fact that must be answered as such, regardless of whatever ethical or legal consequences may flow from the fact.

In determining whether the human embryos that Justin and Jalesia produced are human beings, the Court may consider accepted scientific facts. *State v. Buckley,* 298 S.W. 777, 781 (1927); *State v. Stavricos,* 506 S.W.2d 51, 57 (Mo. App. 1974); *State v. Summers*, 489 S.W.2d 225, 229 (Mo. App. 1972); *Felden v. Horton & Coleman, Inc*., 135 S.W.2d 1115, 1117 (Mo. App. 1939).

Justin's sperm and Jalesia's eggs (oocytes) were germ cells or gametes, each containing a haploid number (one-half or 23) of the chromosomes that a somatic or body cell contains (46). This makeup permits the male and female germ cells to create a single cell that has a diploid or full set of chromosomes. Maureen L. Condic, *When Does Human Life Begin: Scientific Evidence and Terminology Revisited,* 8 Univ. of

St. Thomas J. Law & Pub. Policy 44, 76-77 (2014) ("*Human Life Scientific Evidence*").

Chromosomes are linear bodies that contain all or most of the organism's genes, which are the functional units of inheritance controlling the transmission and expression of one or more traits. Maureen L. Condic, *When Does Human Life Begin, A Scientific Perspective,* Westchester Institute for Ethics and the Human Person, 14 (White Paper, October, 2008) ("*Westchester Institute White Paper*"). Genes do this by transmitting information in a specific sequence of nucleotides in DNA. *Id.* DNA describes the various nucleic acids that are the molecular basis of heredity. *Id.*

All cell types are scientifically identified by differences in composition and behavior, the universally-recognized biological criteria for describing cell types and for determining when a new cell type is formed. *Human Life Scientific Evidence* at 46. The egg or oocyte and sperm have different genomes (gene sets). At the instant of sperm-oocyte plasma binding in normal (and *in vitro*) human reproduction, a series of biochemical and molecular events occurs generating a one-cell embryo called a zygote, whose cell composition and behavior are immediately different from that of the sperm and oocyte. *Id.* at 47 and 79 fig. 1. The zygote's molecular composition is unique, with sperm and oocyte-derived components. The zygote immediately behaves as a new and unique human organism, using cell components to direct his or her own development, not just as a single cell, but towards "production of interacting groups of cells, tissues and structures in a specific spatial and temporal sequence." *Id.* at 48. In other words, the zygote immediately initiates a trajectory of development that ends only with the demise of the

human organism.

Dr. Maureen Condic, who holds a doctorate in neurobiology from the University of California, Berkeley and currently teaches human embryology as Associate Professor of Neurobiology and Anatomy at the University of Utah School of Medicine, confirms that a human being begins with the creation of the zygote upon the fusion of the sperm cell with the oocyte (egg cell):

> The basic events of early development are both reasonably well characterized and entirely uncontested. Following the binding of sperm and egg to each other, the membranes of these two cells fuse, creating in this instant a single hybrid cell: the zygote or one-cell embryo. Cell fusion is a well studied and very rapid event, occurring in less than a second. Because the zygote arises from the fusion of two different cells, it contains all the components of both sperm and egg, and therefore the zygote has a unique molecular composition that is distinct from either gamete.

Westchester Institute White Paper at 3 (internal references omitted). She summarizes the process thereafter as follows:

> Upon formation, the zygote immediately initiates a complex sequence of events that establish the molecular conditions required for continued embryonic development. The behavior of the zygote is radically unlike that of either sperm or egg separately and is characteristic of a human organism. Thus, the scientific evidence supports the conclusion that a

> zygote is a human organism and that the life of a new human being commences at a scientifically well-defined 'moment of conception.' This conclusion is objective, consistent with the factual evidence, and independent of any specific ethical, moral, political, or religious view of human life of the embryos.

Westchester Institute White Paper at ix. See also *Human Life Scientific Evidence* at 44, 76-79 & fig. 1.

Drs. Ronan O'Rahilly and Fabiola Muller, who co-author a standard textbook on embryology, write,

> The terms embryo (of ancient Greek origin) and fetus . . . have gradually become distinguished, and it is now accepted that the word embryo, as currently used in human embryology, means 'an unborn human in the first 8 weeks' from fertilization (COD). Embryonic life begins with the formation of a new embryonic genome (slightly prior to its activation). * * *
>
> Just as postnatal age begins at birth, prenatal age begins at fertilization.

Ronan O'Rahilly & Fabiola Muller, *Human Embryology & Teratology*, 87, 88 (3d ed. 2001).

Another leading textbook in the field states as follows:

> Human development is a continuous process that begins when an oocyte (ovum) from a female is fertilized by a sperm (spermatozoon) from a

> male . . .
>
> * * *
>
> Human development begins at fertilization when a sperm fuses with an oocyte to form a single cell, the zygote. This highly-specialized, totipotent cell . . . marks the beginning of each of us as a unique individual.

Keith L. Moore, T.V.N. Persaud, & Mark G. Torchia, *The Developing Human: Clinically-Oriented Embryology* 1, 11 (10th ed. 2015).

The scientific conclusion that human life begins at fertilization arises from scientists' observation of early embryonic development. Dr. Condic's 2014 paper, *Human Life Scientific Evidence, supra,* relied upon over 100 scientific research papers from 1995 onward that described and analyzed 26 separate developmental changes in the early embryo, from the time of sperm-egg binding through days 4-6. *Human Life Scientific Evidence* at 49-67. The scientific research is clear that from the time of fertilization as a one-cell zygote, an embryo is not a mere collection or aggregate of cells, but an internally directed, dynamic organism.

Dr. Condic explains the differences between an organism and an aggregate of cells, such as tissues or organs. Cells forming an aggregate, she writes,

> are alive and carry on the activities of cellular life, yet fail to exhibit coordinated interactions directed towards any higher level organization. Collections of cells do not establish the complex, interrelated cellular

> structures (tissues, organs, and organ systems) that exist in a whole, living human being. Similarly, a human corpse is not a living human organism, despite the presence of living human cells within the corpse, precisely because this collection of human cells no longer functions as an integrated unit.

Westchester Institute White Paper at 6.

An organism is distinguished by the interaction of its parts "in the context of a coordinated whole." *Id.* Condic notes that the word "organism" is defined by the NIH medical dictionary as "(1) a complex structure of interdependent and subordinate elements whose relations and properties are largely determined by their function in the whole and (2) an individual constituted to carry on the activities of life by means of organs separate in function but mutually dependent: a living being." *Westchester Institute White Paper* at 6, n.22, citing for the second definition National Library of Medicine, *MedLine Plus Dictionary*, "Organism," http://www.merriam-webster.com/medlineplus/ organism (accessed Nov. 25, 2015). Cells and organs are parts of an organism; the organism is the whole, directing the parts from the moment of fertilization. Condic elaborates as follows:

> From the moment of sperm-egg fusion, a human zygote acts as a complete whole, with all the parts of the zygote interacting in an orchestrated fashion to generate the structures and relationships required for the zygote to continue developing towards its state. . . . The zygote acts immediately and decisively to initiate a program of development that will, if uninterrupted by accident,

> disease, or external intervention, proceed seamlessly through formation of the definitive body, birth, childhood, adolescence, maturity, and aging, ending with death. This coordinated behavior is the very hallmark of an organism.

Westchester Institute White Paper at 7.

Condic concludes that the zygote, though only a single cell, "is not merely a unique human cell, but a cell with all the properties of a fully complete (albeit immature) human organism; . . ." *Id.* Each of the scientific papers she cites in her 2014 paper (117 in all, dating from 1995 to 2013) documents the fact that "the embryo does not function as a mere human cell or group of human cells, it functions as an *organism*; a complete human being at an immature stage of development." *Human Life Scientific Evidence* at 68. Examples of the zygote's orchestrated actions as an organism include the following: (1) Cellular modifications take place to prevent other sperm from entering the zygote. *Id*. at 49-50. (2) Eight to ten hours after sperm-egg binding, both halves of the zygotic genome replicate in anticipation of the first division of the one-cell zygote that will not occur for another 15 hours. *Id*. at 53-54. (3) In the first ten hours following sperm-egg fusion, utilization of zygotic genes is initiated, indicating that the zygote and not the mother is controlling its own developmental process. *Id.* at 54. (4) The zygote changes shape into a flattened oval, and the site of sperm entry into the ovum fixes the short axis of the flattened oval several hours after fertilization. The first cleavage plane of the embryo aligns close to that site. *Id.* at 55. (5) The sperm-derived nucleus begins transcription earlier than the maternal nucleus and is four to five times more active. *Id.* at 54-55. These examples show the

zygote's integrated behavior as an organism, directing its own development. The actions will continue until the organism's maturity or demise.

Although cryopreservation of human embryos has been utilized for over 25 years, it is not yet certain whether long-term duration of storage adversely affects them. A 2010 study by researchers at the Jones Institute for Reproductive Medicine in Virginia measured the effects of storage of cryopreserved embryos by statistics on embryos' survival of thawing, implantation into a woman's uterus, and pregnancy. Ryan Riggs, M.D. et al., *Does Storage Time Influence Postthaw Survival and Pregnancy Outcome?* 93 Fertility and Sterility 109 (2010). In that study, the outcomes of 11,768 cryopreserved embryos were compiled according to length of time in storage (up to 5,700 days). *Id.* at 111. While the researchers concluded that "storage time had no significant effect on thaw survival or pregnancy outcomes," *id.* at 112, only five of the 11,768 embryos had been stored for more than ten years. *Id.* at 111.

Among the symbolic sculptures at an exit of the Supreme Court of the United States is a statue of a turtle, symbolizing that the law moves slowly behind society. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court characterized unborn humans as "potential life," expressly citing the scientific knowledge at the time. *Id.* at 159, 160, 161 and n.62. That knowledge is now more than forty years old. The foregoing outline of current human embryology establishes that while human development is indeed a process, lasting throughout prenatal and postnatal life, it begins with a particular event, fertilization. This Court should recognize, as the trial court did not, what science now unmistakably

establishes and that the Missouri General Assembly has acknowledged in the law of this State--new human life is created at the instant of sperm-oocyte binding. The parents who contribute the sperm and oocyte for the express purpose of fertilization exercise their right to procreate at fertilization, when a new human being comes into existence and begins to direct his or her own development until death.

II. The trial court erred in concluding that the frozen embryos produced by in-vitro fertilization (IVF) were not children and in awarding them as marital property, because the court had a duty to make a determination of custody of the embryos according to their best interests, in that the laws of Missouri acknowledge that upon fertilization, unique human beings have been produced who have the rights of human beings but cannot care for themselves, and other states' jurisprudence beginning with *Davis v. Davis* have not assimilated current scientific research.

A. Missouri Law Acknowledges the Legal Rights of Human Embryos

Missouri has long acknowledged by statute that a human embryo is a person with protectable rights in life, health and well-being from the moment of conception onward. The General Assembly has provided as follows:

> 1.205. 1. The general assembly of this state finds that:
>
> (1) The life of each human being begins at conception;
>
> (2) Unborn children have protectable interests in life, health, and well-being;
>
> (3) The natural parents of unborn children have protectable interests in the

life, health, and well-being of their unborn child.

2. 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.

3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.

Mo. Rev. Stat. § 1.205. (All citations to statutes will be to the Revised Statutes of Missouri unless specified otherwise.)

The General Assembly also provided a definition of "conception," as follows: "'Conception', the fertilization of the ovum of a female by a sperm of a male." Mo. Rev. Stat. § 188.015(3). It is significant that the definition of "conception" and the terms of § 1.205 were enacted in the same legislative act, H.B. 1596 of 1986. Laws of Missouri 1986, pp. 689, 690. "When the same or similar words are used in different places within the same legislative act and relate to the same or similar subject matter, then the statutes are in pari materia and should be construed to achieve a harmonious interpretation of the

statutes." *Citizens Bank and Trust Co. v. Director of Revenue,* 639 S.W.2d 833, 835 (Mo. banc 1982), *quoted in State v. Knapp,* 843 S.W.2d 345, 347 (Mo. banc 1992).

The trial court's attention was directed to this statute and the cases that interpret it. *Petitioner's Proposed Judgment and Law*, pp. 4-6 (filed October 14, 2014). Inexplicably, the trial court simply ignored the statute and interpretive authorities. The judgment is bereft of any allusion to them. The trial court wrote, "Missouri Courts and Legislature provide no guidance concerning these issues." *Judgment*, ¶ 46.

Whatever the reason for the Court's refusal to address § 1.205, the omission is quite startling. It is an essential part of the role of courts in a representative government to carry out the intent of the legislature. "The primary rule of statutory construction is to 'ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning.'" *Turner v. School District of Clayton*, 318 S.W.3d 660, 665 (Mo. banc 2010); *State v. Knapp*, *supra*, at 347. "It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert verbiage or superfluous language in a statute." *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 519 (Mo. banc 2009).

The appellate courts of this state have fulfilled this mandate in respect to § 1.205 in cases beginning with *State v. Knapp, supra*. The *Knapp* Court ruled that criminal prosecutions for homicide will lie in appropriate cases when unborn children are the victims. The homicide statutes need not specify that unborn children may be victims, for

§ 1.205 supplies that provision. *State v. Knapp, supra,* at 348. There is no requirement that the children be viable or "quick." *Id.* at 347-48.

Three years after *Knapp,* the Missouri Supreme Court applied § 1.205 to civil cases by holding that an unborn child was a person capable of supporting a claim for wrongful death. *Connor v. Monkem Co., Inc.*, 898 S.W.2d 89 (Mo. banc 1995). The Court rejected a claim that the unborn child must have been viable to qualify as a victim. *Id.* at 92. No such qualification was found in § 1.205.

In *State v. Holcomb,* 956 S.W.2d 286 (Mo. App. 1997), the Missouri Court of Appeals held that *Connor* interpreted § 1.205 to be read *in pari materia* with all other Missouri statutes. Thus, the statute supported prosecutions for first-degree murder of an unborn child. *Holcomb,* 956 S.W.2d at 290. The Court further rejected claims that an unborn child could not be deemed a 'person' because of the U. S. Supreme Court ruling in *Roe v. Wade,* 410 U.S. 113 (1973). *Roe* addressed the right of a pregnant woman to abort a pregnancy because of the particular burdens pregnancy may bring to her, but it granted third parties no immunity from prosecution "in the case of a killing of a child not consented to by the mother." *Id.* at 291.

The Court of Appeals has continued to reject attacks on § 1.205 that are intended to neutralize it. *Bailey v. State,* 191 S.W.3d 53 (Mo. App. 2005) (reiterating that arguments based on *Roe* and viability do not avail); *State v. Rollen,* 133 S.W.3d 57 (Mo. App. 2003) (same); *State v. Harrison,* 390 S.W.3d 927 (Mo. App. 2013) (attack founded on Uniform Definition of Death Act fails).

In short, the statute means what it says. Its principle is amply supported by science, which demonstrates that conception results immediately in a new human being. In a civilized society, the lives of human beings are protected from the intent of other people to throw them away like medical waste. In Missouri, under § 1.205, newly-created human beings are given a chance to live.

The trial court failed in its duty to apply the law when it failed to apply § 1.205. Unless and until the General Assembly chooses to change Missouri law on this point, the best interests of the young human beings involved in this case should be the touchstone for the Court's determination of their custody in this unfortunate dissolution of marriage.

B. The Early Case, *Davis v. Davis,* Was Based On A Misunderstanding Of What Occurs During Early Embryonic Development.

It is believed that in only one case of a custody dispute involving frozen embryos has a court taken evidence and heard scientific testimony on the issue whether a frozen human embryo is a human being and deserves legal protection as such. *Davis v. Davis*, 1989 WL 140495 (Blount County [Tenn.] Cir. Ct. 1989) (*Davis Trial), rev'd,* 842 S.W.2d 588 (Tenn. 1992), *cert. den*. 507 U.S. 911 (1993). On appeal, the Tennessee Supreme Court held that the embryos were not human beings. That holding should be reviewed in light of current science.

In *Davis*, the Tennessee Supreme Court ultimately found that the embryos occupied an intermediate status between person and property. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), *cert. den*. 507 U.S. 911 (1993). By the time the case reached the Tennessee

Supreme Court, the parties had abandoned any argument that the embryos were human lives, leaving the Court without the benefit of advocacy for the embryos' status as human beings. *Davis*, 842 S.W.2d at 588, n.16.

At the trial in *Davis*, world-renowned human geneticist Dr. Jerome LeJeune testified. (Dr. LeJeune discovered the genetic defect responsible for Downs Syndrome and greatly advanced the science of human genetics in several other ways. Eric Pace, *Dr. Jerome Lejeune Dies at 67; Found Cause of Down Syndrome*, New York Times, April 12, 1994, http://www.nytimes.com/1994/04/12/obituaries/dr-jerome-lejeune-dies-at-67-found-cause-of-down-syndrome.html (visited 11/27/2015).) In his testimony, Dr. Lejeune equated conception with fertilization, saying, "Each human has a unique beginning which occurs at the moment of conception." *Davis Trial*, 1989 WL 1404495, at *5. There is no "subclass of the embryo to be called a preembryo," he testified. "[T]here is nothing before the embryo; before an embryo there is only a sperm and an egg. . . . When the first cell exists all the 'tricks of the trade' to build itself into an individual already exist." *Id.* Dr. Lejeune testified that "*upon fertilization*, the entire constitution of the man is clearly, unequivocally spelled-out, including arms, legs, nervous systems and the like; that upon inspection via DNA manipulation, one can see the life codes for each of these otherwise unobservable elements of the unique individual." *Id.* at *8 (emphasis added).

The trial court found Dr. LeJeune's testimony to be clear and unrebutted by the opposing experts. *Id.* The court found "that the cells of human embryos are comprised of differentiated cells, unique in character and specialized to the highest degree of distinction"

and that the "life codes for each special, unique individual are resident at conception and animate the new person very soon after fertilization occurs." *Davis Trial,* at *8.

The opposing experts based their opinions on statements of the Ethics Committee of the American Fertility Society (AFS) issued in 1986. *Davis Trial* at *5. The report was found to constitute guidelines establishing the standard of care for the purpose of malpractice litigation involving fertility treatment professionals. *Id.* at *6. It was not law and would not be considered as authority on the court's determination of the status of the embryos. *Id.*

The Tennessee Supreme Court refused to defer to the trial court's findings, characterizing Dr. LeJeune as exhibiting “profound confusion between science and religion.” *Davis,* 842 S.W.2d at 593. However, the Court found no such problem when it relied upon an *ethics* statement of the American Fertility Society for its own conclusion.

The primary conclusion of the Court was that there is something called a “preembryo” that is not a human being but an “entity deserving special respect” from days one to fourteen. *Davis,* 842 S.W.2d at 593-594. An “embryo” exists, said the Court, only at day 14 and thereafter. *Id.* at 596-597. Subsequent scientific research demonstrates the conclusion was an error. The very term “preembryo” has been discredited. The International Federation of Associations of Anatomists recommends against use of the term. "The foreshortened term "pre-embryo", which has been used in legal and clinical contexts, is not recommended." Federative International Committee for Anatomical Terminologies and International Federation of Associations of Anatomicists,

Terminologia Embryologia, p. 10, n. 32 (April 21, 2010), http://www.unifr.ch/ifaa/Public/EntryPage/ViewTE/TEe02.html (accessed 11/27//2015). (See also *Terminologia Embryologia,* "Preface" and "User Guide," available at http://www.unifr.ch/ifaa/Public/EntryPage/PDF/TE%20Preface.pdf and http://www.unifr.ch/ifaa/Public/EntryPage/PDF/TE%20User%20Guide.pdf, respectively.)

Embryologists confirm that the term "pre-embryo" is scientifically inaccurate and ill-defined.

> The term 'pre-embryo' is not used here for the following reasons: (1) it is ill-defined because it is said to end with the appearance with the primitive streak or to include neurulation; (2) it is inaccurate because purely embryonic cells can already be distinguished after a few days, as can also the embryonic (not the pre-embryonic!) disc; (3) it is unjustified because the accepted meaning of the word embryo includes all of the first 8 weeks; (4) it is equivocal because it may convey the erroneous idea that a new human organism is formed at only some considerable time after fertilization; and (5) it was introduced in 1986 'largely for public policy reasons' (Biggers).

Ronan O'Rahilly & Fabiola Muller, *Human Embryology & Teratology*, 88 (3d ed. 2001).

Scientific research after *Davis* refutes the Court's ostensible distinction between embryo and preembryo. Science now knows that, far from being a mere collection of

human cells, a zygote acts like "an *organism* that is undergoing a self-directed process of maturation." *Human Life Scientific Evidence* at 48 (emphasis in original). The new human being is not a group of “cells in relatively loose association" until 14 days after fertilization, as the *Davis* Court described. *Davis,* 842 S.W.2d at 593. "[H]uman organisms exhibit globally coordinated functions that promote the health and survival of the individual as a whole. The zygote clearly exhibits such coordinated, organismal behavior *from the moment of sperm-egg fusion onward*." *Human Life Scientific Evidence* at 48 (emphasis supplied).

The *Davis* Court’s statement that “the first cellular differentiation of the new generation relates to physiologic interaction with the mother, rather than to the establishment of the embryo itself,” is also incorrect. *Davis,* at 594, citing the ethical study of the American Fertility Society. In fact, the cells in the early embryo interact with each other to develop the embryo body together with the placenta and cord cells. Robert G. Edwards & Christoph Hanis, *Initial differentiation of blastomeres in 4-cell human embryos and its significance for early embryogenesis and implantation.* 11 Reprod. BioMed. Online 206 (2005), *reprinted,* 1 *Tenth Anniversary Issue* 94 (2010), available at http://edwards.elsevierresource.com/articles/initial-differentiation-blastomeres-4-cell-human-embryos-and-its-significance-early/fulltext (accessed November 27, 2015). Two of the cells in the four-cell stage will often develop into the inner cell mass that has one role to play in human development; another cell, into a layer of cells, the trophectoderm, that has another role; and the last cell of the four-cell stage will often develop into the germline,

which will later have a third, separate role in human development. *Tenth Anniversary Issue* at 97. In short, even at the 4-cell stage, specialization is already occurring as the cells work in tandem toward the development of one individual. *Id*.

The *Davis* Court also mistakenly discounted the individuality of the "preembryo" prior to 14 days of development, relying upon an assertion by the AFS that each cell ("blastomere") in the early embryo of eight cells or less "if separated from the others, has the potential to develop into a complete adult.... Stated another way, at the 8-cell stage, the developmental singleness of one person has not been established." *Davis,* at 593. The AFS data is now outdated; it is known that only cells in earlier stages, perhaps up to the 4-cell stage, may be totipotent, that is, "capable of generating a globally coordinated developmental sequence" that is necessary to constitute an organism. Maureen L. Condic, *What Totipotency Is and Is Not*, 23 Stem Cells and Development 796, 797 text at Fig. 1 (2014).

Moreover, assuming a 4-cell embryo has 4 totipotent cells, the embryo is not thereby comprised of 4 human beings. The cells are working together toward development until disaggregated. "Embryos repair injury. They adapt to changing environmental conditions. Most importantly, they show coordinated interactions between parts (molecules, cells, tissues, structures, and organs) that promote the survival, health, and continued development of the organism as a whole." *Id.* One human being is developing as the cells divide into more cells. "The significant role of 'community effects' in development . . . clearly illustrates that the behavior of cells in groups is distinct from the

behavior of the individual cells comprising the group." *Id.* at 800.

An article in *Nature* summarizing recent findings on embryonic development of mammals, including human beings, begins in this way: "Where your head and feet would sprout, and which side would form your back and which your belly, were being defined in the minutes and hours after sperm and egg united. Just five years ago, this statement would have been heresy." Helen Pearson, *Your destiny, from day one*, 418 Nature 14 (2002). After recounting what scientists have found out about the unique characteristics that develop as early as the first two cells, the author reports, "What is clear is that developmental biologists will no longer dismiss early mammalian embryos as featureless bundles of cells." *Id.* at 15. That such findings apply to humans is confirmed in observations recorded in stop-motion photography of human embryos from zygote to blastocyst, supported by other data. Wong, Loewke, Bossert, Behr, DeJonge, Baer, Pera, *Non-invasive imaging of human embryos before embryonic genome activation predicts development to the blastocyst stage*, 28 Nature Biotechnology 115, 119, 120, and fig. 6 . (2010).

That removing a single cell can lead to two separate embryos does not in any way suggest that the original embryo was somehow not a single organism before a totipotent cell was extracted. It was a single organism, an individual human being, before that occurrence and remains one after removal of one cell, even if another human being comes into existence from the removed cell.

Davis described an additional claim by AFS to the effect that an embryo is not a

human being because the embryo has not yet developed the "features of personhood [and] is not yet established as developmentally individual." *Davis* at 596. This hypothesis has not survived additional scientific observation. Human beings at this age are not all alike. Each enjoys a unique genome, the internal development blueprint that produces a unique human being. Moreover, it is not just at the genetic level that differences may be ascertained; one may now observe the outward appearances of these young human beings and the different rates at which each develops and readily conclude that the appearance and development of each is unique. A fascinating time-lapse record of the development of humans from zygotes into multi-celled blastocysts is available for all to see for themselves. The time-lapse photos, when viewed as a video clip, indicate unique individual variances in development. See Renee A. Reijo Pera, *Programming and Reprogramming in the Human Oocyte to Embryo Transition*, *in* Serono Foundation Symposium, The Top Ten in Reproductive Medicine: Debating Breakthrough Basic and Clinical Papers with Their Authors (video presentation, minutes 3:50-5:20, Sept. 20, 2013), available at https://www.excemed.org/resources/l3-non-invasive-imaging-human-embryos-embryonic-genome-activation-predicts-development-blastocyst-stage (last accessed 12/17/2015).

In short, the most important findings of the *Davis* Court are scientifically incorrect in light of current scientific research. While an early human embryo can be empirically observed in various recognized stages of development (zygote, embryo, fetus, baby, child, adolescent, adult, elder, etc.), "preembryo" is not one of these stages. A human organism is a whole human being in each developmental stage.

C. Human Beings Deserve the Protection of the Law When Abortion Is Not At Issue.

Almost 43 years ago, the United States Supreme Court in *Roe v. Wade* said the judiciary would not "speculate" on when life begins "at this point in the development of man's knowledge." *Roe v. Wade,* 410 U.S. 113, 160 (1973). But the Court also ruled that the legislative branch of government, which usually has the competence to determine public policy on controversial questions according to the will of the people, would not be allowed to determine "when life begins" in a manner that precludes abortion to women, who, the Court stressed, uniquely bear whatever burdens a pregnancy may represent for them. "[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." *Id.* at 162; *Planned Parenthood v. Casey,* 505 U.S. 833, 874 (1992) (state may not place undue burden on women's ability to obtain abortions).

The recognition of the humanity of the embryos in the case at bar does not impact a pregnant woman's right to abortion, for there is no pregnancy involved in this case. The burden of pregnancy that predicated the U. S. Supreme Court's barring the legislatures of this country from exercising their usual power to settle policy questions does not exist. *Webster v. Reproductive Health Services*, 492 U.S. 490, 506 (1989) (stating that § 1.205 "does not by its terms regulate abortion"); *Rollen v. Dwyer*, 2007 WL 2199676, at *3-4 (E.D. Mo. July 27, 2007) (noting that treating "an unborn child as a person" under § 1.205 "is not inconsistent with the United States Supreme Court decisions in *Roe v. Wade* and

Webster v. Reproductive Health Services" (citations omitted)); *State v. Rollen*, 133 S.W.3d 57, 63 (Mo. App. E.D. 2003) (noting that "Section 1.205 deals exclusively with unborn children, and thus it is not an 'abortion statute' " and does not contradict *Roe v. Wade*). Thus, there is no federal or state constitutional impediment to the Court's applying the long-standing Missouri policy of favoring unborn human life that is embodied in § 1.205.

It is worthy of note that the patent laws of the United States, which were enacted for protection of property interests, recognize that human beings in their earliest growth stages cannot be the subject of patents. The Leahy-Smith America Invents Act, Pub.L. 112-29 (2011), § 33, prohibits application of the patent laws to human organisms. *Id.*, 125 Stat. 284, 340 (Sept. 16, 2011), classified to 35 U.S.C. § 101 Note, "Limitation on Issuance of Patents." The U. S. Patent Office characterized this statute as enacting explicitly into law what had been the Patent Office's long-standing interpretation of the existing law on patentable subject matter under 35 U.S.C. § 101. Robert S. Bahr, Acting Associate Commissioner for Patent Examination Policy, *Memorandum on Claims Directed to or Encompassing a Human Organism*, U. S. Patent and Trademark Office (September 20, 2011), http://www.uspto.gov/sites/default/files/aia_implementation/human-organism-memo.pdf (last accessed 12/17/2015).

Ratification of the 13th Amendment on December 6, 1865 ended the period in American history in which human life was classified as property. In that period those in power arbitrarily defined African Americans as property in order to buy and sell them like chattel and to deprive them of any rights. Our sorry legacy of having enslaved

human beings, and our scientific knowledge that human embryos are human beings, albeit powerless ones, should raise a red flag of caution against again treating these human beings as property.

Science clearly demonstrates what the Missouri General Assembly has acknowledged, as has the U. S. Congress and the U. S. Patent and Trademark Office: a human embryo is a human being from the first moment of existence. It is for the courts of Missouri to apply the Missouri Legislature's determination of this question and provide for the best interests of the embryos in the circumstances of this case.

III. The trial court erred in concluding that a constitutional right "not to procreate" requires both parties' agreement in the future to allow the frozen embryos to live and also in failing to protect the best interests of the embryos, because the court had a duty to make a determination of custody of these human beings, in that such a right not to procreate is moot when procreation has already occurred, and the best interests of the embryonic children include fostering their care, growth, and relationships with their parents and siblings.

A. The "Right Not to Procreate" Is Moot Because Procreation Has Already Occurred.

The trial court opined that the parties' "fundamental rights to privacy and equal protection under the 14th Amendment to the U. S. Constitution will be violated if either is forced to procreate against his or her wishes." The trial court erred. The parties have

already procreated; neither has to contribute any more gametes or take any similar action in order for new human beings to be created. The parties created four children in 2007. (Tr. 80, 155.) Both parties agreed to the in vitro fertilization process. (Tr. 155.) Justin's intention was to have children. (Id.) Two children were born as a result of the in vitro fertilization. (Id.) That the other two are now literally "on ice" indicates no inherent difference in the humanity of the frozen embryos and their born siblings, but rather a difference in the environment in which they were placed soon after fertilization took place.

The so-called right not to procreate as applied to cases involving frozen embryos became fundamental to the *Davis* case. The *Davis* Court began with a misunderstanding of the biological facts by adopting a description of the embryos as "two or eight cell tiny lumps of complex protein." *Davis*, 842 S.W.2d at 598. Upon that erroneous factual premise, the Court posed the question before it as "whether the parties will become parents." *Id.* The question makes no sense in view of current scientific knowledge. As the portions of this brief describing scientific findings have demonstrated, procreation has occurred, and two unique human beings now exist, albeit in what appears to be suspended animation. There is no way to undo this procreation save by terminating the lives of two human beings.

Since science establishes that a human being begins at fertilization, there can be no “right not to procreate” after fertilization, for the correlative "right to procreate" has already been exercised, and procreation has occurred. Nor is the concept of a "right not to procreate" supported by the “right of privacy” invoked in contraception and abortion cases.

The contraception cases addressed the right to *avoid* fertilization. The abortion cases, beginning with *Roe*, focus on a woman's right to privacy based on her unique experience of pregnancy, an experience that is not implicated in frozen embryo cases. *Davis*, 842 S.W.2d at 601, 602. As the U. S. Supreme Court stated about § 1.205, "Certainly the [section] does not by its terms regulate abortion . . . . 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." *Webster v. Reproductive Health Services,* 492 U.S. 490, 506 (1989) (internal citation omitted).

For this Court to recognize the concept of a "right not to procreate" after fertilization has already occurred would amount to creating a euphemism for ending the life of a living human being. Such a concept is incompatible with human dignity, and it directly contradicts the Missouri General Assembly's recognition in § 1.205 that human life begins at fertilization. Once procreation has occurred and human life has begun, the rights and interests at issue can no longer be framed solely as the procreative or reproductive interests of the parents. The rights and interests of the procreated human embryos, as well as the government's own interest in protecting human life, must also be brought into the calculus. Therefore, cases such as *Davis, supra,* and *J.B. v. M.B.,* 783 A.2d 707 (N.J. 2001), which adopt a balancing test oblivious to the embryo's human dignity, rights and interests, and cases such as *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000), that abjure "forced procreation," reflect a failure to accept what science teaches about the creation of a human being at fertilization. Further, as discussed below, these cases do not apply Missouri law, which

specifically directs that Missouri statutes must be interpreted to hold that human life begins with the union of the human sperm and egg. Such cases should not guide this Court.

B. The Cases Resting on Principles of Strict Contract, Balancing-of-Interests, and Contemporaneous Mutual Consent Fail to Recognize the Human Status of the Embryos and the General Assembly's Command to Interpret All Missouri Statutes Accordingly.

The trial court in the case at bar purported to adopt a balancing-of-interests approach but at the same time found the decisions of the courts of Iowa to be particularly persuasive. *Judgment*, ¶¶ 47-48. The leading Iowa case is *In Re: Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003). In *Witten*, the Iowa Supreme Court (1) refused to enforce any contracts under which frozen embryos would be treated as property, analogous to property divisions in pre-nuptial agreements; (2) turned down a balancing-of-interests approach as inherently substituting the courts as decision-makers for the parties in an inherently personal matter in which the courts ought not to intrude; and (3) adopted a "contemporaneous mutual consent" principle, under which the parties would need to reach their own agreement on the disposition of the embryos according to their current preferences, although the one who wanted to preserve them could maintain the *status quo* by renewing the storage agreements and paying the costs. *Witten,* 672 N.W.2d at 781-783.

The Iowa Supreme Court considered its past interpretation of statutes that touched upon the question whether an unborn human being was a "person" in certain instances, such as for wrongful death actions. *Id.* at 775. The Court determined that each statute

would need to be assessed on its own, in light of the intent of the statute as well as its terms, to determine that issue. No overarching principle on the status of an unborn human would be indulged. *Id.* There is no indication in *Witten* that scientific knowledge regarding the creation of human beings was presented to the Iowa Supreme Court which could have informed such an overarching principle. When it turned to Iowa's divorce statute, therefore, the Court did not interpret it to include a duty to insure the best interests of "fertilized eggs that have not even resulted in a pregnancy." *Id.* at 780.

Lacking the most current scientific research and guidance from the Iowa Legislature, the *Witten* Court failed to acknowledge that the progenitors had already made their reproductive choice when they created the human embryos that they placed in cryostorage. Its "contemporaneous mutual consent" principle is flawed because: (1) it does not require evaluation of the best interests of the embryo, which the court did not recognize as a human being with rights, except to the extent the embryo's interests are championed by one of its parents; (2) it may leave one party hostage to another, who will not agree; and (3) it risks pushing embryo disposition decisions to future generations, since frozen embryos can outlive their progenitors.

By contrast, Missouri has recognized that human rights begin at fertilization in § 1.205, and current scientific knowledge fully supports Missouri's recognition, as indicated above. Furthermore, the General Assembly has directed that "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; . . ." Thus, Missouri has specifically directed that all other laws are to be interpreted in consonance with the principle that human beings have rights from their physical beginning at fertilization. Missouri's courts have acknowledged and have applied that directive. "§ 1.205.2 does set out a canon of interpretation enacted by the general assembly directing that the time of conception and not viability is the determinative point at which the legally protectable rights, privileges, and immunities of an unborn child should be deemed to arise. Section 1.205(2) further sets out the intention of the general assembly that Missouri courts should read all Missouri statutes in pari materia with this section." *Connor v. Monkem Co., Inc.*, 898 S.W.2d 89, 92 (Mo. banc 1995). *See also, e.g., Bailey v. State*, 191 S.W.3d 52, 55 (Mo. App. 2005), and *State v. Rollen*,133 S.W.3d 57, 63-64 (Mo.App. 2003).

Cases from other jurisdictions that have not recognized the status of human beings at the earliest stages of life and have not enacted a rule of statutory construction as Missouri has cannot provide persuasive authority for this Court's decision. In light of the differences between Missouri law and other states' laws, it is an error to adopt the jurisprudence of *Witten*, *Davis*, and like cases.

C. The Best Interests of the Human Embryos Begin With Continued Life

The most important interest of an embryo is his or her interest in continued life. No other right is of any avail if a human being is not around to invoke it. In accordance with the Legislature's command, all other laws of Missouri must be interpreted with the status of each human being at its earliest stages in mind. § 1.205.2.

It is important to note that the hearing commissioner found it necessary to appoint a Guardian Ad Litem (not a custodian of property) for the embryos in adherence to the prescripts of § 1.205.2. *Appointment of Guardian ad Litem* (Order dated May 19, 2014).

The young human beings whose continued existence is at stake in this case are unique human individuals. As with every child, each one of these children has his or her own latent abilities, characteristics, and personalities to be guided and developed during the short time that the parents have stewardship of them. They can neither be replaced by other children nor deemed surplus, as if they were merely consumer goods.

In a proceeding for dissolution of marriage, § 452.375.2 provides that the court shall determine custody in accordance with the best interests of the child, including the following factors:

> (2) The needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child;
>
> (3) The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests;
>
> (4) Which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent; . . .

§ 452.375.2.

In regard to best interests, it is somewhat surprising that the record does not reflect any recommendations to the Court from the Guardian ad Litem for the two young children. While the cases acknowledge that there is no legal requirement for such a report, certainly the objectivity that a GAL can bring to the subject can prove beneficial for the Court.

It is fundamental to the law regarding children that their parents have the duty to assure they receive the necessities of life. *D.L. v. D.L.*, 798 S.W.2d 220 (Mo. App. 1990). The statutes that provide remedies for child abuse and neglect define "neglect" as "failure to provide, by those responsible for the care, custody, and control of the child, the proper or necessary . . . nutrition or medical, surgical, or any other care necessary for the child's well-being." § 210.110(12). Withholding basic nutrition that leads to stunting a child's growth can constitute child abuse. *State v. Hansen*, 449 S.W.3d 781 (Mo. banc 2014).

Missouri's custody statute goes further than the mere duty to preserve the physical lives of human beings. It builds on that by giving special weight to the familial relationships between the minor children and their parents and siblings. §452.375.2(2)-(4), quoted above. In this case, if the young human beings are destroyed rather than brought to birth, not only will they have been denied necessities to stay alive, they will have been denied the chance to know and love their parents, their siblings, and others--and vice versa.

No doubt, the two brothers who were brought to birth right away will someday learn that they had two more siblings, created at the same time as they were. Will they wonder about the age difference? The two boys, who are now eight years in age, will wonder less about a space of years between themselves and the two younger ones than they will about

why their younger siblings were never allowed to live at all. Will the two younger siblings have a good relationship with their father, who lets it be known that at present he wants nothing to do with them? (Tr. 126.) That will depend on their father and them. (Tr. 129.)

Friction between parents that adversely impacts children is not uncommon in divorce situations. Born children are often the subject of resentment when parents separate, but the best interests of the children call for sacrificing such feelings and moving toward a positive relationship, as Justin and Jalesia have begun to do for the older two children by presenting a joint parenting plan for approval. (Tr. 8-9, 13-14.) The same principle will apply in regard to the embryonic children when they are allowed to be carried to birth.

Both of the parties in this dissolution proceeding are highly educated. (Tr. 27, 138.) Both have demonstrated a willingness to sacrifice for others by serving in the Armed Forces of their country. (Tr. 95, 151, 154.) Both have the capacity to make a good life for themselves and have a loving relationship with all four of their children.

CONCLUSION

All humans are unique and irreplaceable. All face challenges in their family life as they grow up; there are no perfect families. Each one of the children of Jalesia and Justin has a place in their family and in the world to grow and flourish. Missouri law, particularly § 1.205, protects their right to be nurtured in their family and their opportunity to seek and find their place in the world. This Court should apply Missouri law accordingly.

Respectfully submitted,

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Certification Pursuant to Rule 84.06(c)

The undersigned certifies that the foregoing brief complies with the limitations on length contained in Mo. Civ. Rule 84.06(b) and Mo.Ct.App.E.D. Local Rule 330, in that it contains approximately 11,986 words in less than 50 pages.

/s/ James S. Cole

Certification Pursuant to Rule 84.06(g)

The undersigned certifies pursuant to Mo. Civ. Rule 84.06(g) that the foregoing brief has been submitted to the Court by electronic filing pursuant to Mo.Ct.App.E.D. Local Rule 330; that prior to the submission thereof, the electronic version was scanned for viruses; and that the brief was found to be virus-free.

/s/ James S. Cole

Certificate of Service

I certify that a copy of the foregoing brief was served upon counsel of record for the parties named below through the Court's electronic filing and service program on the 22d day of December, 2015.

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