SUPREME COURT OF ARIZONA

JOHN JOSEPH TERRELL, Petitioner/Appellee, vs. RUBY TORRES, Respondent/Appellant.	Arizona Supreme Court No. CV-19-0106-PR Court of Appeals Division One No. 1 CA-CV 17-0617 FC Maricopa County Superior Court No. FN 2016-001785

PETITION FOR REVIEW

Eric M. Fraser (027241)
Hayleigh S. Crawford (032326)
OSBORN MALEDON, P.A.
2929 North Central Avenue,
Suite 2100
Phoenix, Arizona 85012
(602) 640-9000
efraser@omlaw.com
hcrawford@omlaw.com

Claudia D. Work (018701)
CAMPBELL LAW GROUP, PLLC
1951 West Camelback Road,
Suite 200
Phoenix, Arizona 85015
(602) 254-5557
cwork@campbellazlaw.com

Attorneys for Petitioner/Appellee John Joseph Terrell

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

INTRODUCTION

This case is about interpreting agreements concerning cryogenically-preserved preembryos. The Court of Appeals concluded, as a matter of first impression, that Arizona courts should apply either a contractual approach or a "balance of the interests" approach to resolve disputes over what to do with preembryos upon divorce. Although it adopted the proper analytical framework, the majority did not apply settled law by using all available interpretive tools to resolve the dispute under the parties' agreement. Instead, the majority rushed to invoke the balancing approach, which gives the court discretion to determine the ultimate outcome. The majority thus effectively exempted cryopreservation agreements from ordinary contract law and blessed judicial interference with the intensely personal reproductive choices made by private parties. The majority compounded these errors by stepping into the role of factfinder and weighing the parties' respective interests on appeal, instead of remanding.

These errors will cause substantial confusion and chaos in this important and rapidly evolving area of the law. The Court should grant review.

ISSUES

1. Under the contractual approach, "an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors." *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992). Does the "contractual approach" require courts to construe cryopreservation agreements just like any other contract, according to settled interpretation principles?

2. Under the balancing approach, "if no prior agreement exists, then the relative interests of the parties in using or not using the pre-embryos must be weighed." *Davis*, 842 S.W.2d at 604. "The balancing approach requires a fact-intensive inquiry looking at the parties' interests in light of both current circumstances and those existing at the time of the IVF treatment." (Op. ¶ 29.) After finding legal error, should an appellate court remand to the trial court to conduct the balancing?

BACKGROUND

I. Ruby Torres is diagnosed with cancer.

Respondent Ruby Torres and Petitioner John Terrell dated on and off for several years. (APP100–01.) After Ruby was diagnosed with breast cancer, her doctors recommended that she cryogenically preserve (i.e., "freeze") her eggs before chemotherapy. (APP112, APP117.) Ruby asked John to donate sperm; he reluctantly agreed. (APP128.)

II. The parties sign a cryopreservation contract.

Three weeks after Ruby's diagnosis, the couple signed an "Embryo Cryopreservation & Embryo Disposition Agreement." (APP103–05, APP126.) They agreed that their preembryos are joint property and cannot be used without the mutual consent of both partners:

> **§ 8:** "I/we have been advised that each embryo resulting from the fertilization of the female patient's ovum by the partner's sperm shall be the *joint property of both*."
>
> **§ 9:** "As owners of any and all such embryo(s), *the consent of both* will be required concerning their use or disposition."
>
> **§ 21:** "We understand that we can change our selections in the future, but need *mutual* and written agreement as outlined above."

(APP065, APP070 (emphases added).)

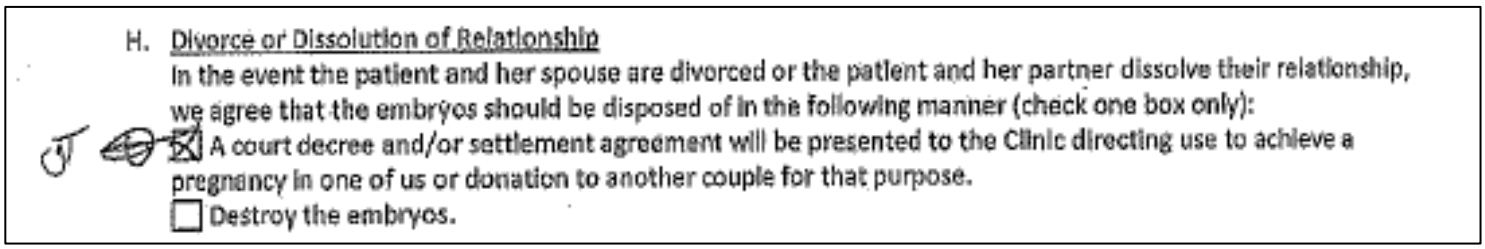
In § 10, the couple agreed what to do with the preembryos in various scenarios. (APP065.) They agreed to three general disposition options, none of which allowed one party to use them without the other's consent:

> **§ 10. Disposition of Embryos -** Because of the possibility of you and/or your partner's separation, divorce, death or incapacitation after embryos have been produced, it is important to decide on the disposition of any embryos that remain in the laboratory in these situations. . . .
>
> Currently, the three alternatives are:
>
> 1. Discarding the cryopreserved embryo(s)
>
> 2. Donating the cryopreserved embryos to another couple in order to attempt pregnancy. . . . *This will require contemporaneous permission of both living partners unless otherwise specified by a court decree and/or settlement agreement in the event of divorce or dissolution of the relationship*.[]
>
> 3. Use by one partner *with the contemporaneous permission of the other for that use*.
>
> . . . .
>
> Note:
>
> - *Embryos cannot be used to produce pregnancy against the wishes of the partner. For example, in the event of a separation or divorce, embryos cannot be used to create a pregnancy without the express, written consent of both parties*, even if donor gametes were used to create the embryos.

(*Id.* (emphases added).)

Section 10(H), in turn, tells the clinic what to do if the parties divorce. The options were: (1) present the clinic with a court decree or settlement

agreement authorizing use of the preembryos, or (2) allow the clinic to destroy them. John and Ruby chose the first option:



H. Divorce or Dissolution of Relationship

In the event the patient and her spouse are divorced or the patient and her partner dissolve their relationship, we agree that the embryos should be disposed of in the following manner (check one box only):

☒ A court decree and/or settlement agreement will be presented to the Clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose.

☐ Destroy the embryos.

(APP068.)

John and Ruby married four days later. (APP105.) The clinic cryopreserved seven preembryos for them. (APP112.)

III. The family court orders that the preembryos be donated.

Although Ruby's treatment was successful, the relationship was not; John filed for divorce. (*See* IR-1 at 9.)

The couple could not agree how to divide their preembryos. (IR-57.) Ruby acknowledged that their agreement states neither party "may use the embryos without the express written permission of the other" (APP132–33), but nevertheless asked the court to override the contract and award them to her, "or in the alternative to be donated just like the contract." (APP130–31.) John initially asked the court to award the preembryos to him. (IR-53 at 6.) Recognizing that their contract did not allow for that,

however, he then asked that the preembryos be donated or kept in storage until the parties could reach agreement. (*See* APP109.)

After an evidentiary hearing, the court ordered that the preembryos be donated to another couple. (APP090–91.) Ruby appealed. (IR-62.)

IV. The Court of Appeals reverses and holds that Ruby can use the preembryos against John's will.

A divided Court of Appeals reversed. The majority agreed that Arizona should adopt the contract and balancing approaches used by other jurisdictions. (Op. ¶¶ 31-34.) It then found that the parties' agreement left disposal of the preembryos in the event of divorce up to the court, thereby giving itself discretion to determine the ultimate outcome. (*See* Op. ¶¶ 36-42.) In addition, the Court of Appeals concluded that courts can apply the balancing approach to "ambiguous" cryopreservation agreements (rather than only when no agreement exists or the agreement is silent). (Op. ¶ 25.)

Applying these erroneous holdings, the majority proceeded to weigh the parties' competing interests and found, contrary to the family court, that Ruby's interests outweighed John's. (Op. ¶¶ 43-56.) It therefore reversed the judgment and awarded the preembryos to Ruby. (Op. ¶ 56.)

Judge Cruz dissented. (Dissent ¶¶ 62-83.)

REASONS TO GRANT REVIEW

This Court should grant review because the law on distributing cryopreserved preembryos at divorce is an issue of first impression in Arizona and has statewide importance. *See* ARCAP 23(d)(3).

The majority opinion ignores settled contract law and unnecessarily invades intensely personal decisions better left to private parties. The Court of Appeals properly adopted the contract and balancing approaches. But by failing to use all available interpretive tools to let the parties' own agreement resolve the dispute, the majority treated cryopreservation agreements differently from other contracts. It instead rushed to apply the balancing approach, which gives the court the discretion to determine the ultimate outcome, and which should apply only if the parties have no agreement or if their agreement is completely silent on the issue. Finally, the majority compounded these errors by stepping into the role of factfinder and reweighing the parties' respective interests on appeal, instead of remanding to the family court.

Because this is a matter of first impression, the Court should grant review to correct the error and clarify the law on interpreting cryopreservation agreements.

I. Under the contractual approach, courts must give controlling effect to the parties' pre-dispute disposition choices whenever possible.

The Tennessee Supreme Court was the first to articulate an analytical framework for resolving disputes between divorcing couples over frozen preembryos in *Davis v. v. Davis*, 842 S.W.2d 588 (Tenn. 1992). It held "that disputes involving the disposition of preembryos produced by in vitro fertilization should be resolved, first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out." *Id.* at 604. But "[i]f no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed." *Id.*

Since then, most jurisdictions to consider preembryo disposition disputes have followed *Davis*'s lead in adopting a contractual approach, and applying a balancing approach only if no prior agreement addresses disposition. (*See* Op. ¶ 30 (collecting cases).)

A. The contractual approach requires courts to use all available interpretive tools.

The contractual approach requires courts to presume that parties' agreements for disposing of their preembryos are valid, binding, and

enforceable in any dispute between them. *See, e.g.*, *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998); *Davis*, 842 S.W.2d at 597. Courts must make every effort to give effect to written agreements addressing disposition of the parties' preembryos, made before disputes arise, using established contract interpretation principles. *See, e.g.*, *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. App. 2006) ("If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law.") (citation omitted). "This conclusion is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority as to their disposition." *Davis*, 842 S.W.2d at 597.

For example, in *Kass v. Kass*, a couple signed an agreement that, like the one here, required "written consent of both" parties to release preembryos, and also stated that upon divorce, they may be "released as directed by order of a court." 696 N.E.2d at 176. The couple further agreed that "[i]n the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes," they would be donated. *Id.* at 176-77.

In divorce proceedings, the wife argued that the provision requiring a court order to release the preembryos upon divorce meant the court could award them to her instead of compelling donation. *Id.* at 181-82. The court disagreed, noting that "[t]he subject of this dispute may be novel but the common-law principles governing contract interpretation are not." *Id.* at 180. Because the provisions could be harmonized using ordinary tools of contract interpretation, the court rejected a reading that would leave the decision to the judiciary and thus allow it to apply the balancing approach. *See id.* at 178-82.

Using the balancing approach only if the parties have no agreement, or the agreement doesn't address disposition, makes good sense. The intensely personal nature of reproductive decisions means courts should make every effort to honor the parties' agreements rather than leaving the question to judicial discretion. "To the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice." *Kass*, 696 N.E.2d at 180.

B. Properly applied, the contractual approach confirms that the couple agreed to donate their preembryos upon divorce.

Applying settled contract-interpretation principles to John and Ruby's agreement confirms that they agreed to donate their preembryos to another couple if they divorced and could not otherwise agree.

Section 10 of the parties' contract specifically addresses what should happen to the preembryos upon divorce. John and Ruby agreed that:

> Embryos cannot be used to produce pregnancy against the wishes of the partner. For example, *in the event of a separation or divorce*, embryos cannot be used to create a pregnancy without the express, written consent of both parties . . . .

(APP065 (emphasis added).) And in § 10(H), John and Ruby indicated that if they divorced, they would provide the clinic with a court decree or settlement agreement authorizing use of the preembryos by one of them or another couple, rather than let the clinic destroy them. (APP068.)

Section 10(H) does not tell the court what to order. It simply obligates the divorcing couple to provide the clinic with a legal document authorizing the preembryos' use before the clinic releases them. In other words, it gives the clinic legal cover in the often tense and emotionally-charged circumstance of divorce. *Cf. Kass*, 696 N.E.2d at 178-82 (concluding

that similar contract terms merely gave clinic legal cover, and did not leave disposition decision to court upon divorce).

Because § 10(H) itself does not tell a court what to order, the agreement must be interpreted just like any other contract, by reading the agreement as a whole and harmonizing all of its terms to give effect to the parties' intent. *See, e.g., Ala. Freight Lines v. Stewart*, 70 Ariz. 140, 144 (1950) ("all clauses must be considered, none ignored; no clause may be given effect as though it stood by itself, disjointed from every other, but all must be scanned; each must be given effect, but all in relation to each other, to bring harmony, if possible, between all parts of the writing").

Read as a whole, the parties' agreement shows that both John and Ruby must consent before *anyone* could use the preembryos, with one exception: donation upon divorce.

First, §§ 8–9 specify that the preembryos "shall be the *joint property of both*" John and Ruby, and "[a]s owners of any and all such embryo(s), *the consent of both* will be required concerning their use or disposition." (APP065 (emphases added).) Section 10 then expands on the particular consents required for each disposition option (use, donation, or destruction). (APP065–68.) In § 10(3), the couple agreed that use by one

partner requires "contemporaneous permission of the other"—no exceptions. (APP065.) By contrast, John and Ruby agreed in § 10(2) that donation to another couple for implantation requires "contemporaneous permission of both living partners, *unless otherwise specified by a court decree and/or settlement agreement in the event of divorce or dissolution of the relationship.*" (*Id.* (emphasis added).)

Putting these terms together with § 10(H), the court cannot decree that one party can use the preembryos without the consent of the other. But it *can* order donation to another couple for implantation without the parties' consent. Indeed, Ruby—who is a practicing attorney—admitted that she understood donation to be the only option available under the contract in these circumstances. (Dissent ¶ 68). Thus, using ordinary tools of contractual interpretation, donation is the only option a court has under § 10(H) when the parties cannot agree.

C. Instead of attempting to construe the parties' agreement as controlling, the majority defaulted to the balancing approach.

Here, the majority concluded that the parties left it up to the court to decide how to dispose of their preembryos if they divorced, and thus immediately moved to balancing John's and Ruby's interests. This ruling

violates the most basic interpretive canons. *See, e.g.*, *Polk v. Koerner*, 111 Ariz. 493, 495 (1975) ("It is a fundamental rule in the interpretation of contracts that the court must ascertain and give effect to the intention of the parties at the time the contract was made if at all possible."); *Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 473 (1966) ("It is axiomatic that a contract must be construed as a whole, and each and every part must be read in the light of the other parts.") (citation omitted). It thus treats cryopreservation agreements differently from other contracts.

As the dissent explains, the parties did not eliminate the need for consent by selecting the court decree option under § 10(H). (Dissent ¶¶ 64-70.) Concluding otherwise renders the contract's repeated references to mutual consent and joint access superfluous. (*See* APP065–70.)

The majority nevertheless reasoned that if both John and Ruby must consent to the preembryos' use, their election in § 10(H) is meaningless because the court could not order the preembryos be used to achieve pregnancy, by them or anyone else, absent their mutual consent. (Op. ¶ 42.) But the majority overlooks § 10's other key provisions exempting donation from the consent requirement upon divorce. (*See* § I.B, above.) In short, the majority failed to harmonize the agreement's terms to give effect

to the parties' intent. Instead, it rushed to apply the balancing approach, unnecessarily injecting itself into one of the most personal decisions imaginable. But the couple's agreement addresses disposition, so the balancing approach doesn't apply.

The majority improperly expanded the balancing approach's scope by concluding that courts can apply "the balancing approach when they are unable to enforce a prior written agreement because it is ambiguous." (Op. ¶ 25.) No other court in the country has held that the balancing approach applies when parties have a valid-but-initially-ambiguous contract addressing preembryo disposition. Here, too, the majority's approach improperly treats cryopreservation agreements differently by allowing courts to substitute their own judgment under the balancing approach instead of resolving any initial ambiguity through ordinary contract-interpretation tools.

D. A.R.S. § 25-318.03 confirms the issue's importance.

The Legislature recently passed A.R.S. § 25-318.03, which governs embryo disposition upon divorce or separation. The statute, however, applies only to disputes between spouses—a limited subset excluding many people who make cryopreservation agreements (e.g., unmarried

couples, family members, friends, strangers). This statute, therefore, does not diminish the importance of the issues presented in this Petition, and in fact confirms that the Legislature thought embryo disposition has statewide importance.

The Court of Appeals's decision is the first opinion in Arizona addressing preembryo disposition under a cryopreservation agreement. It warrants this Court's review.

II. When it applies, the balancing approach requires deference to the trial court's findings.

Even though the majority never should have reached the balancing-of-interests test, its erroneous application of that test provides another reason for this Court's review. The majority improperly assumed the role of factfinder by reweighing the parties' interests instead of remanding to the family court. The majority's decision opens the door for appellate courts to apply the balancing test de novo, under the guise of reviewing a trial court's application of the law to the facts.

A. An appellate court reviews the trial court's balancing of interests for legal error.

When reviewing a trial court's application of a balancing test, the appellate court is limited to identifying legal errors, clearly erroneous

factual findings, and misapplications of law to fact. *See Ariz. Bd. of Regents v. Phx. Newspapers, Inc.*, 167 Ariz. 254, 257 (1991). If the trial court has misapplied the law, the appellate court must remand for the trial court to reconsider the balancing test in light of the appellate court's guidance. *See In re Marriage of Rooks*, 429 P.3d 579, 581, ¶ 5 (Colo. 2018) (concluding the trial court had weighed improper factor and remanding for it to re-balance the parties' interests using proper factors). This approach respects each court's particular expertise and perspective. *See Lee Dev. Co. v. Papp*, 166 Ariz. 471, 475-76 (App. 1990) (appellate courts must give "due regard to the opportunity of the trial court to view evidence and weigh the credibility of the witnesses").

B. Instead of remanding, the majority improperly assumed the family court's role.

Here, the majority failed to give "due regard" to the family court's trier-of-fact role in dissolution proceedings.

Consider the majority's finding that Ruby had only a "remote" chance of achieving parenthood via embryo donation. (Op. ¶ 47.) The majority cited Dr. Behera's "unrebutted testimony explaining that embryo donation involved being placed on a long waiting list due to the limited

number of embryos available." (Op. ¶¶ 12, 47.) But all Dr. Behera said was that "[t]here's a fairly long waiting list for couples" desiring an embryo. (APP119.) She never explained what "fairly long" means, and she also testified that embryo donation remains viable for Ruby. (APP118–20.) Drawing inferences from live testimony is the trial court's job, not the appellate court's.

Despite making these sorts of inferences on appeal, the majority contends it was merely drawing legal conclusions, not reweighing the evidence. (Op. ¶ 44.) But if the majority had limited its review to the family court's misapplication of law to the facts, then it should have remanded, instead of reweighing the parties' interests itself to reach the opposite conclusion. *Compare* Op. ¶ 56 ("we applying the balancing approach to the competing interests"), *with Rooks*, 429 P.3d at 595, ¶ 75 ("We reverse . . . and remand with directions to return the matter to the trial court to apply the balancing framework . . . .").

If allowed to stand, the majority's decision will allow other courts to apply balancing tests de novo on appeal. This Court should grant review to clarify that the balancing approach does not allow the Court of Appeals

to take over these discretionary, interest-weighing determinations, no matter how unfair it may perceive the result to be.

CONCLUSION

This case presents an issue of first impression, in a rapidly evolving legal area. The Court should grant the Petition.

RESPECTFULLY SUBMITTED this 15th day of May, 2019.

OSBORN MALEDON, P.A.

By:/s/ Hayleigh S. Crawford
Eric M. Fraser
Hayleigh S. Crawford
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793

CAMPBELL LAW GROUP, PLLC
Claudia D. Work
1951 West Camelback Road, Suite 200
Phoenix, Arizona 85015

Attorneys for Petitioner/Appellee John Joseph Terrell

THIS PAGE INTENTIONALLY LEFT BLANK

THIS PAGE INTENTIONALLY LEFT BLANK

THIS PAGE INTENTIONALLY LEFT BLANK

APPENDIX
TABLE OF CONTENTS*

* The appendix page number matches the electronic PDF page number. Counsel has added emphasis to selected pages in this Appendix using yellow highlighting to assist the Court with its review of the record. Counsel has also redacted certain personal information. Some record items included in the Appendix contain only a limited excerpt. This Appendix complies with the bookmarking requirements of ARCAP 13.1(d)(3).

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

In re the Matter of:

JOHN JOSEPH TERRELL, *Petitioner/Appellee*,

v.

RUBY TORRES, *Respondent/Appellant*.

No. 1 CA-CV 17-0617 FC
FILED 3-14-2019

Appeal from the Superior Court in Maricopa County
No. FN 2016-001785
The Honorable Ronee Korbin Steiner, Judge

VACATED AND REMANDED WITH INSTRUCTIONS

COUNSEL

Law Office of Dennis P. Levine PC, Phoenix
By Debora M. Levine
Co-Counsel for Respondent/Appellant

The Murray Law Offices PC, Scottsdale
By Stanley D. Murray
Co-Counsel for Respondent/Appellant

Stoddard Law Group PC, Phoenix
By Allie Stoddard
Co-Counsel for Petitioner/Appellee

Campbell Law Group PLLC, Phoenix
By Claudia D. Work
Co-Counsel for Petitioner/Appellee

Sherman & Howard LLC, Phoenix
By Christopher M. Jackson, *pro hac vice*, Matthew A. Hesketh
Co-Counsel for Amicus Curiae Academy of Adoption & Assisted Reproduction Attorneys

Daniel I. Ziskin PC, Phoenix
By Daniel I. Ziskin
Co-Counsel for *Amicus Curiae Academy of Adoption & Assisted Reproduction Attorneys*

OPINION

Judge Jennifer B. Campbell delivered the opinion of the Court, in which Judge James P. Beene joined. Presiding Judge Maria Elena Cruz dissented.

C A M P B E L L, Judge:

¶1 Ruby Torres and John Joseph Terrell disagree about the disposition of cryogenically preserved embryos[1] created using Torres' eggs and Terrell's sperm. The dispute arose over whether, under the terms of their in vitro fertilization agreement ("IVF Agreement"), Torres could use the embryos for implantation without Terrell's consent. The parties did not challenge the jurisdiction of the family court.[2] Following an evidentiary

---

[1] Arizona statute defines "human embryo" as "a living organism of the species homo sapiens through the first fifty-six days of its development, excluding any time during which its development has been suspended." Ariz. Rev. Stat. ("A.R.S.") § 36-2311(3). While other courts have used various terms including "preembryo," *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1052 n.1 (Mass. 2000), and "pre-zygote," *Kass v. Kass*, 696 N.E.2d 174, 175 n.1 (N.Y. 1998), we use the term "embryo," in line with the legislature's definition. *See also Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992) (similarly using the term "embryo").

[2] In this case, the parties treated the embryos as joint property pursuant to statute, *see* A.R.S. § 25-318(A) (authorizing the court in a dissolution proceeding to divide property held in common equitably, though not

hearing, the court ordered the embryos to be donated to a third party for implantation. We vacate the trial court's order and hold that Torres may use the embryos to attempt to become pregnant.

BACKGROUND

¶2 In June 2014, Torres was diagnosed with an aggressive form of bilateral breast cancer. Torres' oncologist explained that she would need to begin chemotherapy within a month. The oncologist advised Torres that the chemotherapy would impair her ability to become pregnant by causing her to begin menopause, after which "there [was] no guarantee that [her] body would recover . . . and come out of menopause." The next month, after meeting with Dr. Millie Behera, a fertility specialist at the Bloom Reproductive Institute (the "Fertility Clinic"), she elected to undergo IVF to produce embryos, using her own eggs and donor sperm.

¶3 Torres initially asked Terrell, then her boyfriend, to serve as the sperm donor, but he declined. She began the process of preserving her eggs and found another sperm donor, a prior boyfriend. Upon learning of the other volunteer donor, Terrell changed his mind and agreed to be the donor. He later testified he only did this as a favor.

¶4 On July 11, 2014, the parties executed the IVF Agreement, provided by the Fertility Clinic, which included terms regarding the parties' informed consent for assisted reproduction, the cryopreservation of embryos, and the disposition of any embryos that might result from the IVF procedure. The IVF Agreement specified that any embryo resulting from Torres' egg and Terrell's sperm would be their joint property.

¶5 The IVF Agreement also contained a provision addressing the parties' preferences regarding the disposition of embryos (the "Disposition Provision"), stating, as relevant:

> 10. Disposition of Embryos—Because of the possibility of you and/or your partner's separation, divorce, death or incapacitation . . . it is important to decide on the disposition of any embryos that remain in the laboratory in these situations. Since this is a rapidly evolving field, both medically and legally, the clinic cannot guarantee what the

---

necessarily in kind), although they could have simply brought a contract action. Neither party objected to the family court resolving this issue. The outcome of this matter is not dependent upon their marital status.

> available or acceptable avenues for disposition will be at any future date.
>
> Currently, the three alternatives are:
>
> 1. Discarding the cryopreserved embryo(s)
>
> 2. Donating the cryopreserved embryo(s) to another couple in order to attempt pregnancy.
>
> . . .
>
> 3. Use by one partner with the contemporaneous permission of the other for that use.
>
> This agreement provides several choices for disposition of embryos in these circumstances ([including] separation or divorce of the patient and her spouse/partner . . .). *Disposition may also be controlled by the final decision of a court or other governmental authority having jurisdiction*.
>
> I/We agree that in the absence of a more recent written and witnessed consent form, Fertility Treatment Center is authorized to act on our choices indicated below (items A-H), so far as it is practical.

(Emphasis added.)

¶6 The Disposition Provision also contained the following general language entitled "Note":

> Embryos cannot be used to produce pregnancy against the wishes of the partner. For example, in the event of a separation or divorce, embryos cannot be used to create a pregnancy *without the express, written consent of both parties*, even if donor gametes were used to create the embryos.

(Emphasis added.)

¶7 The Disposition Provision then identified various options for the disposition of embryos, in differing future circumstances, such as death of one or both parties, separation, or divorce. Specifically, subsection H addressed the parties' options upon divorce or dissolution of their relationship:

> H. Divorce or Dissolution of Relationship In the event the patient and her spouse are divorced or the patient and her partner dissolve their relationship, we agree that the embryos should be disposed of in the following manner (check one box only).
>
> [1] A court decree and/or settlement agreement will be presented to the Clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose.
>
> [2] Destroy the embryos.

The parties selected and initialed the first option placing the disposition decision in the hands of the court. This is the sole provision in the Disposition Provision of the Agreement between the parties and not between the clinic and the parties jointly.

¶8 Four days after signing the IVF Agreement, the parties married. The IVF procedure yielded seven viable embryos which were cryogenically preserved for future use. Torres subsequently underwent chemotherapy, causing her hormone levels to drop to menopausal amounts. After two years of marriage, Terrell filed a petition for dissolution of marriage. The seven embryos were still preserved and there had been no attempt at implantation. The parties could not agree on the disposition of the embryos—the primary dispute was whether the court could award Torres the embryos to achieve a pregnancy.[3]

¶9 At the evidentiary hearing, neither party contested that the IVF Agreement represented a valid, binding agreement regarding the disposition of the embryos. Terrell explained he elected to sign the IVF Agreement because he believed it was "honorable" to do so under the circumstances. Relying on the "Note," Terrell testified he never intended for Torres to use the embryos without his consent. He explained that when he signed the IVF Agreement, he hoped to have children with Torres "[i]f she survived," but at that time he thought her survival unlikely.

---

[3] Terrell's position regarding disposition of the embryos changed during the proceedings: he initially argued the embryos should be destroyed; later he took the position that he should be awarded the embryos to prevent Torres from procreating against his wishes; and still later stated he would agree to their use by a third party, rather than having the embryos stored in perpetuity.

¶10 Terrell also claimed that he only married Torres because she needed health insurance; he went so far as to testify he would not have married her but for that need. Indeed, when asked by counsel if he would have "married [Torres] if she had not presented to [him] that she had cancer and needed [his] health insurance," he responded "[n]o."

¶11 Terrell did not want Torres to have the embryos because he was concerned about his "financial liability in the future, . . . as far as . . . [his] inheritance or, [an obligation to pay] child support for a child that [he] would[] never see[]." Terrell also stated concerns about the possibility of Torres "poisoning" a child against him and "painting" him as a "monster." When questioned by the court as to whether he could "co-parent" with Torres, he answered "[n]o." Torres testified that, should she conceive a child from the embryos, it would be Terrell's choice whether he wished to be involved in the child's life. Torres also testified that she would not seek child support from Terrell, and planned to implant the embryos when, and if, she remarried.

¶12 Torres and Dr. Behera, the fertility specialist, both testified that without the embryos, Torres would be unable to have biological children because her hormone levels were menopausal after chemotherapy. Behera testified that Torres' lab work indicated "low to no" ovarian function. Behera also testified that if Torres took medication to stimulate her ovaries "it probably would not result in any viable eggs." Agreeing thatonly in a "miraculous situation"Torres could achieve "a postmenopausal pregnancy," Behera testified that there was a "less than 1 percent" chance of that occurring. Behera went on to explain that the waiting list for obtaining donated embryos was long. Torres testified that although she had considered adoption, due to her cancer diagnosis and a genetic mutation "BRCA1" that increased her cancer risk, it was "unlikely" she would be considered as an adoptive placement.

¶13 In the decree of dissolution, the family court noted there is no Arizona case law or statutory authority addressing the disposition of embryos in a dissolution proceeding. The court analyzed out-of-state case law and identified three approaches adopted by other courts: (1) the contract approach, (2) the balancing approach, and (3) the contemporaneous mutual consent approach.

¶14 The trial court found that because the parties disagreed on the disposition of the embryos, and because the parties had consented to a judicial determination for disposition in the event of a dissolution, it should apply a balancing approach based on the language of the IVF Agreement.

Analyzing the parties' competing interests, *infra* ¶ 45, the court concluded that Terrell's "right not to be compelled to be a parent outweigh[ed] [Torres'] right to procreate and desire to have a biologically related child." The trial court directed the Fertility Clinic to donate any remaining embryos to a third party or couple.

¶15 Torres timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1).

DISCUSSION

I. Overview: The Law of Other States

¶16 This is a case of first impression in Arizona. To begin, we must determine what law should govern the disposition of cryogenically preserved embryos created using one party's eggs and another party's sperm when the parties disagree. An overview of how other states have approached this issue provides significant context for this analysis.

A. The Contract Approach

¶17 Under the contract approach, an agreement between progenitors, or gamete donors, regarding disposition of embryos is generally presumed to be valid and binding, and will be enforced. *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998). Some courts have held that such agreements are enforceable "subject to mutual change of mind" by the parties. *Id.*; *In re Marriage of Dahl & Angle*, 194 P.3d 834, 840 (Or. Ct. App. 2008) (citation omitted). *Cf. J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001) (holding that a mutual change of mind is not required and that agreements entered into at the time of IVF will be enforced "subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored [embryos]").[4]

¶18 The contract approach was first enunciated in *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992). That case involved dissolution proceedings, in which there was no prior agreement between the parties, a husband and wife, regarding the disposition of cryogenically preserved embryos.[5] *Id.* at 598. The court concluded as a matter of first impression that

---

[4] Courts that have adopted this approach have also first considered whether enforcing the parties' prior agreement would violate state public policy. Neither party in this matter argues that the contract approach violates Arizona public policy.

[5] We discuss this case in more detail below. *Infra* ¶¶ 26-28.

the contract approach should be the preferred method for resolving similar disputes, stating:

> We believe, as a starting point, that an agreement regarding disposition of any untransferred [embryos] in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors.

Id. at 597. The *Davis* court noted such an approach enables "the progenitors, having provided the gametic material giving rise to the [embryos], [to] retain decision-making authority as to their disposition." *Id*.

¶19 The contract approach has been the most preferred and most adopted approach nationwide. *See Szafranski v. Dunston ("Szafranski I")*, 993 N.E.2d 502, 514, ¶ 40 (Ill. App. Ct. 2013); *Dahl & Angle*, 194 P.3d at 840-41; *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. App. 2006); *Litowitz v. Litowitz*, 48 P.3d 261, 267 (Wash. 2002); *J.B.*, 783 A.2d at 719; *Kass*, 696 N.E.2d at 180; *Davis*, 842 S.W.2d at 597. *But see A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-58 (Mass. 2000) (rejecting the contract approach and concluding that it violated public policy to enforce a contract "that would compel one donor to become a parent against his or her will").

¶20 Courts across jurisdictions have generally agreed that the primary benefit of the contract approach is that it leaves deeply personal decisions involving reproductive choices in the hands of the parties. *Szafranski I*, 993 N.E.2d at 506, ¶ 18 ("[A] benefit[] of a contractual approach is that . . . it removes state and court involvement in private family decisions."). That is, enforcing the parties' prior agreements has the benefit of "both minimiz[ing] misunderstandings and maximiz[ing] procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision." *Roman*, 193 S.W.3d at 50 (quoting *Kass*, 696 N.E.2d at 180).

¶21 The contract approach also provides certainty that the contract will be binding and provides an opportunity for the parties to carefully reflect on their different options and to think through their preferences under different circumstances. *Szafranski I*, 993 N.E.2d at 515, ¶ 41 ("[H]onoring such agreements will promote serious discussions between the parties prior to participating in [IVF] regarding their desires, intentions, and concerns."); *Kass*, 696 N.E.2d at 180 ("[P]arties should be encouraged in advance, before embarking on IVF and cryopreservation, to

think through possible contingencies and carefully specify their wishes in writing."). Moreover, the contract approach "encourages parties to enter into agreements that will avoid future costly litigation." *Szafranski I*, 993 N.E.2d at 506, ¶ 18.

¶22 The primary criticism of the contract approach is that there are numerous "uncertainties inherent in the IVF process" that "extend[] the viability of [embryos] indefinitely and allow[] time for minds, and circumstances, to change." *Kass,* 696 N.E.2d at 180. The court in *Davis* agreed:

> [W]e recognize that life is not static, and that human emotions run particularly high when a married couple is attempting to overcome infertility problems. It follows that the parties' initial "informed consent" to IVF procedures will often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds.

842 S.W.2d at 597; *see also In re Marriage of Witten*, 672 N.W.2d 768, 777 (Iowa 2003) (noting criticism that the contract approach "insufficiently protects the individual and societal interests at stake" by enforcing terms that may be inconsistent with a party's present "wishes, values, and beliefs" regarding "matters of such fundamental personal importance" (quoting Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 Minn. L. Rev. 55, 88 (1999))).

¶23 Another concern with the contract approach is that, as here, the IVF Agreement directing disposition of any embryos may be only part of the informed consent agreement with the Fertility Clinic, which also contains information on the risks of IVF treatment, and therefore can include "anxiety-producing information a patient might be inclined to resist or ignore." Ellen A. Waldman, *Disputing Over Embryos: Of Contracts and Consents*, 32 Ariz. St. L.J. 897, 924 (2000). Combining such medical information with contract provisions regarding divorce and other difficult subjects may make future determinations even more difficult because it adds more "information that is difficult to process and thoughtfully evaluate." *Id.* at 924-25.

¶24 Courts have addressed these concerns by permitting parties to subsequently jointly modify their initial agreement. *See Kass*, 696 N.E.2d at 180; *see also Davis*, 842 S.W.2d at 597 (concluding that permitting initial

agreements to be modified by a subsequent agreement will protect the parties against some of the risks of uncertainty and high emotions). The ability to subsequently amend an agreement allows the parties flexibility to adapt the agreement to changing circumstances to address any new concerns.

B. Balancing Approach

¶25 Next is the balancing approach, where a court balances the competing interests of the parties. *Davis*, 842 S.W.2d at 603. That is, courts will "consider the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions." *Id*. Courts have applied the balancing approach when they are unable to enforce a prior written agreement because it is ambiguous, the agreement grants the court the authority to make the disposition decision, or there is no agreement to enforce. *See id.*; *Reber v. Reiss*, 42 A.3d 1131, 1136 (Pa. Super. Ct. 2012).

¶26 *Davis* provides a framework for analyzing the disposition of embryos outside of a written agreement. In *Davis*, a husband and wife had not entered into any agreement regarding the disposition of embryos in the event of a dissolution. *Davis*, 842 S.W.2d at 598. The wife wished to donate the embryos to another couple. *Id*. at 604. The husband, however, wanted the embryos destroyed. *Id*. at 603-04. After considering the wife's interest in knowing that the "lengthy IVF procedures" she had endured were not "futile," the court concluded that the wife's "interest in donation [was] not as significant as the [husband's] interest . . . in avoiding parenthood." *Id.* at 604.

¶27 The *Davis* court applied the following framework to balance the interests of the parties in the absence of a contract:

> Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the [embryos] in question. If no other reasonable alternatives exist, then the argument in favor of using the [embryos] to achieve pregnancy should be considered.

Id.

¶28 To this end, the *Davis* court also concluded that "[t]he case would be closer if [the wife] were seeking to use the [embryos] herself, but only if she could not achieve parenthood by any other reasonable means."

Id. The court noted that the wife still had the opportunity to undergo further IVF procedures, as she was still able to harvest viable eggs. *Id.* Additionally, she had previously attempted to adopt and therefore exhibited a willingness to "forgo genetic parenthood." *Id*.

¶29 The balancing approach requires a fact-intensive inquiry looking at the parties' interests in light of both current circumstances and those existing at the time of the IVF treatment. A party's interest in parenthood includes the party's interest in having a biologically-related child. The interest in parenthood, however, is broader than that, and may also include adoption. *Cf. Reber*, 42 A.3d at 1138 ("[S]imply because adoption or foster parenting may be available . . . does not mean that such options should be given equal weight in a balancing test."). *Contra In re Marriage of Rooks*, 429 P.3d 579, 594, ¶ 71 (Colo. 2018) ("[B]ecause . . . the relevant interest at stake is . . . achieving or avoiding *genetic* parenthood, courts should not consider whether a spouse seeking to use the []embryos to become a genetic parent could instead adopt a child or otherwise parent non-biological children.").

¶30 Other courts have applied the *Davis* framework. *See Szafranski v. Dunston ("Szafranski II")*, 34 N.E.3d 1132, 1161-62, ¶¶ 124-29 (Ill. App. Ct. 2015); *Szafranski I*, 993 N.E.2d at 515, ¶ 42; *Reber*, 42 A.3d at 1137-42. C*f. J.B.*, 783 A.2d at 716, 720 (agreeing the party wishing to avoid procreation should ordinarily prevail, but "express[ing] no opinion in respect of a case in which a party who has become infertile seeks use of stored [embryos] against the wishes of his or her partner, noting only that the possibility of adoption also may be a consideration, among others, in the court's assessment").

C. Contemporaneous Mutual Consent

¶31 Finally, there is the contemporaneous mutual consent approach, which has only been adopted by the Iowa Supreme Court. *Witten*, 672 N.W.2d 768.[6] Under this approach, "no transfer, release, disposition, or use of the embryos can occur without the signed

[6] *But see McQueen v. Gadberry*, 507 S.W.3d 127, 157-58 (Mo. Ct. App. 2016) (without explicitly adopting the contemporaneous mutual consent approach, affirming the trial court's judgment which jointly awarded embryos to a divorcing couple and ordered that the embryos could not be released for any use without the signed authorization of both parties).

authorization of both donors. If a stalemate results, the status quo would be maintained." *Id.* at 783.

¶32 This approach attempts to avoid many of the concerns regarding judicial or state interference in individual reproductive choices, which involve "highly personal" and "intensely emotional matters." *Id*. at 777-79, 781. This approach has been criticized "as being totally unrealistic" given that "[i]f the parties could reach an agreement, they would not be in court." *Reber*, 42 A.3d at 1135 n.5. For instance, it "give[s] each progenitor a powerful bargaining chip at a time when individuals might very well be tempted to punish their soon-to-be ex-spouses." *Szafranski I*, 993 N.E.2d at 512, ¶ 31 (citing Mark P. Strasser, *You Take the Embryos But I Get the House (and the Business): Recent Trends in Awards Involving Embryos Upon Divorce*, 57 Buff. L. Rev. 1159, 1225 (2009)). As such, applying this approach "invite[s] individuals to hold hostage their ex-partner's ability to parent a biologically related child in order to punish or to gain other advantages." *Id*. We agree with such criticism. We decline to give one party a blanket veto and accordingly reject this approach.

II. Adoption of the Contract Approach

¶33 Having considered each approach, we agree with the majority of jurisdictions and adopt the contract approach. As the dissent points out—and to which the majority agrees—contracts matter. Specifically, we hold that "[a]greements between progenitors, or gamete donors, regarding disposition of their [embryos] should generally be presumed valid binding, and enforced in any dispute between them." *Kass*, 696 N.E.2d at 180. Such agreements, like any contract, can subsequently be modified by written agreement. If the parties have no prior agreement, or if the agreement leaves the decision to the court, the balancing approach provides the proper framework for the determination.[7] Such a framework "recognizes that both

---

[7] During the pendency of this appeal, Arizona adopted a new statute governing the disposition of embryos in a proceeding for dissolution of marriage or legal separation. *See* A.R.S. § 25-318.03. This statute only applies to married couples and will not resolve similar disputes between unmarried persons in the future. *See* A.R.S. § 25-318.03(A); A.R.S. § 25-318(A). The statute directs courts to "[a]ward the in vitro human embryos to the spouse who intends to allow the in vitro human embryos to develop to birth." A.R.S. § 25-318.03(A)(1). Even if the spouses have a disposition agreement, the statute requires the court to award the embryos as prescribed by the statute. A.R.S. § 25-318.03(B). The statute was not in

spouses have equally valid, constitutionally based interests in procreational autonomy . . . [and] encourages couples to record their mutual consent regarding the disposition of remaining [embryos] in the event of divorce by an express agreement." *Rooks*, 429 P.3d at 594, ¶ 72.

¶34 In applying the balancing approach, we agree with other jurisdictions that the party who does not wish to become a parent should prevail if the other party has a "reasonable possibility" of becoming a parent without the use of the embryos. *Davis*, 842 S.W.2d at 604 ("If no other reasonable alternatives exist, then the argument in favor of using the [embryos] to achieve pregnancy should be considered."); *Szafranski I*, 993 N.E.2d at 515, ¶ 42; *J.B.*, 783 A.2d at 719-20.

¶35 Applying these principles, we turn to the facts of this case.

III. Decree of Dissolution

A. The IVF Agreement

¶36 The trial court correctly started its analysis with the parties' contract. Neither party disputes that the IVF Agreement is a valid and enforceable agreement. At issue is how the contract is to be interpreted.

¶37 Torres argues section H of the IVF Agreement "clearly shows that the parties intended for the trial court to make the decision as to the disposition of the frozen embryos." In contrast, Terrell argues that the contract unambiguously provides that the court cannot award one party the embryos without the express written consent of both parties.

¶38 "The interpretation of a contract is a matter of law, which we review de novo." *Earle Invs., LLC v. S. Desert Med. Ctr. Partners*, 242 Ariz. 252, 255, ¶ 14 (App. 2017). "When interpreting a contract . . . it is fundamental that a court attempt to 'ascertain and give effect to the intention of the parties at the time the contract was made if at all possible.'" *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153 (1993) (quoting *Polk v. Koerner*, 111 Ariz. 493, 495 (1975)). "To determine the parties' intent, we 'look to the plain meaning of the words as viewed in the context of the contract as a whole.'" *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 290-91, ¶ 15 (App. 2010) (quoting *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 259 (App. 1983)). When the terms of a valid contract are clear and unambiguous we must give effect to the contract as written. *Grubb & Ellis*

---

effect at the time the trial court made its decision and we are not bound by it in reaching a resolution.

Mgmt. Servs., Inc. v. 407417 B.C., L.L.C., 213 Ariz. 83, 86, ¶ 12 (App. 2006). "In interpreting a contract, we attempt to reconcile and give meaning to all its terms." *Weatherguard Roofing Co., Inc. v. D.R. Ward Const. Co., Inc.*, 214 Ariz. 344, 350, ¶ 27 (App. 2007). Moreover, we must give greater weight to specific provisions—namely those that require an affirmative response from the parties—in a contract "because specific contract provisions express the parties' intent more precisely than general provisions." *ELM*, 226 Ariz. at 291, ¶ 18 (citation omitted).

¶39 The "Note," which Terrell relies on, states that "in the event of a separation or divorce, embryos cannot be used to create a pregnancy without the express, written consent of both parties." Just three pages later, the parties provided the necessary "express, written consent" in subsection H. The parties affirmatively elected that upon divorce or dissolution of their relationship, a court could either award one party the embryos for implantation or award the embryos to a third party for implantation. Moreover, the parties acknowledged they could later change their selections for disposition, "but need[ed] [a] mutual and written agreement" to do so. Subsection H unambiguously governs disposition of the embryos by providing the written consent to overcome the more general "Note." *See id.* In making the choice to allow the court to determine the disposition, the court was required to employ the balancing approach.[8]

¶40 We reject Terrell's argument that section H was included because "if the parties [had] reached an agreement as to final disposition, that agreement would, necessarily, and pursuant to Arizona law, [be] included in either a decree or settlement agreement [pursuant to Arizona Rule of Family Law Procedure 69(A)]." The IVF Agreement makes clear that the parties were free "at any time" to jointly enter into a new agreement and revise their disposition choices—had the parties reached a new agreement, the clinic would honor the parties' choice. Absent such an agreement to modify their choices for disposition of the embryos, the

---

[8] We further note that the IVF Agreement provided three "alternatives" for disposition of the embryos: discarding the embryos, donation to third party to attempt to achieve pregnancy, and use by one partner with "contemporaneous permission" of the other partner. *Supra* ¶ 5. Immediately following that statement, however, the IVF Agreement also states that the disposition of the embryos "may also be controlled by the final decision of a court or other governmental authority having jurisdiction." The parties were therefore aware that the three listed "alternatives" were not exhaustive.

original IVF Agreement applies, and court intervention and decision-making was mandated.

¶41 Terrell next argues that subsection H refers only to divorce, "[t]o read the [IVF Agreement] as allowing a court to direct use of the embryos by one-half of a divorcing couple, but as not allowing such an option to couples who are unmarried and breaking up, or legally separating, is nonsensical." Terrell simply did not read the contractual provision fully. Subsection H of the IVF Agreement applies to the disposition of the embryos in the event of "[d]ivorce" or "[d]issolution of [r]elationship" and, as such, is not limited to divorcing couples. Thus, we do not interpret the IVF Agreement differently depending on the marital status of the contracting parties.

¶42 The dissent posits that our reading of the IVF Agreement renders the "Note" meaningless. It does not. The converse is actually true. If the "Note" controls, it renders meaningless the parties' election in the Disposition Provision, which allows the court to award the embryos to one party for all purposes, including "use to *achieve a pregnancy* in one of us or donation to another couple *for that purpose*." (Emphasis added.) With the dissent's construction of the "Note," only if the parties agree would implantation be possible, which runs against the plain language of Terrell's and Torres' election in section H. The majority considered each provision of the contract together to determine that, by written consent of the parties, the court was authorized to make the disposition determination for the embryos in this case. *See id.* ("[E]ach part of a contract must be read together, 'to bring harmony, if possible, between all parts of the writing.'" (citation omitted)).

B. Balance of Interests

¶43 Given the authorization granted to the court in the IVF Agreement, we must now proceed to balance the interests of the parties. Application of the balancing approach involves mixed questions of law and fact, which we review de novo. *See Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, 233, ¶ 8 (App. 2005). We accept the trial court's factual findings unless they are clearly erroneous. *In re Estate of Newman*, 219 Ariz. 260, 265, ¶ 13 (App. 2008). *See also Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 349, ¶ 21 (App. 2001) ("We can decide whether the superior court correctly balanced the interests only after considering what it found as facts.").

¶44 The balancing approach allows the consideration of parol evidence. *See generally Davis*, 842 S.W.2d at 603-04. In reviewing the application of a balancing test, we accept the trial court's factual determinations. *See Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cty. v. KPNX Broad. Co.*, 191 Ariz. 297, 302 (1998). "We are, however, free to draw our own conclusions of law from these facts." *Id.* To do so is not to reweigh evidence, because as a matter of first impression, the trial court's application of the law to its findings created the error.

¶45 The trial court found that Torres had a strong interest in having her own biologically-related child and it was "extremely improbable" that Torres could achieve a post-menopausal pregnancy without the embryos. Torres had other avenues to parenthood, as further noted by the trial court: "[Torres could] still adopt or seek donation of other embryos, even if the options are more difficult" or "not as desirable as having a biological child of her own." The trial court found Terrell "would face the potential of significant financial responsibilities that despite [Torres'] position cannot be waived by her." The court further concluded that "[Terrell] ha[d] legitimate concerns about parenting with [Torres]" and it was "unlikely the parties [would] be able to co-parent." The court also found credible Terrell's testimony that he "never intended on having children with [Torres] if the parties were not together."

¶46 Here it is undisputed that the sole purpose of the IVF process was for Torres to preserve her ability to have biological offspring. She began the IVF procedure immediately after receiving her cancer diagnosis and information that cancer treatment would likely make it impossible to become a biological parent through normal means. Following her doctor's advice and expertise, Torres elected to preserve embryos, increasing her chances of successful procreation. As explained by Dr. Behera, the most stable preservation method to ensure successful reproduction in the future was to freeze fertilized eggs, or embryos. With this information, Torres located a donor who was prepared to assist in the creation of fertilized eggs. It was only after hearing about the other donor that Terrell agreed to provide his gametes. Although the trial court found that Torres had less than a one percent chance of having biological children through normal means of pregnancy, and that she had gone through great pains to preserve a method by which she could have biological children, the court nevertheless appeared to conclude that the mere possibility that Torres could conceive and bear a biological child after her cancer treatment tipped the balance against Torres' claims to the embryos.

¶47 The trial court erred by improperly concluding Torres' "less than one percent" chance of becoming pregnant through normal means and the remote possibility of adoption or insemination with a donor embryo negated her claims to these embryos. The trial court overstated Torres' ability to become a parent through means other than the use of the disputed embryos. Moreover, the court gave insufficient weight to Torres' desire to have a biologically-related child—which was the entire purpose of engaging in IVF in the first place. In regard to her other avenues of parenthood, Behera gave unrebutted testimony explaining that embryo donation involved being placed on a long waiting list due to the limited number of embryos available. Torres testified that adoption was "unlikely" not only for the reason outlined by Behera, but also because of her medical history, which includes a genetic mutation that substantially increases her risk of cancer. This leaves Torres with less than a one percent chance of having a biological child and only a speculative chance of having children in the future.

¶48 Additionally, the trial court erred when it placed heavy weight on the parties' inability to "co-parent." Nothing in the record suggests that either of them expected or intended to co-parent any offspring derived from the embryos. As the trial court found, "[Torres left] the choice to [Terrell] to be involved or not to be involved in the life of a child if awarded the embryos." At no point did Terrell indicate he had any desire to be a part of a child's life; in fact, he anticipated he may never see children resulting from the IVF procedure.

¶49 The trial court determined that the parties' decision to use IVF—as opposed to freezing "just" Torres' eggs—weighed against her. As the court explained, had she frozen just her eggs, "there would be no further dispute, as [Torres'] eggs would be her sole property and it would not involve the potential of [Terrell] becoming a father against his wishes." This was also error. Not only was Torres' decision to freeze embryos medically supported, the court also heard uncontested testimony that Torres gave up a ready and willing alternate gamete donor. Without Terrell's intervention, Torres would likely have viable cryogenically preserved embryos ready for implantation, as she planned.

¶50 The trial court found the parties "did not contemplate a marriage and . . . bringing children into the world in the typical manner [and] [a]s a result of [Torres'] cancer diagnosis, the parties' actions were more impulsive and expedient." It later credited Terrell's testimony that he did not intend to have children with Torres if the marriage failed, based in part on its finding that "[t]here was no evidence presented that after the

marriage the parties, for example, discussed having children regardless of the status of their relationship."

¶51 While the record supports the conclusion that the parties may not have discussed having children after they married, this is irrelevant to the parties' decision to jointly fertilize embryos. Nothing in the record demonstrates that the IVF Agreement was entered into impulsively or done in contemplation of marriage. Torres, facing infertility and a serious cancer diagnosis, was advised that the only way to preserve her fertility with certainty was to undergo IVF treatments. Torres began IVF with an immediate and specific intent to preserve her fertility. To be sure, the parties entered into the IVF Agreement expediently, but the record shows it was done with deliberation. The fact that Torres had already enlisted the assistance of a different donor demonstrates her purpose—to preserve her ability to have a biologically related child, or children, and not to simply have a child biologically related to Terrell. Even though Terrell doubted Torres would survive the cancer when he entered into the IVF Agreement, his doubts that Torres would live long enough to use the embryos in the future does not relieve him of his obligations under the contract. Torres and Terrell sought to jointly preserve Torres' fertility, and not simply to have a child within a marriage, or even within a relationship.

¶52 It is of course true that if Torres were awarded the embryos, Terrell could be legally responsible to financially support the children.[9] *See* A.R.S. § 25-814(A)(2) (presumption of paternity); *McLaughlin v. Jones ex rel Pima Cty.*, 243 Ariz. 29, 36, ¶ 29 (2017). That reality is the same today as it was when the parties executed the IVF Agreement nearly four years ago.

¶53 Finally, we note the trial court erred as a matter of law to the extent that it considered and relied on a constitutional right to procreational autonomy to resolve the dispute. The trial court appeared to balance what it construed as Torres' "constitutionally established right to procreate" against Terrell's "right not to procreate." Although expressing some skepticism as to whether such "rights" pertained to an agreement between the parties, and as to whether there is in fact a "right" not to procreate, the trial court nonetheless concluded that Terrell's "right not to be compelled

---

[9] *See Albins v. Elovitz*, 164 Ariz. 99, 102 (App. 1990) (noting that a custodial parent may waive child support payments, but "any such agreement[s] [are] not binding on the court and will be enforced only so long as the interest of the child is not adversely affected.").

to be a parent outweigh[ed] [Torres'] right to procreate and desire to have . . . child[ren]."[10]

¶54 We do not agree that such a framework is useful or applicable when two individuals no longer agree on the disposition of embryos and the disagreement cannot be resolved by the terms of a prior agreement. Such constitutional rights are directed at protecting an individual against government intrusion on personal decisions regarding reproduction. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541-42 (1942). Here, the parties specifically empowered the court to decide any future dispute regarding disposition of the embryos. As such, the trial court erred in concluding the dispute here involved a "right" to procreate and a "right" not to procreate. Under the balancing approach, the trial court should have only considered the parties' competing and varying interests.[11]

¶55 We have not, as suggested by the dissent, failed to give due weight and consideration to the trial court, but have adopted its factual findings in reaching our decision. Even as we defer to the court's factual findings, we must hold that the court erred in its application of the balancing approach. This case presents compelling factual support for awarding the embryos to Torres. If the factual underpinnings found by the court here do not support Torres' claim to the embryos, then there is likely

---

[10] For instance, the trial court found that "to the extent either party had a constitutional right regarding procreation with *these* embryos, they both waived the right by . . . signing and executing . . . an agreement." (Emphasis added.)

[11] We note that the trial court also found that awarding Torres the embryos to achieve pregnancy was against public policy because "litigation" over a potential child was "inherent" and would be contrary to A.R.S. § 25-103 (declaring the public policy of this state and the general purposes of Title 25 are "[t]o promote strong families [and] . . . strong family values"). We disagree. Section 25-103 is inapplicable. To apply it to these circumstances, in which one party wants to use embryos to procreate and the other party objects, would always necessarily tip the balance in favor of the objecting party; thus, it would functionally operate to give greater weight to the objecting party's interests much in the same way that the contemporaneous mutual consent approach operates to give the objecting party greater power in a dispute. Further, any conclusion as to whether implantation of the embryos would result in "strong" families and family values is speculative.

no factual scenario which would result in the award of the embryos to one party over the objection of the other. The result reached by the trial court, therefore, would be a de facto adoption of the contemporaneous mutual consent approach—an approach we have rejected. *Supra* ¶ 32.

¶56 After reviewing the record, deferring to the superior court's factual findings, we apply the balancing approach to the competing interests. The majority finds Torres' interests in the embryos—especially given that she gave up the opportunity to use another donor and she is likely unable to become a parent (biological or otherwise) through other means—outweighs Terrell's interest in avoiding procreation. We therefore vacate the trial court's order and remand to the trial court to enter an order awarding Torres the embryos.

IV. Attorney Fees

¶57 Pursuant to A.R.S. § 25-324(A), the trial court has discretion to award a party's reasonable attorney fees "after considering the financial resources of both parties and the reasonableness of the positions each party has taken." We review the trial court's award of attorney fees for an abuse of discretion. *Murray v. Murray*, 239 Ariz. 174, 179, ¶ 20 (App. 2016).

¶58 In the decree, the trial court denied Torres' request for attorney fees and costs after finding "there [was] not a substantial disparity of financial resources between the parties" and "both parties acted unreasonably in a limited way but neither more than the other." Specifically, the trial court found that Torres had acted unreasonably in refusing to "refund [Terrell]'s insurance premiums until just before trial started, even though the law supports such reimbursement." Torres does not contest the trial court's finding regarding the disparity of income. Instead, she contests the trial court's finding that she acted unreasonably and further argues, "[c]ompared to the number of instances showing [Terrell]'s positions were unreasonable, [the] one instance of Torres' unreasonableness does not justify completely [denying] her request for an award of attorney[] fees."

¶59 Even assuming it is undisputed that Terrell was entitled to reimbursement of the insurance premiums, the record supports Torres' contention that Terrell did not request reimbursement until a week before the evidentiary hearing, in the pretrial statement. At the start of the hearing, the parties reached a binding agreement that Torres would reimburse Terrell $2,508.54 for the post-service insurance premiums and waived the issue for purposes of the hearing. Although the trial court has discretion in

determining when a party is unreasonable, based on this record, the trial court abused its discretion in concluding that Torres acted unreasonably.

¶60 We therefore remand the matter to the trial court, for purposes of reassessing Torres' request for attorney fees consistent with A.R.S. § 25-324(A) and our conclusion that Torres was not unreasonable.

CONCLUSION

¶61 For the forgoing reasons, we vacate the trial court's order directing the embryos be donated to a third party. We remand the matter for the trial court to enter an order awarding Torres the embryos, and for the trial court to reconsider its denial of attorney fees. We grant Torres' request for attorney fees and costs on appeal pursuant to A.R.S. § 25-324(A), contingent upon her compliance with Arizona Rule of Civil Appellate Procedure 21.

C R U Z, Judge, dissenting:

¶62 Contracts matter. Arizona's Constitution protects individual rights when it explicitly prohibits the impairment of contractual obligations. Ariz. Const. art. II, § 25. Accordingly, I must respectfully dissent.

¶63 The majority holds the trial court erred *as a matter of law* by not awarding the embryos to Torres, even though:

(1) Neither party disputes the enforceability of the Agreement between each other, *see supra* ¶ 36; and

(2) Only the interpretation of the contract language is at issue, *see id.*, and a specific contract provision, which is entitled to greater weight under contract law, expresses the parties' precise intent that "[e]mbryos cannot be used to produce pregnancy against the wishes of the partner. For example, in the event of a separation or divorce, embryos cannot be used to create a pregnancy without the express, written consent of both parties . . . ." *See supra* ¶ 6.

¶64 As the majority concedes, the Note at the outset of Section 10 states that neither party may use the embryos to create a pregnancy without the written consent of the other. In interpreting Section 10(H), however, the

majority incorrectly concludes in paragraph 43 that a court interpreting the Agreement can disregard the Note and proceed to allocate the embryos according to a balancing test that is nowhere to be found in the Agreement. In other words, the majority concludes that when called upon to decide a question that the parties have addressed in the Agreement, the court is not governed by that Agreement.

¶65 But 10(H) does not say that. Instead, it recognizes that, in the case of a dissolution or separation, the Clinic can relinquish control of the embryos only upon receipt of a court order or agreement. It is no surprise that the form contract drafted by the Clinic would insulate the Clinic, for its own protection, from the obligation of having to act in the event of a disagreement between the parties. That is the meaning of the language in 10(H) that the parties checked, to the effect that a decree or settlement agreement "will be presented to the Clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose." But nothing in the Agreement states that a court is free to disregard the other terms of the Agreement when it decides the question. Instead, 10(H) recognizes that, upon dissolution or separation, the court does what courts do: interpret the Agreement to decide the matter.

¶66 The majority concludes that because 10(H) refers to the specific situation of a dissolution or separation, it should "control" over the Note. But the Note itself specifically states that it applies in the event of separation or divorce: "For example, in the event of a separation or divorce, embryos cannot be used to create a pregnancy without the express, written consent of both parties . . . ." Under the Note, the court may not allocate the embryos to Torres because Terrell does not consent. Because the parties did not check the box to signify their agreement that the embryos could be destroyed, the only available option under the Agreement was donation to a third party. Instead, the majority's interpretation of Section 10 would render a part of the contract—the Note—meaningless. That is, "in the event of separation or divorce, embryos cannot be used to create a pregnancy **without the express, written** consent of both parties," is language wholly cast aside because the majority now has balanced the interests in favor of Torres. (Emphasis added.) *See Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 478, ¶ 56 (App. 2010) (stating the court should not construe one contractual term in a way that renders another meaningless) (citation omitted); *Gesina v. Gen. Elec. Co.*, 162 Ariz. 39, 45 (App. 1988) ("Each section of an agreement must be read in relation to each other to bring harmony, if possible, between all parts of the writing.") (citation omitted).

¶67 The two options available to the parties—(1) allow one of the two parties to use the embryos for pregnancy as to one of the parties, or (2) donate them to another couple—are *consistent* with the parties' selections under additional sections of the Agreement, such as Sections A, B, D, and E. Those Sections of the Agreement anticipate and provide for other situations in which the Clinic would need to dispose of the embryos. Those are discontinuation of IVF treatment, nonpayment of storage fees, age-limited storage, death of a patient, and divorce or dissolution of the relationship of the parties. Most notably, Section H is the only circumstance of the five enumerated where the parties would be on opposing sides of a lawsuit. No other circumstance, not even the death of a party, requires a court order or settlement agreement for the Clinic to release the embryos. Logically, as discussed above, because of the potential for legal exposure, in divorce cases the Clinic requires the parties to produce either a court order or settlement agreement before it will release the embryos to either party. This requirement shields the Clinic from the risk of inadvertently releasing the embryos to the wrong party or releasing the embryos to a party who may use them to produce pregnancy against the wishes of the other partner, in clear violation of the terms of the Agreement. On the other hand, if the divorcing parties agree that one party may use the embryos for implantation, a court order need not be provided, so long as the settlement agreement displays the "contemporaneous permission" of the parties. This interpretation of the IVF Agreement gives effect to Sections A, B, D, E, and H without rendering any one of them meaningless.

¶68 Torres testified acknowledging the binding effect of the contract, admitting "we did sign a contract and we agreed to these provisions." Because the Agreement requires the contemporaneous permission of the other partner before one of them may use the embryos, when it states that "in the event of a separation or divorce, embryos cannot be used to create a pregnancy without the express, written consent of both parties," given that Terrell does not consent to the embryos being given to Torres, Section H's requirement directs the court to direct the Clinic to exercise the only remaining alternative: that the embryos be donated to another couple. Torres admitted she understood this to be the only alternative under the Agreement and that her request to have the embryos awarded to her was a request for relief outside the terms of the Agreement. Torres' own admission is telling:

> Q. What are you asking the court to order with regard to the embryos?

> A. I'm asking the court to order that they be awarded to me with use ***or in the alternative to be donated just like the contract***. I want—you know, we both made this agreement when we were okay. And I understand things didn't go the way we planned—or at least the way I planned, I'm not sure. ***But we did sign a contract and we agreed to these provisions***. ***We agreed to donate them***. Never did we select to destroy them.

(Emphasis added.)

¶69 Here, the majority, instead of construing the contract in a way that harmonizes all sections and is consistent with Torres' own understanding of their Agreement, interprets Section H to grant discretion to a court presiding over a dissolution "to make the disposition determination for the embryos in this case," without concern for other provisions of the parties' Agreement. *See supra* ¶42. The majority incorrectly concludes that Section 10(H) charges the court with deciding between awarding them to either party or donating them to another couple untethered to the constraints of the Agreement. Respectfully, I believe this conclusion is wholly unsupported. If the parties intended to grant a court the power to determine who should receive the embryos upon their divorce, unconstrained by the other terms of their Agreement, the IVF Agreement would have said so explicitly.

¶70 The IVF Agreement contains express language explicitly prohibiting the result the majority reaches today. Specific provisions in a contract are entitled to greater weight "because specific contract provisions express the parties' intent more precisely than general provisions." *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 291, ¶ 18 (App. 2010) (citing *Tech. Equities Corp. v. Coachman Real Estate Inv. Corp.*, 145 Ariz. 305, 306 (App. 1985), and *Cent. Hous. Inv. Corp. v. Fed. Nat'l Mortg. Ass'n*, 74 Ariz. 308, 311 (1952)); *see also Duenas v. Life Care Ctrs. of Am., Inc.*, 236 Ariz. 130, 140, ¶ 34 (App. 2014). The Agreement says that the "[e]mbryos cannot be used to produce pregnancy against the wishes of the partner. . . . without the ***express***, ***written*** consent of both parties . . . ." (Emphasis added.) If the parties intended that in the event of a divorce a court should be the ultimate decisionmaker, their written agreement would state that the terms of the Agreement have no effect in the context of a divorce. Likewise, if Torres wanted to be permitted to use the embryos regardless of the Terrell's consent, she should have included such language in the Agreement or otherwise made plain that she did not agree to the requirement that his written consent would be required to make use of the embryos. By Torres'

own testimony, we know Terrell was not her only sperm donor option. Torres' ex-boyfriend had previously agreed to donate his sperm. Whether that ex-boyfriend would have agreed to donate his sperm without limitation on her use of the resulting embryos, or whether any sperm contribution by that ex-boyfriend would have generated embryos is speculative; but the terms of the contract for obtaining Terrell's sperm contribution were clear, agreed to by the parties and memorialized in a signed contract. Torres chose, despite having another donor option, to enter the Agreement and IVF process with Terrell.

¶71 Not only do I disagree with the majority's conclusion that the Agreement granted the court the power to decide the issue based not on the language of the Agreement but instead by balancing the parties' interests, I also disagree with the majority's decision to balance those interests itself. In so doing, the majority has not accorded due weight to the discretion of the superior court to consider the evidence and decide issues of credibility.

¶72 Because it is a legal question, we review *de novo* the trial court's choice of a legal principle to apply. *Pullen v. Pullen*, 223 Ariz. 293, 295, ¶ 9 (App. 2009). However, because the weight to which a factor is given is a factual question within the discretion of the trial court, the law requires that we review the court's weighing of factors in a balancing test for an abuse of discretion, giving appropriate deference to the trial court's ruling, and we will uphold the court's application of those factors if the court's decision is supported by sufficient evidence. *Id.* at 295-96, ¶ 9; *State v. Chapple*, 135 Ariz. 281, 297 n.18 (1983) ("Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case . . . . Where a decision is made on that basis, it is truly discretionary, and we will not substitute our judgment for that of the trial judge . . . .") (internal citations omitted).

¶73 Although we do not reweigh evidence on appeal, here the majority holds the trial court erred as a matter of law in its *application* of the balancing approach—in other words, it concludes the trial court correctly decided to undertake to balance the parties' respective interests but weighed them incorrectly. This is clear from the majority's listing of what the trial court did wrong: "The trial court erred by improperly concluding Torres' 'less than one percent' chance of becoming pregnant through normal means and the remote possibility of adoption or insemination with a donor embryo negated her claims to these embryos"; "the court gave insufficient weight to Torres' desire to have a biologically related child"; "the trial court erred when it placed heavy weight on the parties' inability to 'co-parent'"; the court improperly weighed Torres' decision to freeze

embryos as opposed to just her eggs; and the court placed too much emphasis on its findings regarding the parties' marriage, calling the parties' actions "impulsive and expedient." *See supra* ¶¶ 47-50.

¶74 Under *Davis v. Davis*, the interests of the party wishing to avoid procreation should prevail in such a balancing, assuming the other party has a reasonable possibility of achieving parenthood by other means. 842 S.W.2d 588, 604 (Tenn. 1992). However, if no other reasonable alternatives exist, then the argument in favor of allowing the partner to use the pre-embryos to achieve pregnancy should be considered. *Id.* The lack of reasonable alternatives does not automatically require the court to award the embryos to the party seeking parenthood, but instead requires that it weigh that fact along with the other interests of the parties to resolve disposition of the embryos in a fair and responsible manner. *Id.* at 591.

¶75 Here, it is undisputed that when Torres signed the contract, she understood and agreed that she could not use the embryos without Terrell's permission. Nevertheless, balancing her interests to use the embryos against Terrell's desire not to have Torres use the embryos to achieve parentage, the trial court determined that Terrell's right not to be compelled to be a parent outweighed Torres' right to become a biological parent. Supporting its conclusion, the trial court found Terrell had an interest in choosing not to parent a biological child with Torres outside of marriage, would face a potentially significant financial responsibility of raising children, and that Torres waived her interest in procreating with the embryos created with Terrell's genetic contribution by signing the contract.[12]

¶76 The majority on one hand agrees with *Davis* and relies on it to support application of the balance of interests approach, but on the other ignores that *Davis* recognized "the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation." 842 S.W.2d at 601; *Eisenstadt v. Baird*, 405

---

[12] To the extent the court's order was based on public policy, I agree with the majority that it may have been an improper consideration, though I agree that Terrell had an interest and right not to be forced to procreate with Torres if he did not wish to do so. As the court found, Terrell testified he did not intend to have children with Torres if they were not together, and neither Torres nor Terrell presented evidence they discussed having children together if the relationship ended, nor did they execute any further agreements saying otherwise.

U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or *beget* a child.") (emphasis added) (citation omitted). "The equivalence of and inherent tension between these two interests are nowhere more evident than in the context of *in vitro* fertilization." *Davis*, 842 S.W.2d at 601. While crediting Torres' interest (right) in biological procreation and the difficulty she would otherwise encounter if not granted the embryos, the majority disregards Terrell's interest (right) in not having biological children, though they both equally extend from the same right of procreational autonomy—a "*right* to procreate" and a "*right* to avoid procreation." *See id.* at 601, 603 (emphasis added); discussion *supra* Section II.B. Although the majority correctly notes this case does not present the same type of government intrusion on the parties' personal decisions regarding reproduction, *see supra* ¶¶ 53-54, it errs by separating the parties' rights from the interests protected by those rights.

¶77 Moreover, the trial court did not improperly discount Torres' interest in having children. The court considered Torres' "strong interest in having a biological child," and acknowledged "the evidence supports that it would be almost impossible for [Torres] to become pregnant through normal means of pregnancy and through the use of any existing egg." On the other hand, the court noted Torres could achieve parenthood by other means.

¶78 The majority concludes "[t]he trial court overstated Torres' ability to become a parent through means other than the use of the disputed embryos." *See supra* ¶ 48. In support of this proposition, the majority relies on Dr. Behera's testimony that "embryo donation involved being placed on a long waiting list," and on Torres' testimony that she has thought of adoption but her medical history makes it unlikely that she would be given the opportunity to adopt a child. But the court heard no evidence, other than Torres' speculation, regarding her perceived inability to adopt children. To be sure, Dr. Behera offered no testimony regarding the likelihood that Torres could achieve parenthood through adoption.

¶79 In *Davis*, the court concluded that "if [the wife] were unable to undergo another round of IVF, or opted not to try, she could still achieve the child-rearing aspects of parenthood through adoption." 842 S.W.2d at 604. While Torres asserts her desire to have biological children—an interest entitled to some weight—the trial court found she can still adopt or seek donation of other embryos, even if those avenues were more difficult.

Arizona law treats biological children and adopted children the same. A.R.S. § 8-117 ("On entry of the decree of adoption, the relationship of parent and child and all the legal rights, privileges, duties, obligations and other legal consequences of the natural relationship of child and parent thereafter exist . . . as though the adopted child were born to the adoptive parent in lawful wedlock."). Torres may have a higher interest in biological children and the trial court may give weight to her interest, but I am wary of a judicial determination that a greater weight to biological parenthood exists over adoptive.[13] Furthermore, any medical concerns regarding her ability to adopt a child or to raise adoptive children are similarly present during pregnancy and biological child-rearing. And Torres was medically cleared by her oncologist to become pregnant through IVF. Arguably, if Torres' medical history does not prevent her from achieving parenthood through implantation, it should not act as a bar to adoption either. To conclude Torres is likely unable to become a parent through adoption is to step outside out role and reweigh the credibility of Torres' self-serving testimony. The trial court saw and heard Torres testify. As such, the court was free to take all positions, significance of interests, and burdens into account when making credibility determinations and resolving the conflicting interests of the parties, including those of her prospective children if Torres suffers future medical hardship. *Davis*, 842 S.W.2d at 603. Therefore, the trial court gave proper consideration to Torres' ability to become a parent through adoption.

¶80 Also, while it is true that the possibility of a child support obligation existed when Terrell signed the IVF agreement, the terms of the Agreement protected him, in the event of a separation or divorce, from incurring that financial responsibility without his express written consent. Moreover, a father's involvement with children may extend beyond simple financial support, to the raising and caring for children in every way contemplated by society, just as the mother's involvement extends beyond maternal care to financial support. The majority's ruling also ignores Terrell's position that, given Torres' connection to Terrell's family and friends, there exists a high likelihood that any children, potentially seven or more of them, born of the embryos would be known to Terrell's family and

---

[13] *Contra Reber v. Reiss*, 42 A.3d 1131, 1139 (Pa. Super. Ct. 2012) ("There is no question that the ability to have a biological child and/or be pregnant is a distinct experience from adoption. Thus, simply because adoption or foster parenting may be available to Wife, it does not mean that such options should be given equal weight in a balancing test.").

friends, forcing him to choose between accepting parenthood or crassly and openly avoiding it. The trial court properly weighed these factors.

¶81 Notwithstanding the contract, the trial court balanced the competing interest of the parties. Still, consistent with the parties' contractual Agreement, the court awarded the embryos to the IVF center to allow another couple to bring them to life. The majority reweighs the evidence to reach a different result. For the foregoing reasons, I dissent from the majority opinion vacating the trial court's order and directing the trial court to award Torres the embryos based on the majority's own re-weighing of the parties' interests.

¶82 I further dissent as to the form of relief granted. If we conclude the court erred as a matter of law when it improperly weighed Torres' interests, then, rather than putting ourselves in the position of fact-finder by weighing the interests of the parties, we should remand this matter to the trial court for a proper weighing of the interests. *See, e.g.*, *Owen v. Blackhawk*, 206 Ariz. 418, 423, ¶¶ 22-23 (App. 2013) (remanding upon finding the trial court failed to properly consider father's engagement and certain related evidence, with instructions to the trial court to give such evidence "full consideration"). It is not our role as an appellate court to invade the factual province of the superior court and balance the interests of the parties ourselves.

¶83 Do contracts matter? I believe they do. Therefore, because the contract of these parties explicitly prohibits the outcome reached by the majority, and because it is outside our purview to reweigh the evidence, I would affirm the trial court's judgment, or, in the alternative, remand the matter to the trial court for a new weighing of the parties' interests.

AMY M. WOOD • Clerk of the Court
FILED: AA

1 CA-CV 17-0617 FC
TERRELL VS TORRES

Electronic Index of Record
MAR Case # FN2016-001785

No.	Document Name	Filed Date
1.	PETITION FOR DISSOLUTION OF A NON-COVENANT MARRIAGE	Aug. 11, 2016
2.	**RESTRICTED** FAMILY COURT / SENSITIVE DATA COVERSHEET WITHOUT CHILDREN (CONFIDENTIAL RECORD)	Aug. 11, 2016
3.	PRELIMINARY INJUNCTION	Aug. 11, 2016
4.	NOTICE OF YOUR RIGHTS ABOUT HEALTH INSURANCE COVERAGE WHEN A PETITION FOR DISSOLUTION (DIVORCE) OF MARRIAGE IS FILED	Aug. 11, 2016
5.	SUMMONS	Aug. 11, 2016
6.	(PART 1 OF 2) NOTICE OF FILING ACCEPTANCE OF SERVICE	Oct. 12, 2016
7.	(PART 2 OF 2) NOTICE OF FILING ACCEPTANCE OF SERVICE	Oct. 12, 2016
8.	NOTICE OF FAILURE TO SERVE AND INTENT TO DISMISS YOUR CASE	Oct. 13, 2016
9.	PETITION TO TRANSFER MATTER TO CONCILIATION COURT FOR COUNSELING PURSUANT TO A.R.S. 25-381.09	Oct. 27, 2016
10.	NOTICE OF APPEARANCE	Oct. 27, 2016
11.	CREDIT MEMO	Oct. 28, 2016
12.	**ME: PETITION/CONCILIATION ACCEPTED [11/02/2016]**	**Nov. 7, 2016**
13.	OBJECTION TO PETITION TO TRANSFER TO CONCILIATION COURT FOR COUNSELING	Nov. 7, 2016
14.	ORDER TO APPEAR FOR CONCILIATION COURT SERVICES	Nov. 9, 2016
15.	UPDATE INFORMATION ON ADDRESS	Nov. 22, 2016
16.	**ME: ORDER ENTERED BY COURT [11/22/2016]**	**Nov. 28, 2016**
17.	REQUEST FOR COURT TO SCHEDULE RESOLUTION MANAGEMENT CONFERENCE	Dec. 7, 2016
18.	**ME: CASE ON INACTIVE CALENDAR [12/09/2016]**	**Dec. 13, 2016**
19.	NOTICE OF TERMINATION OF CONCILIATION COURT SERVICES AND ORDER LIFTING CONCILIATION STAY	Jan. 3, 2017

Electronic Index of Record
MAR Case # FN2016-001785

No.	Document Name	Filed Date
20.	RESPONSE TO PETITION FOR DISSOLUTION OF A NON-COVENANT MARRIAGE (WITHOUT MINOR CHILDREN)	Jan. 23, 2017
21.	**ME: RESOLUTION MANAGEMENT CONFERENCE SET [01/26/2017]**	**Jan. 27, 2017**
22.	RESOLUTION STATEMENT	Feb. 8, 2017
23.	RESPONDENT'S RESOLUTION MANAGEMENT STATEMENT	Feb. 8, 2017
24.	**ME: CASE ON INACTIVE CALENDAR [02/13/2017]**	**Feb. 14, 2017**
25.	**RESTRICTED** NOTICE OF FILING AFFIDAVIT OF FINANCIAL INFORMATION	Mar. 3, 2017
26.	**RESTRICTED** AFFIDAVIT OF FINANCIAL INFORMATION	Mar. 3, 2017
27.	**ME: ORDER ENTERED BY COURT [03/07/2017]**	**Mar. 8, 2017**
28.	(PART 1 OF 2) MOTION TO CONTINUE ON INACTIVE CALENDAR	Mar. 21, 2017
29.	(PART 2 OF 2) MOTION TO CONTINUE ON INACTIVE CALENDAR	Mar. 21, 2017
30.	MOTION TO COMPEL PETITIONER TO EXECUTE AUTHORIZATION FOR CONTINUED STORAGE OF EMBRYOS	Apr. 12, 2017
31.	**ME: RULING [04/14/2017]**	**Apr. 18, 2017**
32.	MOTION TO SET FOR TRIAL AND CERTIFICATE OF READINESS	Apr. 25, 2017
33.	RESPONSE TO MOTION TO COMPEL PETITIONER TO EXECUTE AUTHORIZATION FOR CONTINUED STORAGE OF EMBRYOS	Apr. 26, 2017
34.	**ME: STATUS CONFERENCE SET [04/27/2017]**	**Apr. 28, 2017**
35.	MOTION TO STRIKE PETITIONER'S RESPONSE TO MOTION TO COMPEL PETITIONER TO EXECUTE AUTHORIZATION FOR CONTINUED STORAGE OF EMBRYOS	May. 1, 2017
36.	RESPONSE TO MOTION TO STRIKE PETITIONER'S RESPONSE TO MOTION TO COMPEL PETITIONER TO EXECUTE AUTHORIZATION FOR CONTINUED STORAGE OF EMBRYOS	May. 3, 2017
37.	**ME: ORDER ENTERED BY COURT [05/04/2017]**	**May. 5, 2017**
38.	NOTICE OF FILING OF COPY OF CONTRACT WITH BLOOM REPRODUCTIVE INSTITUTE	May. 12, 2017

Electronic Index of Record
MAR Case # FN2016-001785

No.	Document Name	Filed Date
39.	**ME: ORDER ENTERED BY COURT [05/15/2017]**	**May. 16, 2017**
40.	**ME: HEARING SET [05/22/2017]**	**May. 30, 2017**
41.	NOTICE TO COURT RE PETITIONER'S FAILURE TO EXECUTE DOCUMENTS FOR CONTINUED STORAGE OF EMBRYOS AND REQUEST FOR SANCTIONS	Jun. 8, 2017
42.	**ME: ORDER ENTERED BY COURT [06/12/2017]**	**Jun. 13, 2017**
43.	(PART 1 OF 2) RESPONSE TO NOTICE TO COURT RE PETITIONER'S FAILURE TO EXECUTE DOCUMENTS FOR CONTINUED STORAGE OF EMBRYOS AND REQUEST FOR SANCTIONS	Jun. 15, 2017
44.	(PART 2 OF 2) RESPONSE TO NOTICE TO COURT RE PETITIONER'S FAILURE TO EXECUTE DOCUMENTS FOR CONTINUED STORAGE OF EMBRYOS AND REQUEST FOR SANCTIONS	Jun. 15, 2017
45.	BRIEF RE EMBRYOS AS PROPERTY	Jun. 16, 2017
46.	HUSBAND'S BRIEF RE DISPOSITION OF FROZEN EMBRYOS	Jun. 16, 2017
47.	REQUEST FOR COURT REPORTER PURSUANT TO LOCAL RULE 2.22	Jun. 21, 2017
48.	REPLY TO NOTICE TO COURT RE PETITIONER'S FAILURE TO EXECUTE DOCUMENTS FOR CONTINUED STORAGE OF EMBRYOS AND REQUEST FOR SANCTIONS	Jun. 23, 2017
49.	**ME: ORDER ENTERED BY COURT [06/23/2017]**	**Jun. 26, 2017**
50.	RESPONDENT'S MOTION FOR LEAVE TO PRESENT TESTIMONY TELEPHONICALLY AT AUGUST 14, 2017 TRIAL	Jul. 21, 2017
51.	RESPONSE TO RESPONDENT'S MOTION FOR LEAVE TO PRESENT TESTIMONY TELEPHONICALLY AT AUGUST 14, 2017 TRIAL	Jul. 31, 2017
52.	ORDER PERMITTING TELEPHONIC TESTIMONY OF DR. MILLIE BEHERA	Aug. 2, 2017
53.	JOINT PRETRIAL STATEMENT	Aug. 7, 2017
54.	MOTION FOR REQUEST FOR ADMISSIONS TO BE DEEMED ADMITTED	Aug. 8, 2017
55.	**ME: ORDER ENTERED BY COURT [08/08/2017]**	**Aug. 9, 2017**

Electronic Index of Record
MAR Case # FN2016-001785

No.	Document Name	Filed Date
56.	RESPONSE TO MOTION FOR REQUEST FOR ADMISSIONS TO BE DEEMED ADMITTED	Aug. 10, 2017
57.	TERRELL/TORRES RULE 69 AGREEMENT	Aug. 10, 2017
58.	**ME: RULING [08/11/2017]**	**Aug. 14, 2017**
59.	**ME: MATTER UNDER ADVISEMENT [08/14/2017]**	**Aug. 16, 2017**
60.	**ME: JUDGMENT/DECREE [08/18/2017]**	**Aug. 21, 2017**
61.	EXHIBITS WORKSHEET H.D. 08/14/2017	Aug. 21, 2017
62.	NOTICE OF APPEAL	Sep. 19, 2017

APPEAL COUNT: 1

RE: CASE: 1 CA-CV 17-0617 FC

DUE DATE: 10/18/2017

CAPTION: TERRELL VS TORRES

EXHIBIT(S): H.D. 08/14/2017 LIST# 1 3 5 6 7 8 9 11 12 13 14 15 17 18 19
IN A MANILA ENVELOPE

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

DEPOSITION(S): NONE

TRANSCRIPT(S): NONE

COMPILED BY: blacky on October 23, 2017; [2.5-17026.63]
\\ntfsnas\c2c\C2C-6\FN2016-001785\Group_01

1 CA-CV 17-0617 FC
TERRELL VS TORRES

Electronic Index of Record
MAR Case # FN2016-001785

CERTIFICATION: I, MICHAEL K. JEANES, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.

The bracketed [date] following the minute entry title is the date of the minute entry.

CONTACT INFO: Clerk of the Superior Court, Maricopa County, Appeals Unit, 175 W Madison Ave, Phoenix, AZ 85003; 602-372-5375

LAW OFFICE OF DENNIS P. LEVINE, P.C.
1305 West McDowell Road
Phoenix, AZ 85007-1798
(602) 253-5880
Dennis P. Levine State Bar No. 003667
dplevinepc@aol.com
Debora M. Levine State Bar No. 029836
dmlevinejd@aol.com
Attorney for Respondent

(602) 253-5880
FAX (602) 252-6494

LAW OFFICE OF
DENNIS P. LEVINE, P.C.
1305 W. McDOWELL ROAD
PHOENIX, ARIZONA 85007-1798

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

In re the matter of:	NO. FN2016-001785
JOHN JOSEPH TERRELL, Petitioner, and **RUBY TORRES,** Respondent.	NOTICE OF FILING OF COPY OF CONTRACT WITH BLOOM REPRODUCTIVE INSTITUTE (Assigned to the Hon. Ronee Korbin Steiner)

Respondent, RUBY TORRES, herein submits a copy of the parties' "Informed Consent Packet for Assisted Reproduction: In Vitro Fertilization, Intracytoplasmic Sperm Injection, Embry Biopsy for Pre-Implantation Genetic Screening, Assisted Hatching & Embryo Cryopreservation" pursuant to this Honorable Court's minute entry dated May 4, 2017 (filed by the Clerk of the Court on May 5, 2017).

The Court's attention is directed to page 16, letter H, which states, in relevant part, as follows:

> H. Divorce or Dissolution of Relationship
>
> In the event of the patient and her spouse are divorced or the patient and her partner dissolve their relationship, we agree that the embryos should be disposed of in the following manner (check one box only):

☒ A court decree and/or settlement agreement will be presented to the Clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose.

☐ Destroy the embryos.

It should be noted that the parties' initials appear next to the box that states the court decree will direct use to achieve a pregnancy or donation to another couple for that purpose. The box permitting destruction of the embryos is **not** checked nor do the parties' initials appear next to said checkbox.

RESPECTFULLY SUBMITTED this 12th day of May 2017.

LAW OFFICE OF DENNIS P. LEVINE, P.C.

By Debora M. Levine
DEBORA M. LEVINE
Attorney for Respondent

COPY of the foregoing
e-filed this 12th
day of May 2017, to:

The Hon. Ronee Korbin Steiner
Judge of the Superior Court

COPY of the foregoing
emailed & mailed this 12th
day of May 2017, to:

Allie Stoddard
Stoddard Law Group PC
2375 E. Camelback Rd., Ste 600
Phoenix, AZ 85016-3493

By: Debora M. Levine

LAW OFFICE OF
DENNIS P. LEVINE, P.C.
1305 W. McDOWELL ROAD
PHOENIX, ARIZONA 85007-1798
(602) 253-5880
FAX (602) 252-6494

Patient: Ruby Torres DOB: [redacted] Partner: JOHN TERRELL DOB:

Embryo Cryopreservation & Embryo Disposition

Consent to Embryo Cryopreservation

This consent, made and entered into on the 11 day of JULY, 2014 in Maricopa County, Arizona, relating to the services authorized to be performed by the Fertility Treatment Center (FTC), through its authorized representatives.

1. I/We, Ruby Torres (Female Partner) and JOHN TERRELL (Male Partner), the undersigned, are over eighteen (18) years of age and are citizens and residents of PHOENIX, AZ (city/state).

2. I/We have agreed to submit our embryos (s) that result from in vitro fertilization or micromanipulation to the process of cryopreservation (freezing). Freezing of embryos is a common procedure. This process involves cooling of the embryo(s) under conditions determined by the Fertility Treatment Center and its designees. For a "freeze all" IVF cycle, the embryo(s) are stored in a frozen state until the physicians responsible for the Female Partner's care determine that appropriate conditions exist for transfer of the embryo(s) to the Female Partner's uterus. Each thawed embryo will be examined to determine whether it is medically appropriate to transfer it to the uterus. If so, Embryo Transfer (ET) will occur. If, after thawing, the embryo does not survive the process and does not grow, that embryo will not be transferred back into the Female Partner's or anyone's uterus.

   Freezing of embryos following a fresh embryo transfer is also a common procedure. Since multiple eggs (oocytes) are often produced during ovarian stimulation, on occasion there are more embryos available than are considered appropriate for a fresh embryo transfer to the uterus without a fresh embryo transfer. These embryos, if viable, can be frozen for future use. This saves the expense and inconvenience of stimulation to obtain additional eggs in the future. Furthermore, the availability of cryopreservation permits patients to transfer fewer embryos during a fresh cycle, reducing the risk of high-order multiple gestations (triplets or greater). At Fertility Treatment Center, the clinical pregnancy success rates for cryopreserved embryos transferred into the uterus is greater than fresh embryos transferred to the uterus.

3. **Indications** – I/We understand the following indications:
   a. To reduce the risks of multiple gestation, specifically pregnancies with triplets or more. In addition, it is hoped that this will increase the pregnancy rate for Assisted Reproductive Procedures.
   b. To preserve fertility potential in the face of certain necessary medical procedures.
   c. To increase the chance of having one or more pregnancies from a single cycle of ovarian stimulation.
   d. To minimize the medical risk and cost to the patient by decreasing the number of stimulated cycles and egg retrievals.
   e. To temporarily delay pregnancy and decrease the risks of hyperstimulation by freezing all embryos, when this risk is high for a fresh transfer. Not all of the embryo(s) will survive the freeze and thaw process.

4. Neither the physician nor the Fertility Treatment Center will guarantee the results of this procedure.

5. I/We understand that the Fertility Treatment Center will store the embryos for up to ten (10) years. At the end of that time the embryos will need to be transferred to a long term storage facility, at the patient's expense.

6. Current techniques deliver a high percentage of viable embryos thawed after cryopreservation, but there can be no certainty that embryos will thaw normally, nor be viable enough to divide and eventually implant in the uterus. Cryopreservation techniques could theoretically be injurious to the embryo. Extensive animal data (through several generations), and limited human data, do not indicate any likelihood that children born of embryos that have been cryopreserved and thawed will experience greater risk of abnormalities than those born of fresh embryos. However, until very large numbers of children have been born following freezing and thawing of embryos, it is not possible to be certain that the rate of abnormalities is no different from the normal rate.

Patient: Ruby Torres DOB: [redacted] Partner: JOHN TERRELL DOB:

7. If pregnancy does occur, referral to a qualified physician for amniocentesis of chorionic villus sampling (removal of a sample of the fluid or cells surrounding the fetus) will be offered. Amniocentesis and chorionic villus sampling are effective in identifying certain chromosomal (genetic) abnormalities and major structural abnormalities in the central nervous system. If an abnormality is identified through amniocentesis, the geneticist and the physicians working with us will discuss the implications of these findings, and we will be given an opportunity to decide whether a termination of the pregnancy will be undertaken. If termination of pregnancy is performed, we agree to accept financial responsibility for the associated care and treatment.

8. IVF and embryo freezing are new areas in which legal principles and requirements have not been firmly established. There are, as yet, no Arizona State laws dealing specifically with these issues. Based on currently accepted principles regarding legal ownership of human sperm and ova (eggs), I/we have been advised that each embryo resulting from the fertilization of the female patients's ovum by the partner's sperm shall be the joint property of both. I/We understand that laws may be established by the State or guidelines may change at any time.

9. As owners of any and all such embryo(s), the consent of both will be required concerning their use or disposition. Such consent must be obtained from patient and partner prior to cryopreservation. Certain use or disposition may also require approval by the Fertility Treatment Center IVF Team.

10. **Disposition of Embryos** – Because of the possibility of you and/or your partner's separation, divorce, death or incapacitation after embryos have been produced, it is important to decide on the disposition of any embryos that remain in the laboratory in these situations. Since this is a rapidly evolving field, both medically and legally, the clinic cannot guarantee what the available or acceptable avenues for disposition will be at any future date.

    Currently, the three alternatives are:

    1. Discarding the cryopreserved embryo(s)
    2. Donating the cryopreserved embryos to another couple in order to attempt pregnancy. (In this case, you may be required to undergo additional infectious disease testing and screening due to Federal or State requirements. This will require contemporaneous permission of both living partners unless otherwise specified by a court decree and/or settlement agreement in the event of divorce or dissolution of the relationship.)
    3. Use by one partner with the contemporaneous permission of the other for that use.

    This agreement provides several choices for disposition of embryos in these circumstances (death of the patient or the patient's spouse or partner, separation or divorce of the patient and her spouse/partner, successful completion of IVF treatment, decision to discontinue IVF treatment, and by failure to pay fees for frozen storage). Disposition may also be controlled by the final decision of a court or other governmental authority having jurisdiction.

    I/We agree that in the absence of a more recent written and witnessed consent form, Fertility Treatment Center is authorized to act on our choices indicated below (items A-H), so far as it is practical.

    I/We also agree that in the event that either our chosen dispositional choices are not available or we fail to preserve any choices made herein, whether through nonpayment of storage fees or otherwise, the clinic is authorized to discard and destroy our embryos.

    Note:

    - Embryos cannot be used to produce pregnancy against the wishes of the partner. For example, in the event of a separation or divorce, embryos cannot be used to create a pregnancy without the express, written consent of both parties, even if donor gametes were used to create the embryos.
    - Embryo donation to achieve a pregnancy is regulated by the FDA (U.S. Food and Drug Administration) as well as state laws, as donated tissue; certain screening and testing of the persons providing the sperm and eggs are required before donation can occur.
    - You are free to revise the choices you indicate here at any time by completing another form and having it notarized.

(Initials)

Patient: Rudy Torres DOB: [redacted] Partner: JOHN TERRELL DOB:

- Your wills should also include your wishes on disposition of the embryos and be consistent with this consent form. Any discrepancies will need to be resolved by court decree.
- Please check the appropriate box in each section to delineate your wishes and initial the bottom of each page.

A. Discontinuation of IVF Treatment

In the event the patient and her spouse or partner mutually agree to discontinue IVF treatment, we agree that any embryos should be disposed of in the following manner (check one box only):

☒ Award to patient, which gives complete control for any purpose, including implantation, donation for research, or destruction. This may entail maintaining the embryos in storage, and the fees and other payments due the clinic for these cryopreservation services.

☐ Award to spouse or partner, which gives complete control for any purpose, including implantation, donation, or destruction. This may entail maintaining the embryos in storage, and the fees and other payments due the clinic for these cryopreservation services.

☐ Donate to another couple or individual for reproductive purposes. If you wish to anonymously donate the embryos to an unknown recipient, Fertility Treatment Center will waive storage and associated cryopreservation fees. You may also designate a couple or individual to receive the embryos. In the event the designated couple or individual is unable or unwilling to accept the embryos, the clinic will determine who receives them.

Please donate to: Name _____

Address _____

_____

Phone _____

Email _____

Special note for embryos created with gamete donors: If your embryos were formed using gametes (eggs or sperm) from a known third party donor, your instruction to donate these embryos to another couple or individual must be consistent with and in accordance with any and all prior agreements made with the gamete donor(s). If anonymous donor gametes were used, written authorization from the gamete donor must be obtained to use these gametes for anything other than reproduction or destruction of the embryos.

☐ Destroy the embryos.

☐ Other disposition (please specify): _____

B. Nonpayment of Cryopreservation Storage Fees

Maintaining embryo(s) in a frozen state is labor intensive and expensive. There are fees associated with freezing and maintaining cryopreserved embryo(s). Patients/couples who have frozen embryo(s) must remain in contact with the clinic on an annual basis in order to inform the clinic of their wishes as well as to pay fees associated with the storage of their embryo(s). In situations where there is no contact with the clinic for a period of two years or fees associated with embryo storage have not been paid for a period of two years and the clinic is unable to contact the patient after reasonable efforts have been made (via registered mail at last known address), the embryo(s) may be destroyed by the clinic in accordance with normal laboratory procedures and applicable law.

If I/we fail to pay the overdue storage fees within 30 days from the date of said mailing, such failure to pay constitutes my/our express authorization to the clinic to follow the disposition instructions we have elected below without further communications to or from us (check one box only):

☒ Donate to another couple or individual for reproductive purposes.

☐ Destroy the embryos.

C. Time-Limited Storage of Embryos

I/We understand that the Clinic will only maintain cryopreserved embryos for a period of 10 years. After that time, we elect (check one box only):

☐ Donate to another couple or individual for reproductive purposes.

☐ Destroy the embryos.

(Initials)

Patient: Ruby Torres DOB: [redacted] Partner: DOB:

JOHN TORELLI

☒ Transfer to a storage facility at our expense.

D. **Age-Limited Storage of Embryos**

I/We understand that the clinic will not normally transfer embryos to produce a pregnancy after I reach age 50 years of age. After this age, I/We elect (check one box only):

☒ Donate to another couple or individual for reproductive purposes.
☐ Destroy the embryos.
☐ Transfer to a storage facility at our expense.

E. **Death of a Patient**

In the event the patient dies prior to use of all the embryos, we agree that the embryos should be disposed of in the following manner (check only one box):

☒ Award to patient's spouse or partner, which gives complete control for any purpose, including implantation, donation, or destruction. This may entail maintaining the embryos in storage, and the fees and other payments due the clinic for these cryopreservation services.

☐ Donate to another couple or individual for reproductive purposes. If you wish to anonymously donate the embryos to an unknown recipient, Fertility Treatment Center will waive storage and associated cryopreservation fees. You may also designate a couple or individual to receive the embryos. In the event the designated couple or individual is unable or unwilling to accept the embryos, the clinic will determine who receives them.

Please donate to: Name _____
Address _____
_____
Phone _____
Email _____

Special note for embryos created with gamete donors: If your embryos were formed using gametes (eggs or sperm) from a known third party donor, your instruction to donate these embryos to another couple or individual must be consistent with and in accordance with any and all prior agreements made with the gamete donor(s). If anonymous donor gametes were used, written authorization from the gamete donor must be obtained to use these gametes for anything other than reproduction or destruction of the embryos.

☐ Destroy the embryos.
☐ Other disposition (please specify): _____

F. **Death of Spouse or Partner**

In the event the patient's spouse or partner dies prior to use of all the embryos, we agree that the embryos should be disposed of in the following manner (check one box only):

☒ Award to patient, which gives complete control for any purpose, including implantation, donation, or destruction. This may entail maintaining the embryos in storage, and the fees and other payments due the clinic for these cryopreservation services.

☐ Donate to another couple or individual for reproductive purposes. If you wish to anonymously donate the embryos to an unknown recipient, Fertility Treatment Center will waive storage and associated cryopreservation fees. You may also designate a couple or individual to receive the embryos. In the event the designated couple or individual is unable or unwilling to accept the embryos, the clinic will determine who receives them.

Please donate to: Name _____
Address _____
_____
Phone _____
Email _____

Special note for embryos created with gamete donors: If your embryos were formed using gametes (eggs or sperm) from a known third party donor, your instruction to donate these embryos to another couple or individual must be consistent with and in accordance with any and all prior agreements made with the

(initials)

Patient: Ruby Torres DOB: [redacted] Partner: JOHN TORRELL DOB:

gamete donor(s). If anonymous donor gametes were used, written authorization from the gamete donor must be obtained to use these gametes for anything other than reproduction or destruction of the embryos.

☐ Destroy the embryos.

☐ Other disposition (please specify): _____

G. Death of Patient and Spouse or Partner

In the event the patient and her spouse or partner die at the same time, prior to use of all the embryos, we agree that the embryos should be disposed of in the following manner (check one box only):

☒ Donate to another couple or individual for reproductive purposes. If you wish to anonymously donate the embryos to an unknown recipient, Fertility Treatment Center will waive storage and associated cryopreservation fees. You may also designate a couple or individual to receive the embryos. In the event the designated couple or individual is unable or unwilling to accept the embryos, the clinic will determine who receives them.

Please donate to: Name _____

Address _____

_____

Phone _____

Email _____

Special note for embryos created with gamete donors: If your embryos were formed using gametes (eggs or sperm) from a known third party donor, your instruction to donate these embryos to another couple or individual must be consistent with and in accordance with any and all prior agreements made with the gamete donor(s). If anonymous donor gametes were used, written authorization from the gamete donor must be obtained to use these gametes for anything other than reproduction or destruction of the embryos.

☐ Destroy the embryos.

☐ Other disposition (please specify): _____

H. Divorce or Dissolution of Relationship

In the event the patient and her spouse are divorced or the patient and her partner dissolve their relationship, we agree that the embryos should be disposed of in the following manner (check one box only):

☒ A court decree and/or settlement agreement will be presented to the Clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose.

☐ Destroy the embryos.

11. The law regarding embryo cryopreservation, subsequent thaw and use, and parent-child status of any resulting child(ren) is, or may be, unsettled in the state in which either the patient, spouse, partner, or any donor currently or in the future lives, or the state in which the ART Program is located. We acknowledge that the ART Program has not given us legal advice, that we are not relying on the ART Program to give us any legal advice, and that we have been informed that we may wish to consult a lawyer who is experienced in the areas of reproductive law and embryo cryopreservation and disposition if we have any questions or concerns about the present or future status of our embryos, our individual or joint access to them, our individual or joint parental status as to any resulting child, or about any other aspect of this consent and agreement. I/We understand that this decision is binding. I/We will retain the right to change our decisions in this regard at any future time, or until the embryo(s) are disposed by written notice to the Fertility Treatment Center IVF Team. At such notification, a new contract will be signed by both Female Partner and Male partner.

12. If the embryo(s) are donated, confidentiality will be maintained and the prevailing legal opinion is that successful offspring will attain the legal status of adopted children without legal ties to the biological parents.

13. In circumstances where the Fertility Treatment Center IVF program is terminated and embryo(s) which have been cryopreserved remain in storage, we will be contacted and all reasonable efforts will be made to arrange for disposition of such embryo(s) in accordance with our desires at such time.

Patient: Ruby Torres DOB: [redacted] Partner: DOB:
JOHN TERRELL

14. Each of us hereby agrees and acknowledges that any of our sperm, ova, or embryo(s) which the Fertility Treatment Center IVF Team determines in the exercise of reasonable medical judgment are non-viable or otherwise not medically suitable for transfer, may be disposed of I accordance with program policies.
15. We are voluntary participants, but we are free to withdraw out consent as to the disposition of our embryo(s) and to discontinue participation by requesting in writing relocation of our embryo(s) to another suitable location at any time without prejudice.
16. If pregnancy occurs, close observation by the Fertility Treatment Center is important and will continue throughout the pregnancy unless we notify in writing the Fertility Treatment Center IVF Team of our objections to the observation. If we or any of our offspring should require any medical treatment as a result of any physical injury arising from our participation in this process financial responsibility for such will be ours. Therefore, payment of all medical costs associated with our participation will be our responsibility. The Fertility Treatment Center will not be held responsible for conditions related to this procedure.
17. IN THE EVENT OF INJURY RESULTING FROM THIS PROCEDURE, THE FERTILITY TREATMENT CENTER IS NOT ABLE TO OFFER FINANCIAL COMPENSATION NOT TO ABSORB THE COSTS OF MEDICAL TREATMENT. HOWEVER, NECESSARY FACILITIES, EMERGENCY TREATMENT AND PROFESSIONAL SERVICES WILL BE AVAILABLE. MY SIGNATURE BELOW, ACKNOWLEDGES MY VOLUNTARY PARTICIPATION IN THIS PROCEDURE, BUT IN NO WAY RELEASES THE MEDICAL STAFF FROM THEIR PROFESSIONAL AND ETHICAL RESPONSIBILITY TO ME.
18. We shall indemnify the Fertility Treatment Center for any attorney's fees, court costs, damages, judgments, or any other losses or expenses incurred by the Fertility Treatment Center or for which they may be responsible with respect to this claim, legal action, or defenses thereto arising out of the Human embryo Cryopreservation process, herein contemplated, including but not limited to and claim or legal action bought by the child(ren) resulting from the Human Embryo Cryopreservation process of their offspring.
19. In signing this agreement, we are aware that this procedure may have serious psychological consequences with respect to, but not limited to the parent / child and husband / partner / wife relationships. We hereby release the Fertility Treatment Center from all liability and responsibility whatsoever for any psychological consequences this procedure may have.
20. We understand that every effort will be made to maintain the confidentiality of our medical records and research material within legal limits; however, absolute confidentiality cannot be guaranteed. We also understand that participants' name will not be releases without expressed consent. Data generated from the IVF-ET program will be presented in scientific format with anonymity maintained.

Patient: Ruby Torres DOB: [redacted] Partner: JOHN TERRELL DOB:

21. Our questions regarding these procedures have been answered to out satisfaction. Our participation is purely voluntary. We understand that we may withdraw our consent at any time prior to the procedure. We have read and understand this form. Our signatures below certify the embryo disposition selections we have made above. We understand that we can change our selections in the future, but need mutual and written agreement as outlined above. We also understand that in the event that none of our elected choices is available, the clinic is authorized, without further notice from us, to destroy and discard our frozen embryos. If we have additional questions later, we understand that we can contact: H. Randall Craig, MD or Millie Behera, MD at (480) 831-2445.

Ruby Torres	JOHN TERRELL
Printed Patient Name	Printed Partner Name
Patient Signature	Partner Signature
FTC employee or Notary Public	FTC employee or Notary Public
7/11/14	7/11/14
Date	Date

A copy of this form is located in your Patient Portal

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2016-001785

08/18/2017

HONORABLE RONEE F. KORBIN STEINER

CLERK OF THE COURT
A. Delgado
Deputy

IN RE THE MATTER OF
JOHN JOSEPH TERRELL

ALLIE E STODDARD

AND

RUBY TORRES

DEBORA M LEVINE

DOCKET-FAMILY COURT CCC
MILLIE BEHERA, M.D., FACOG, FRCSC
BLOOM REPRODUCTIVE INSTITUTE
8415 N PIMA ROAD, SUITE 290
SCOTTSDALE AZ 85258

DECREE OF DISSOLUTION OF MARRIAGE

Petitioner John Joseph Terrell (Husband) filed a Petition for Dissolution on August 11, 2016. Respondent Ruby Torres (Wife) accepted service on October 7, 2016. The matter was transferred to Conciliation Court and placed on a stay. The parties did not reconcile their marital differences. Wife filed her response on January 23, 2017. The parties attended a Resolution Management Conference on February 13, 2017, at which the parties reached limited agreements as set forth on the record and reiterated herein. The parties attended private mediation on April 20, 2017, at which they reached agreements and placed those agreements in writing, which are reiterated herein. A copy of that agreement has been filed with the Clerk of Court.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2016-001785 08/18/2017

The parties did not resolve all of their issues and upon completion of discovery, the current trial date was set.

The Trial in this matter was conducted on August 14, 2017. During the proceedings, the Court heard from the witnesses, including the parties. The Court has since considered the evidence, including the demeanor of the witnesses, reviewed the exhibits as well as the case history, and considered the parties' arguments.

After significant deliberation, the Court makes the following findings and enters the following orders:

THE COURT FINDS as follows:

A. At the time this action was commenced at least one of the parties was domiciled in the State of Arizona and that said domicile had been maintained for at least 90 days prior to the filing of the Petition for Dissolution of Marriage.
B. The conciliation provisions of A.R.S. § 25-381.09 have either been met or do not apply.
C. The parties were married on July 15, 2014 in Phoenix, Arizona. By operation of law, the marital community is deemed to have terminated on October 7, 2016.
D. The marriage is irretrievably broken and there is no reasonable prospect for reconciliation.
E. There are no minor children common to the parties.
F. Wife is not pregnant.
G. This was not a covenant marriage.
H. To the extent that it has jurisdiction to do so, the court has considered, approved and made provision for the maintenance of each spouse and the division of property and debts.

DISSOLUTION OF MARRIAGE

IT IS ORDERED dissolving the marriage of the parties and restoring each party to the status of a single person.

SPOUSAL MAINTENANCE

Neither party has asked for spousal maintenance under A.R.S. § 25-319(A).

IT IS FURTHER ORDERED that neither Husband nor Wife is awarded spousal maintenance.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2016-001785 08/18/2017

DIVISION OF PROPERTY AND DEBTS

Community/Sole and Separate Property Claims and Debts

The Court shall divide any disputed property in accordance with the property's character. Property is characterized by the time of its acquisition. If acquired by either spouse before marriage or acquired during marriage by gift, devise, or descent, property is characterized as separate property. A.R.S. § 25-213(A). The Court shall assign each spouse's sole and separate property to that spouse. A.R.S. § 25-318(A).

Property acquired by either spouse during marriage is characterized as community property (with the exceptions of property acquired by gift, devise, or descent). A.R.S. § 25-211(A). There is a presumption that any property acquired by either spouse during marriage is community property, unless demonstrated otherwise by clear and convincing evidence. *See Sommerfield v. Sommerfield*, 121 Ariz. 575, 578, 592 P.2d 771, 774 (1979). Any property acquired by either spouse outside of Arizona shall be deemed to be community property if such property would have been characterized as community property had it been initially acquired in Arizona. A.R.S. § 25-318(A).

Equitable Division

The Court shall divide community property equitably, although not necessarily in kind, without any regard to marital misconduct. A.R.S. § 25-318(A). As a general presumption, equitable division requires that community property be divided substantially equally. *See Toth v. Toth*, 190 Ariz. 218, 221, 946 P.2d 900, 903 (1997). However, the court may order an unequal division of community property in consideration of excessive or abnormal expenditures or the destruction, concealment, or fraudulent disposition of property. A.R.S. § 25-318(C).

When dividing property, the Court may consider all related debts and obligations. A.R.S. § 25-318(B). To determine property's value, the court shall select a valuation date. The selection of this valuation date rests within the wide discretion of the trial court and shall be tested upon review by the fairness of the result. *See Sample v. Sample*, 152 Ariz. 239, 242-43, 731 P.2d 604, 607-08 (Ct. App. 1986).

Unequal Division of Property

Only rarely is unequal division of community property appropriate to achieve equity. *See Toth*, 190 Ariz. at 221, 946 P.2d at 903 (unequal division of property was appropriate because one spouse contributed substantially disproportionate separate funds compared to the other's contribution); *see also Flower v. Flower*, 223 Ariz. 531, 531, 225 P.3d 588, 588 (Ct. App. 2010)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2016-001785 08/18/2017

(unequal division of property was appropriate because the parties incurred substantial community debt to benefit one spouse's separate property). *But see Inboden v. Inboden*, 223 Ariz. 542, 547, 225 P.3d 599, 604 (Ct. App. 2010) (vacating an order for the unequal division of property because each spouse had contributed separate funds to joint property).

The Court shall consider all equitable factors before ordering an unequal division of community property , including: the length of the marriage, the contributions of each spouse to the community, the source of funds used to acquire the property to be divided, the allocation of debt, and any other factor that may affect the outcome. *See Inboden*, 223 Ariz. at 547, 225 P.3d at 604.

THE COURT FURTHER FINDS that this case does not present a unique set of facts or circumstances. Therefore, an equal division of community property is appropriate to achieve equity.

Real Property

By agreement of the parties, there is no real property to divide. Husband owns a residence from prior to the marriage and the property is affirmed to him as his sole and separate property. Wife waived any claim to the residence.

Personal Property

The parties had one dispute regarding personal property, the dog named "Angel." Husband claims Wife never mentioned the dog as an issue until 3 days prior to the mediation. Wife claims she rescued the dog in 2012 prior to the marriage and should be awarded the dog.

"Arizona law is consistent with the majority position classifying animals as personal property and limiting damages for their negligent injury or death to their fair market value." Kaufman v. Langhofer, 223 Ariz. 249, 252, 222 P.3d 272, 275 (Ct. App. 2009). Neither party has established any fair market value for the dog.

Husband explained the parties rescued her before marriage. The dog was injured. The parties left her and Wife returned to get the dog to take her to the vet. The parties learned the dog's leg was fractured. He helped care for Angel during the time she had a cast although the dog was residing with Husband at the time. Husband stayed at Wife's home a few times per week and when there, he assisted in the dog's care, along with a few other dogs.

Husband claimed that Angel began to reside with him, about 3-4 months after the dog's cast was removed, in about April 2013. Wife was fostering other dogs at the time and Wife told

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2016-001785 08/18/2017

Husband take "your dog to your house," after she got mud all over some furniture. Wife treated Angel differently than her dog Diego.

Angel has been with Husband alone since April 2016, when she left Angel at his residence. When she moved, she took most of her belongings with her but left Angel. Husband was gone from the residence when Wife moved out. The parties differed over the reason for Wife leaving, with Husband claiming they had a verbal altercation, which resulted in a physical altercation between the parties against which Husband defended himself and Wife claiming Husband committed domestic violence.

Wife acknowledged not raising the issue over the dog until just before the parties' private mediation. Husband claimed he paid for all costs associated with the dog post-service including for medical treatment but there was no proof provided as to what those costs were.

Wife asserted she acquired the dog on November 11, 2012, when her mother found the then injured dog near her home. Wife returned the next day and retrieved the dog. Wife posted information on the Arizona Small Dog Rescue's Facebook page and her own page, inquiring about the dog and reflecting she found a dog (she then named Angel). Wife provided numerous photos over time showing the dog in Wife's home and car. She was not living with Husband at the time. Wife provided invoices for veterinary services obtained by Wife. The vet is in Phoenix near her home and Husband resided in Chandler. Wife was listed as the client and her mother was listed as a family member.

The parties moved in together in late September or early October 2015 even though they married earlier. She moved out of the residence April 2016 after being allegedly assaulted by Husband. She claimed being scared by a gun in his possession and that he threatened her with a knife.

Angel was registered and microchipped to Wife. She also made a police report initially upon finding the dog.

She acknowledged leaving the dog at Husband's home, although she stated she did not know where she was going at the time. She waited to raise the issue because she did not think of Angel as "property." Prior to that, she thought the parties could resolve the issues together, which is why she sought reconciliation.

As reflected on the record, it appears that Husband's claim is not about who owned the dog during the marriage but instead, an argument that Wife abandoned the dog and therefore, the dog is now Husband's sole and separate property. Nothing in the record supports that the dog was Husband's pre-marital sole and separate property. The only evidence supports that the dog

was Wife's pre-marital sole and separate property, in spite of leaving the dog at Husband's residence when she moved out. Husband did not cite to any law that reflects the property became his property when Wife moved out. The Court considers Angel as property left in the residence while the matter was pending and not any abandoned property requiring an order awarding the property to Husband.

IT IS ORDERED affirming Angel the dog to Wife as her sole and separate property. Husband shall return Angel to Wife by August 21, 2017. The dog shall be unharmed and well kept.

IT IS FURTHER ORDERED affirming the agreements of the parties from mediation and awarding each party the household and personal property in his or her possession.

IT IS FURTHER ORDERED Husband is awarded as his sole and separate property, subject to any liens or encumbrances on the property, all vehicles including the 2016 Toyota Forerunner, household furniture, furnishings and appliances, and other personal property currently in his possession.

IT IS FURTHER ORDERED Wife is awarded as her sole and separate property, subject to any liens or encumbrances on the property, all vehicles including the 2015 Toyota Camry, household furniture, furnishings and appliances, and other personal property currently in her possession.

IT IS FURTHER ORDERED that any personal property that was the subject of previous orders and which has not been exchanged shall be exchanged on or before September 30, 2017.

Financial Accounts

IT IS FURTHER ORDERED awarding each party any and all financial accounts in his or her own name. There are no financial accounts to divide.

Investment and Retirement Accounts

By agreement of the parties, and without equalization or offset to either party,

IT IS ORDERED awarding to Husband as his sole and separate property:

1. Thrift Savings Plan ending in 5313 to Husband

IT IS FURTHER ORDERED awarding to Wife as her sole and separate property:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2016-001785 08/18/2017

1. Edward Jones account ending in 1414;
2. Edward Jones IRA account ending in 7010;
3. Edward Jones Roth IRA account ending in 8812;
4. American Funds IRA ending in 3360.

IT IS FURTHER ORDERED awarding to each party any other retirement and investment accounts in his or her own name.

Frozen Embryos

The only major point of contention in this matter is over the frozen embryos, stored for the parties during their In Vitro Fertilization ("IVF") process. It is Husband's position that he should be awarded the embryos, that they be discarded, or that they be treated as special property and remain at the Bloom Fertility Treatment Center ("Bloom") unless the parties are able to provide an agreement to the center. It is Wife's position that she should be awarded the embryos.

On July 11, 2014, the parties entered into a contract with Fertility Treatment Center ("FTC") for the IVF, Intracytoplasmic Sperm Injection, Embryo Biopsy for Pre-Implantation Genetic Screening and Assisted Hatching and Embryo Cryopreservation. In other words, the parties decided to have the assistance of the clinic in creating and freezing embryos for impregnation. When they signed the contract, the parties were 4 days from getting married although the parties did not necessarily know that day they were going to be married 4 days later. While the contract was created prior to the marriage, the parties' contract governs their conduct after marriage as it relates to the IVF and freezing of the embryos.

The parties dated on and off for a long period of time as early as 2003, often fighting, breaking up and reconciling over the years. In July 2014, Wife was diagnosed with breast cancer, more fully described below. According to Husband, Wife explained her prognosis to him as "a death sentence." She was afraid for her life and he did not expect her to survive the cancer. Husband testified the parties decided to get married in order to get Wife on his insurance after her cancer diagnosis, although he acknowledged he loved her when they got married. He testified he would not have gotten married but for her need for insurance.

As to the contract, Husband testified he signed the contract after Wife signed it, with Wife having left the packet for him at the house. He testified he was "doing her a favor" by entering into the contract. He thought the parties would have a child together eventually and he had no intent to have her use the embryos without Wife's consent. He then clarified that he intended to have children with her but he did not expect she would live long enough to have children with him.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2016-001785 08/18/2017

Husband indicated he relied on the "consent provision" when he signed the agreement. He is not interested in having a child with Wife at this time. As for financial obligations, he does not want to have such obligations over a child with whom he does not have a relationship. For whatever reason, he also testified he is concerned about how having a child would impact any inheritance he might receive. He also stated neither party contemplated donation of the embryos to another couple, although the Court notes that the parties specifically elected that option in the contract. The Court inquired of Husband whether if faced with an order holding the embryos jointly versus donation, which he would select. Husband responded that he preferred donation. He also offered the option of discarding the embryos, discussed more fully below.

Wife testified she was diagnosed with triple negative bilateral breast cancer, the most aggressive form of cancer. In August of 2014, she was informed she had the genetic mutation, the Braca 1 gene.[1] Her cancer required chemotherapy treatment, which she ultimately completed along with a bilateral mastectomy and then radiation. It was recommended she would then have a full hysterectomy. She was advised that the chemotherapy could place her body in menopause, without a guarantee that it would recover.

She met with fertility specialist Dr. Behera at Bloom, whose testimony is discussed more fully below, in the beginning of July 2014. At that time, they discussed reproductive assistance by Bloom, in order to address the potential inability to reproduce after her cancer treatment. She was given a month to start her chemotherapy.

Initially when Wife approached Husband with the request that he fertilize her eggs for cryopreservation, he refused to participate. As a result, she discussed the potential with another former partner who had agreed to participate. However, Husband agreed thereafter to participate and the parties decided to undergo the process. On July 11, 2014, they discussed the procedure and plan and went in thereafter for further discussions. The contract was signed on that date.

Wife has been told she has no ability to have biological children without the embryos. Her last menstrual period was about October 10, 2016. She still has her uterus and the ability to carry a child if it is prepared for impregnation.[2] She could also use a surrogate but not in Arizona as a result of the state laws. Because of the type of cancer, she presently does not have medical clearance to have a child because her cancer reoccurrence rate would be greater. She believes she could be cleared as early as December of 2017, but there are no guarantees. Thus far, all of her cancer reoccurrence markers have been good.

The parties got married on a whim 4 days after signing the contract. The parties clearly

[1] While no one provided such evidence, the Court wonders whether such a genetic issue would have the potential impact on the embryo and future potential child.
[2] No one explained what "prepared" means.

did not contemplate a marriage and discussions over bringing children into the world in the typical manner. As a result of Wife's cancer diagnosis, the parties' actions were more impulsive and expedient. Wife did not disagree that getting married was a quick way to get on Husband's health insurance, although she claimed there were other options. Wife claimed she had every reason to believe that the parties would be together for the rest of their lives when they signed the agreement.

Wife explained that the parties had a history of breaking up and that Husband had previously assaulted her. Oddly, despite these claims, Wife continued to assert a desire to have children with him, bringing Wife's credibility into question on the issue of the alleged assaults. Her version of events was significantly different than Husband's version. While the Court is unclear which party was the perpetrator of the domestic violence, it is uncontested that the parties have had high conflict over the course of their relationship. Based on the evidence, there is no reason to believe the parties could or would co-parent effectively if left in that position.

Wife and Husband differed on whether they had discussions about child support. Husband stated they had no such discussions, and Wife believes the parties had generic discussions but as they related to other people in Husband's work place. The contract does not discuss the parties' future financial responsibilities.

Wife acknowledged that the parties' agreement reflects neither party can use the embryos without express written permission of the other party, but she believes the Court can override that requirement and award them to her. She does not want the embryos to be destroyed because they are her only chance to have a biological child. She chose to fertilize all of her eggs instead of freezing her eggs alone, despite this provision. Her intent was to preserve her right to have a child. Husband's intent was to have a child with Wife and not for one of them to have it alone and for the parties to agree on the use of the embryos.

Wife leaves the choice to Husband to be involved or not to be involved in the life of a child if awarded the embryos. She has no desire to seek child support. Wife however understands that she cannot waive the child support claim and that the state may have the right to initiate an establishment of child support regardless of any waiver by Wife.[3]

Wife has considered adoption, but she claims it is unlikely she will be given a child to adopt. She has considered the option of receiving a donation of embryos but it also requires a long wait and more financial constraints.

[3] The State can only intervene if either Wife ends up receiving public benefits or if Wife affirmatively requests assistance in collecting child support. Thus, State involvement is not a certainty.

She is seeking reimbursement for the IVF process if the Court does not order the embryos to be awarded to her. She paid $3500.00 prior to the marriage. The Court notes Wife has not produced any proof of these amounts. However, regardless, the Court does not see it as legally appropriate to enter orders of reimbursement for funds spent by one single person as against another single person particularly without proof of such amounts being spent. In addition, at the time Wife entered into this contract, the facts were different. The Court does not see Husband's position as punitive. The Court does not see a basis to support such a claim under these circumstances.

Wife's physician Dr. Millie Behera testified. She is a reproductive and fertility specialist at Bloom, where she met Wife as a patient in July 2014. Wife was referred by a breast cancer specialist for fertility preservation therapy. According to the doctor, Wife elected to preserve her fertility in light of the upcoming cancer treatment and its threats to her fertility. She had 14 eggs developed and of the 14 (13 of which were mature for fertilization), and after fertilization, 7 embryos were cryopreserved for potential use in the future. Thereafter, Wife underwent her cancer treatment.

Before and after her chemotherapy, Wife had lab work to assess her ovarian function. Previous to her chemotherapy, she had normal function. Thereafter, her lab work showed a significant drop in her reproductive function including most recently low to no ovarian function. Her ovaries can be stimulated but they will not likely produce viable eggs. Her hormones are at the menopausal level.

Dr. Behera testified that Wife had the option of freezing just her eggs but she did not take this option. In comparison of the options, embryos have the better ability to be frozen and thawed. This creates a better egg quality and better health. The Court notes that had Wife chosen to freeze her eggs only, there would be no further dispute as Wife's eggs would be her sole property and it would not involve the potential of Husband becoming a father against his wishes. Dr. Behera stated that Wife's chances of getting pregnant are less than 1%, identifying the potential as a "miracle" as post-menopausal pregnancies are rare.

The doctor testified that as an alternative option, and as long as Wife is anatomically healthy, she could carry a child. However, there is a fairly long waiting list for donated embryos.

Dr. Behera is a partner at Bloom. She reflected an understanding of the clinic's general contracts provided to parties before undergoing IVF and cryopreservation. While not asked to interpret the contract, Dr. Behera understands the provisions of the contract to require both parties to consent to the use of embryos for implantation. It is for this reason that Bloom includes the language as reflected in this couple's contract, as set forth below.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2016-001785 08/18/2017

THE CONTRACT

The contract reflects that the parties agreed that the purpose of engaging the assistance of the clinic was to get pregnant and have children. Both parties agreed either to freeze the embryos or to donate them. (Page 1, π 3) The parties acknowledged having had the opportunities to ask all necessary questions. (Page 7, π 4). The contract reflected the parties understood that the embryos were to be stored up to 10 years and thereafter, the embryos would have to be transferred to long term storage. (Page 12, π 5) The contract reflected the parties agreed the property would be considered joint property of the parties (Page 13, π 8). This is the first area of conflict, given that there are other provisions that appear to reflect the disposition of that property as something other than joint property.

The contract specifically requires the consent of both parties. Specifically, the contract states "As owners of any and all such embryo(s), the consent of both will be required concerning their use or disposition. Such consent must be obtained from patient and partner prior to cryopreservation." (Page 13, π 10) The contract sets forth three possible alternatives for the disposition of the embryos as a. discarding the embryos; b. donating them to another couple to attempt pregnancy; and c. Use by one partner with the contemporaneous permission of the other for that use. (Page 13, π 10) This paragraph continues by reflecting "Disposition may also be controlled by the final decision of a court or other governmental authority having jurisdiction." (Page 13, π 10)

The very same paragraph states that "Embryos cannot be used to produce pregnancy against the wishes of the partner. For example, "In [sic] the event of a separation or divorce, embryos cannot be used to create a pregnancy without the express, written consent of both parties, even if donor gametes were used to create the embryos…You are free to revise the choices you indicate here at any time by completing another form and having it notarized." (Page 13, π 10) While the remaining forms allow for certain choices to be elected by the parties, the writing as set forth above creates questions and contradictions in this language.

The inconsistencies arise as a result of provisions on page 14 of the contract. Paragraph A (Discontinuation of IVF treatment) reflects that "In the event the patient and her spouse or partner mutually agree to discontinue IVF treatment, we agree that any embryos should be disposed of in the following manner: Award to patient, which gives complete control for any purpose, including implantation, donation for research or destruction. This may entail maintaining the embryos in storage, and the fees and other payments due the clinic for these cryopreservation services." On page 3 of the contract, Wife is identified as the patient. The other options in this particular paragraph would have allowed the parties to elect a) award to spouse or partner, which gives complete control for any purpose, including implantation, donation for research or destruction. This may entail maintaining the embryos in storage, and the fees and

other payments due the clinic for these cryopreservation services; OR, b) donation of the embryos to another couple. The parties did not elect either of those 2 provisions.

The contract reflects that upon the age limit to transfer the embryos to Wife, the embryos will be donated to another couple or individual for reproductive purposes. (p. 15, π D) In the event of the death of either party, the parties agreed the embryos would be awarded to the other. (p. 15, π E and F) In the event both parties die, the parties agreed to donate the embryos to another couple or person for reproductive purposes. (p. 16, π G) Finally, the contract then states that in case of divorce or dissolution of the relationship, "we agree that the embryos should be disposed of in the following manner: A court decree and/or settlement agreement will be presented to the Clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose." (p. 15, π H)

Both parties signed the agreement, which was witnessed by clinic staff member. Both parties initialed each relevant page of the document. The Court also note that there are no provisions reminding the parties of any financial responsibility regarding a child born as a result of implantation of the embryos. Nowhere in the contract did the parties indicate a desire to destroy the embryos. While Husband testified he simply "accepted" Wife's initials where they were, the Court believes if Husband desired this to be an option, he would have alerted Wife or refused to sign the contract as it was written.[4]

LEGAL ANALYSIS

To date, there is no Arizona appellate case or statute that addresses how the Court should resolve the disposition of embryos in a dissolution action. While the IVF process is nothing short of miraculous to infertile couples, when one party wants to use the embryo for pregnancy and the other does not want to be forced into parentage, significant conflict arises.

The Court reminds the parties that it is not the job of the judiciary to make law. Such responsibilities are those of the legislature. While the legislature could act, it has not done so. For example, unlike other states, Arizona has not adopted the Uniform Parentage Act (UPA), which might have provided certain guidance to the Court. The UPA provides that a former spouse will not be a parent of any child born as a result of the placement of embryos through assisted reproduction after dissolution of marriage unless the former spouse consents to be a parent. Under the UPA, a former spouse may withdraw consent to placement of embryos at any time before they are placed. Arizona does not follow this law and such policy decision is left to the Arizona legislature. As a result, the determination as to the disposition of the embryos is

[4] The Court notes there are places in the contract that are crossed out and where it is indicated "N/A" as in not applicable to the circumstances. There was no evidence presented that Husband could not have refused to sign or amended the contract with Wife.

now left to the Court.

Arizona defines embryos in A.R.S. §36-2311(3) as follows: 3. "Human embryo" means a living organism of the species homo sapiens through the first fifty-six days of its development, excluding any time during which its development has been suspended. A.R.S. §36-2311(3). However, it is defined in context of the criminal statutes and is only used to reflect what cannot be done with embryos, such as the creation of human-animal hybrids. This statute gives no direction to the Court in dissolution cases. While Arizona has adopted portions of the Uniform Probate Code, Arizona has not adopted the 2010 amendment to the UPC that addresses placement of embryos post-dissolution.

While neither party is arguing the viability of the embryos, the Court must make the best determination of what standard to apply to a case where the parties dispute what should happen to their frozen embryos. There are currently no laws that protect "fertilized eggs outside the womb in the way statutes protect fetuses and embryos implanted in wombs." *Jeter v. Mayo Clinic Arizona*, 211 Ariz. 386, 393, 121 P.3d 1256, 1263 (Ct.App. 2005). In *Jeter*, the Court concluded that without legislative direction, embryos are not persons, at least when it came to application of wrongful death statutes. *Id.* at 401, 121 P.3d 1256, 1271. However, the Court went further to reflect that embryos may be entitled to special respect, placing them between "mere human tissue and persons because of their potential to become potential persons" depending on the circumstances in which they are addressed *Id.* (referring to Report of the American Fertilization Society's Ethical Considerations of the New Reproductive Technologies.) As a result, the *Jeter* Court treated the embryos as property of a special nature. This property has no monetary value. This property has no real value unless it is used for the purpose of becoming pregnant.

While Arizona has no statutory or appellate authority, the issue has been addressed in some states. Consequently, the Court looks to other states for guidance on the issue. States have struggled to balance the rights between the spouses and to define, or avoid defining, the subject of the dispute--the embryo. Generally, courts have most often ruled against the party seeking to implant the embryo. These decisions are based on (1) a balancing test, or (2) a requirement of contemporaneous consent to any use of the embryo. The nonperson status of the embryo is a crucial element underlying these decisions. However, in this case, there is a written agreement between the parties and the clinic. As such, and as done in other state cases, the Court must start with an analysis of that contract.

Under the contract approach, an agreement between spouses that was entered into when the embryos were created and cryostored will be enforced as to the disposition of the embryos on dissolution of marriage. *See* Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992). Other states have since followed Tennessee's lead and have ruled, citing *Davis*, that agreements between

spouses that are entered into at the time of IVF are enforceable with respect to any agreed-upon disposition of cryopreserved embryos on dissolution of marriage. *See* Kass v. Kass, 91 N.Y.2d 554, 673 N.Y.S.2d 350, 696 N.E.2d 174, 180 (1998); *In re Marriage of Dahl*, 222 Or.App. 572, 194 P.3d 834, 840 (2008); *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. App. 2006); *but see A.Z. v. B.Z., 431 Mass. 150, 725 N.E.2d 1051, 1053-59 (2000)* (refusing to enforce parties' agreement that if they separated, the wife, who had already given birth to two children using the parties' embryos, would receive their remaining embryos for implantation).

This Court believes that where the parties entered into a written contract regarding the issue, the Court should commence its analysis by applying the contract if possible to assist in determining the disposition of the embryos. When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." 3 Arthur L. Corbin, Corbin on Contracts § 573, at 357 (1960) ("Corbin"); *see also Rental Dev. Corp. v. Rubenstein Const. Co.*, 96 Ariz. 133, 136, 393 P.2d 144, 146 (1964) (citing Corbin). Antecedent understandings and negotiations may be admissible, however, for purposes other than varying or contradicting a final agreement. 3 Corbin § 576, at 384. Interpretation is one such purpose. 3 Corbin § 579, at 412–13; Restatement (Second) of Contracts § 214(c) & cmt. b (1979) ("Restatement"). *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993).

The Court should not interpret a contract in a way that would read one term in a way that renders another meaningless. *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 478, ¶ 56, 224 P.3d 960, 975 (App.2010). Contractual provisions shall be read together, "to bring harmony, if possible, between all parts of the writing." *Gesina v. Gen. Elec. Co.*, 162 Ariz. 39, 45, 780 P.2d 1380, 1386 (App.1988). In addition, there are specific contractual provisions that may express the parties' intent more precisely than general provisions and specific provisions qualify the meaning of general provisions. *Technical Equities Corp. v. Coachman Real Estate Inv. Corp.*, 145 Ariz. 305, 306, 701 P.2d 13, 14 (App.1985); *see also Cent. Hous. Inv. Corp. v. Fed. Nat'l Mortg. Ass'n*, 74 Ariz. 308, 311, 248 P.2d 866, 867 (1952).

The contract in this matter unfortunately is less than clear in that the contract presents some contradictory clauses. There are two items that the Court sees as clear from the contract: 1. the parties intended that any remaining embryos should not be destroyed and 2. the parties did not modify the contract thereafter. In any place on the contract where the parties could have selected destruction of the embryos, they did not do so. Although Husband testified he considers the destruction of the embryos as an option now, nothing in the contract or in the record supports that the parties intended for that to be an option at the time of the agreement.

Neither party argued that there is no contract. Husband argues that aspects of the contract are unenforceable because they violate public policy and/or certain United States Constitutional provisions. Husband has the burden to prove the defense that the contract's provisions are unenforceable. *Gullet v. Kindred Nursing Centers W., LLC*, 241 Ariz. 532, para. 31, 390 P.3d 378 (App. 2017) (party challenging contract provision's enforceability bears burden of proving that defense; addressing enforceability of arbitration provision). Wife in essence asks the Court to ignore aspects of the contract and appears to argue that the Court should apply the terms of the contract but also balance interests and ultimately award the embryos to her because her interest in procreation outweighs Husband's interest in not procreating. The Court will not get to that issue unless it determines that the contract is insufficient to determine the disposition of the embryos.

Generally, and in Arizona, a court will attempt to enforce a contract according to the parties' intent. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9 (App.2009); *Polk v. Koerner*, 111 Ariz. 493, 495, 533 P.2d 660, 662 (1975); *Sam Levitz Furniture Co. v. Safeway Stores, Inc.*, 105 Ariz. 329, 330–31, 464 P.2d 612, 613–14 (1970). "A general principle of contract law is that when parties bind themselves by a lawful contract, the terms of which are clear and unambiguous, a court must give effect to the contract as written." *Id.* (quoting *Grubb & Ellis Mgmt. Sews., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 86, ¶ 12 (App.2006)). We look to "the plain meaning of the words in the context of the contract as a whole" to give effect to the parties' intent. *Grosvenor*, 222 Ariz. at 593, ¶ 9. "The primary and ultimate purpose of interpretation" is to discover that intent and to make it effective. 3 Corbin § 572B, at 421 (1992 Supp.). This Court must decide what evidence, other than what is in the writing, is admissible in the interpretation process, bearing in mind that the parol evidence rule prohibits extrinsic evidence to vary or contradict, but not to interpret, the agreement. *See* 3 Corbin § 543, at 130–34.

It is axiomatic that a court must attempt to "ascertain and give effect to the intention of the parties at the time the contract was made if at all possible." *Polk*, 111 Ariz. at 495, 533 P.2d at 662; *see also Darner*, 140 Ariz. at 393, 682 P.2d at 398; *Sam Levitz Furniture Co.*, 105 Ariz. at 330–31, 464 P.2d at 613–14. "The judge, therefore, must avoid the often irresistible temptation to automatically interpret contract language as he or she would understand the words. This natural tendency is sometimes disguised in the judge's ruling that contract language is "unambiguous." *See* 3 Corbin § 543A, at 159 (1992 Supp.). Words, however, are seldom so clear that they "apply themselves to the subject matter." Restatement § 214 cmt. b. On occasion, exposition of the evidence regarding the intention of the parties will illuminate plausible interpretations other than the one that is facially obvious to the judge. *See id.* Thus, ambiguity determined by the judge's view of "clear meaning" is a troublesome concept that often obstructs the court's proper and primary function in this area—to enforce the meaning intended by the contracting parties. *See* 3 Corbin § 542, at 122–24; Gottsfield, *supra*, at 385.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2016-001785 08/18/2017

In addition, in contractual interpretation, this Court should not construe one term in a way that renders another meaningless. *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 478, ¶ 56, 224 P.3d 960, 975 (App.2010).

> As a corollary, each part of a contract must be read together, "to bring harmony, if possible, between all parts of the writing." *Gesina v. Gen. Elec. Co.*, 162 Ariz. 39, 45, 780 P.2d 1380, 1386 (App.1988). Finally, because specific contract provisions express the parties' intent more precisely than general provisions, specific provisions qualify the meaning of general provisions. *Technical Equities Corp. v. Coachman Real Estate Inv. Corp.*, 145 Ariz. 305, 306, 701 P.2d 13, 14 (App.1985); *see also Cent. Hous. Inv. Corp. v. Fed. Nat'l Mortg. Ass'n*, 74 Ariz. 308, 311, 248 P.2d 866, 867 (1952). ELM Ret. Ctr., LP v. Callaway, 226 Ariz. 287, 291, 246 P.3d 938, 942 (Ct. App. 2010)

The parties' agreement makes clear that the parties did not intend for impregnation without the consent of the other prior to cryopreservation. The agreement gives a specific example of what may happen upon a divorce, reflecting that in the event of a divorce, the embryos cannot be used to create a pregnancy "without the express, **written** consent of both parties, even if donor gametes were used to create the embryos…You are free to revise the choices you indicate here at any time by completing another form and having it notarized." (Page 13, π 10)

The other provision that relates to divorce allows the Court to issue an order, or for the parties to provide a settlement agreement, to the clinic to direct use of the embryos by either allowing either party to become pregnant or for donation to another party. Neither party consents to the other's use for pregnancy and neither party wants the embryos destroyed. Consequently, if the Court is to give meaning to both of these provisions, post-dissolution of their relationship, the only option for the Court is to direct the clinic to donate the embryos for the purpose of impregnation of another couple or individual If the Court ignores the specific provision on page 13, the Court would be failing to give value to that clause, specifically included in their agreement and for which the parties could have modified or otherwise eliminated if they chose to do so. Provision of the embryos to the other upon death would have eliminated the need for consent by the other, by election of that provision in and of itself.

Therefore,

THE COURT FINDS that the Court may elect to award the embryos to either party for impregnation or to a third party for the purpose of impregnation, but only by written consent of both parties. However, given the parties do not agree to either party having the embryos, and in light of the fact the contract gives no guidance to the Court to determine who should receive the

embryos or whether the clinic should be directed to donate them to a third party for impregnation, the Court must balance interests to determine the disposition of the embryos.

REJECTION OF CONTEMPORANEOUS MUTUAL CONSENT APPROACH

While Iowa has employed a contemporaneous mutual consent approach, this Court does not believe such an approach is appropriate. In applying that approach, this Court would be ordering the parties to retain the property indefinitely in storage until the parties can agree as to their disposition. *In re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003); *see Szafranski I*, 993 N.E.2d at 510–11.

This Court does not believe a contemporaneous mutual consent approach is appropriate for a number of reasons. First, if the parties were able to reach agreements, such agreements would likely have been reached before trial. Second, the Court has found the parties are unlikely to be able to co-parent. If they cannot co-parent, they are unlikely to ever agree on the disposition of the embryos. As part of that analysis the Court expects that future litigation would occur. For example, the parties could argue over payment of storage fees and/or transfer of embryos to long term storage. This would invite further litigation between the parties, costing them and tax payers more money. In addition, if one of the parties preceded the other in death, this Court can expect litigation between the living party and the estate of the other over costs and the potential ownership of the embryos posthumously. This Court sees none of those options as appropriate.

Arizona follows a no-fault approach to dissolutions. Those laws present a manner by which married people can move forward in their separate lives, disentangled from each other post-judgment of dissolution. That noble goal is not achieved by creating unenforceable orders or orders that are subject to protracted future litigation.[5] Such an arrangement under contemporaneous mutual consent provides no finality of the division of property and therefore, such an order is contrary to Arizona law and public policy.[6]

---

[5] While the Court cannot cite to the decision because it is a lower court decision, the Court has reviewed and referred to certain language from Findley v. Lee and the Regents of the University of California, a decision by the Honorable Anne-Christine Massullo, Judge of the Superior Court of California, San Francisco County.

[6] The Iowa court's approach has been criticized as being "totally unrealistic," because if the parties had any ability to reach an agreement on disposition of their embryos, they would not need a court's ruling. *Reber*, 42 A.3d at 1135 n.5; *see Szafranski I*, 993 N.E.2d at 511. Such a position "essentially gives one party a *de facto* veto over the other party" because the issue will inevitably be determined by the passage of time. *See Szafranski I*, 993 N.E.2d at 512 (noting that Iowa's approach may provide a bargaining chip for an ex-spouse to effectively hold embryos hostage to punish the other ex-spouse or to gain other advantages). Colorado courts have also joined in the rejection of this approach.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2016-001785 08/18/2017

BALANCING OF INTERESTS

The Tennessee Supreme Court in *Davis* supported a contract approach but was ultimately unable to use this approach in its pure form because the parties' contract lacked specifics as to the disposition of their embryos. This fact required the *Davis* court to use a balancing of interests approach in ultimately determining "the husband's interest in avoiding procreation more heavily than the wife's interest in wanting to donate the embryos to another couple." *Davis*, 842 S.W.2d at 598, 603–04. Other courts have also held that, when the parties have not agreed as to who should receive cryopreserved embryos on dissolution of marriage, the trial court must balance the parties' interests to resolve the issue. *See J.B. v. M.B.*, 170 N.J. 9, 783 A.2d 707, 713–14, 719–20 (2001); *Reber v. Reiss*, 42 A.3d 1131, 1136 (Pa. Super. Ct. 2012).

The *Davis* court said, "[o]rdinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the [ ]embryos in question." 842 S.W.2d at 604; *accord Szafranski I*, 993 N.E.2d at 514–15; *see also Szafranski v. Dunston*, 393 Ill.Dec. 604, 34 N.E.3d 1132, 1161–64 (2015) (*Szafranski II*) (upholding lower court's ruling that the interests of a woman, who had embryos created with a male friend before undergoing chemotherapy, were paramount because she had no other option for having a biological child); *J.B.*, 783 A.2d at 719–20 (ruling in favor of the wife's interest to avoid procreation after considering that the husband was already a father and was capable of fathering other children); *Reber*, 42 A.3d at 1132–43 (upholding ruling in favor of forty-four-year-old wife, who had no children and had undergone IVF before cancer treatment in order to preserve her ability to conceive a child).

A.R.S. §25-103 states as follows in relevant part:

A. It is declared that the public policy of this state and the general purposes of this title are:

1. To promote strong families;
2. To promote strong family values.

B. It is also the declared public policy of this state and the general policy of this state and the general purpose of this title that absent evidence to the contrary, it is in a child's best interest:

1. To have substantial, frequent, meaningful and continuing parenting time with both parents.
2. To have both parents participate in decision making about the child.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2016-001785 08/18/2017

A.R.S. §25-103.

While there is not a child over which to enter decision making and parenting time orders, the Court begins with this statute because the Court seeks as much guidance from existing laws as is available. The legislature has seen fit to establish public policy with regards to families. If in fact this Court awards the embryos to Wife, and light of the Court's findings that the parents are unlikely to be able to co-parent and in consideration of the fact that Husband does not want to procreate with Wife, this Court would either be violating the above public policy or ignoring the policy established by the legislature.

Wife has a strong interest in having a biological child. Wife could have preserved her eggs separate from fertilization. She chose not to do so. While Wife may not have a biological child without the embryos, Wife can still adopt or seek donation of other embryos, even if the options are more difficult than, or not as desirable as, having a biological child of her own.[7] In addition, it is possible she could produce eggs, even if unlikely, further impacting Wife's claim.

On the other hand, the evidence supports that it would be almost impossible for Wife to become pregnant through normal means of pregnancy and through the use of any existing egg. Dr. Behera testified this chance is less than 1% given Wife is considered to be in a post-menopausal state. While not impossible, the chance is extremely improbable.

Both parties have made Constitutional arguments in this case. The right to privacy is not an explicit right set forth in the U.S. Constitution; however, in a line of decisions going back to the late 1800's, the U.S. Supreme Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*, 410 U.S. 113, 152, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The roots of the right to privacy are found in the penumbras of the Bill of Rights and in various amendments to the U.S. Constitution, including the Fourteenth Amendment's concept of personal liberty and restrictions upon state action. *Id.* at 152–53, 93 S.Ct. 705.

Based on this Court's reading of the Constitution and case law, Wife has a constitutionally established right to procreate. The Court is unclear whether there is a constitutional right **not** to procreate but Husband cites no law to support such an argument; nor has the Court been able to identify any such citations.[8] On the other hand, Wife's right to procreate does not extend as a constitutional right to procreate with Husband. In addition, to the extent either party had a constitutional right regarding procreation with **these** embryos, they both waived the right by agreeing (and signing and executing) an agreement that required both

[7] The Court notes that even if the embryos were provided, there is no guarantee of impregnation. Wife has not even been medically cleared to get pregnant at this point.
[8] It could be argued that *Roe v. Wade* and its progenies present such a position.

parties' to consent to the use of the embryos for impregnation. Both parties had the right to refuse to sign the agreement, to consult with a lawyer, to ask questions and so on. To the extent the parties acted rashly and did not have such opportunities, although neither party presented such evidence nor raised such issues at trial, the Court would be even more reluctant to force them into parentage together at this time.

Also, Husband would face the potential of significant financial responsibilities that despite Wife's position cannot be waived by her. There is nothing in the contract or the evidence to suggest the parties had an informed discussion about these possibilities outside of their marriage.[9]

Additionally, Husband has legitimate concerns about parenting with Wife. It is unlikely the parties will be able to co-parent. While family law courts must consistently address such concerns over parenting, the Court does not get involved in such disputes until a child is born and the parties have sought Court intervention, invoking the Court's jurisdiction. The Court finds it is contrary to public policy to force parties into a situation where litigation over that child is inherent and built into that picture in advance of the child's potential birth and where the Court cannot find it is otherwise "promoting strong families" and "to promote strong family values." See A.R.S. §25-103.

CONCLUSION REGARDING EMBRYOS

As the Court noted to the parties at the time of trial, the Court is not lacking in empathy for both parties' positions. The Court understands and sees both points of view. The Court hopes that contracts for IVF and cryopreservation will be updated as to make clear the parties' intentions at the time of their agreement as to avoid future litigation, similar to cases involving prenuptial agreements. Alternatively, the Court hopes that the legislature will act by promulgating legislation to resolve the important public policy and legal questions raised by IVF and the cryopreservation of embryos. Such is not the case here. Husband's testimony was that he never intended on having children with Wife if the parties were not together. The Court believes this to be true. There was no evidence presented that after the marriage the parties, for example, discussed having children regardless of the status of their relationship. The parties did not execute any further agreements saying otherwise.

The Court having considered all of the evidence pertaining to the contractual terms and balancing the interests of the parties, Husband's right not to be compelled to be a parent outweighs Wife's right to procreate and desire to have a biologically related child.

[9] This is not to say that if the parties had a child and then got divorced that Husband would be protected from child support responsibilities. This is only to say that there is nothing to reflect Husband would have known of such obligations

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2016-001785 08/18/2017

Therefore,

IT IS ORDERED directing the Bloom Reproductive Institute to use any remaining embryos for the purpose of donation to a third party or couple for the purpose of impregnation.

IT IS FURTHER ORDERED directing the Bloom Reproductive Institute **not** to transfer the embryos for a period of thirty-one (31) days from entry of this order, or until any other date ordered by the Court thereafter.

Reimbursement of medical coverage

By the parties' agreement,

IT IS FURTHER ORDERED Wife will pay $2508.54 to Husband within 60 days of the date of trial, to satisfy the reimbursement claims.

Debts

By agreement of the parties,

IT IS FURTHER ORDERED as follows:

- Husband shall be solely responsible for any credit card or debt in his name incurred after service of the Petition, any debt that may be in his name including credit cards regardless of the date the obligation was incurred and for any obligation related to any property of any kind awarded to him as part of the agreements reached.

- Wife shall be solely responsible for any credit card or debt in her sole name incurred after service of the Petition, any debt that may be in her name including credit cards regardless of the date the obligation was incurred and for any obligation related to any property of any kind awarded to her as part of the agreements reached.

- Wife shall also be awarded all student loans in her name.

- Each party shall indemnify and hold harmless from any and all debts designated as the responsibility of that party by the terms set forth in this Decree.

IT IS FURTHER ORDERED:

- Any community debts that were not identified at the time of the trial shall be divided equally between the parties.

Waiver of claims:

By agreement of the parties,

IT IS FURTHER ORDERED each party hereby waives any and all other claims that he or she may have made against the other for the division of any community property and debt for any waste claims.

Equalization

THE COURT FINDS that the above allocation of the real and personal property, when considered with the division of debt, is fair and equitable under the circumstances and that no further adjustments are necessary.

RESTORATION OF NAME

There was no request for restoration of either party's name.

ATTORNEY FEES AND COSTS

Both parties requested an award of attorney fees and costs although only Wife testified about her requests. An award of attorney fees and costs is governed by A.R.S. § 25-324. Section 25-324 provides as follows:

> A. The court from time to time, after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending any proceedings under this chapter or chapter 4, article 1 of this title. On request of a party or another court of competent jurisdiction, the court shall make specific findings concerning the portions of any award of fees and expenses that are based on consideration of financial resources and that are based on consideration of reasonableness of positions. The

court may make these findings before, during or after the issuance of a fee award.

B. If the court determines that a party filed a petition under one of the following circumstances, the court shall award reasonable costs and attorney fees to the other party:

1. The petition was not filed in good faith.
2. The petition was not grounded in fact or based on law.
3. The petition was filed for an improper purpose, such as to harass the other party, to cause an unnecessary delay or to increase the cost of litigation to the other party.

C. For the purpose of this section, costs and expenses may include attorney fees, deposition costs and other reasonableness expenses as the court finds necessary to the full and proper presentation of the action, including any appeal.

D. The court may order all amounts paid directly to the attorney, who may enforce the order in the attorney's name with the same force and effect, and in the same manner, as if the order had been made on behalf of any party to the action.

Neither party argues in his or her pretrial statement that there is a substantial disparity of financial resources. There was no testimony on the issue. Although the parties' AFIs reflect a difference in incomes, without more information,

THE COURT FURTHER FINDS there is not a substantial disparity of financial resources between the parties.

As to the reasonableness of the parties' positions, Wife testified Husband failed to comply with the Court's order regarding maintaining the storage. He refused to return Angel, which she sees as an unreasonable position. She also claims he brought up the insurance costs a week before trial and objected to Wife's expert testifying telephonically, which she also sees as unreasonable. The record supports that Husband's failure to sign the storage agreement was unreasonable and caused Wife to incur additional fees. The Court does not see any of the other positions as unreasonable although delaying the claim for costs is certainly improper.

Husband did not provide any specific testimony.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2016-001785 08/18/2017

THE COURT FURTHER FINDS that Husband was unreasonable in delaying signature on necessary forms. On the other hand, Wife refused to refund Husband's insurance premiums until just before trial started, even though the law supports such reimbursement.

Therefore,

THE COURT FURTHER FINDS both parties acted unreasonably in a limited way but neither more than the other.

THE COURT FURTHER FINDS that the provisions of A.R.S. § 25-324(B) do not apply.

THE COURT FURTHER FINDS that neither Wife nor Husband knowingly presented a false claim, knowingly accused the other parent of making a false claim, or violated a court order compelling disclosure or discovery such that an award of attorney fees and costs is appropriate under A.R.S. § 25-415.

IT IS THEREFORE ORDERED denying both parties' requests for attorney fees and costs.

CONCLUSION

IT IS FURTHER ORDERED denying any affirmative relief sought before the date of this Order that is not expressly granted above.

IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court pursuant to Rule 81, *Arizona Rules of Family Law Procedure*.

DATED the 18th day of August, 2017.

HONORABLE RONEE F KORBIN STEINER
JUDICIAL OFFICER OF THE SUPERIOR COURT

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2016-001785 08/18/2017

All parties representing themselves must keep the Court updated with address changes.
A form may be downloaded at:
http://www.superiorcourt.maricopa.gov/SuperiorCourt/LawLibraryResourceCenter/

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

In re the Marriage of: JOHN JOSEPH TERRELL, Petitioner, and RUBY TORRES, Respondent.	1 CA-CV 17-0617 FC FN 2016-001785

Phoenix, Arizona
August 14, 2017
2:04 p.m.

BEFORE: The Honorable RONEE KORBIN STEINER, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Prepared for: Appeal

Reported by: Mr. Scott M. Coniam, RMR, CRR
Certified Court Reporter #50269

A P P E A R A N C E S

STODDARD LAW GROUP, P.C.
By: Ms. Allie Stoddard

LAW OFFICE OF DENNIS P. LEVINE, P.C.
By: Ms. Debora M. Levine

I N D E X

T E S T I M O N Y

All right. Counsel, you ready?
MS. STODDARD: I am, Your Honor.
THE COURT: Call your first witness.
MS. STODDARD: I'd like to call petitioner John Terrell to the stand.
THE COURT: All right. Mr. Terrell, if you would take your seat up here. And you have been -- they were sworn before going on the record?
THE CLERK: Yes.
THE COURT: Okay.
MS. STODDARD: Your Honor, may I stay seated?
THE COURT: Yes, you may.

JOHN JOSEPH TERRELL,
having been called as a witness herein, having been previously first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MS. STODDARD:
Q. Mr. Terrell, can you please state your full name for the record.
A. John Joseph Terrell.
Q. And where are you employed?

A. At the VA Hospital.
Q. What is your position there?
A. I'm an LPN.
Q. What is your relationship to the respondent?
A. We were married.
We are still married.
Q. When did you first meet Ms. Torres?
A. It was in 2003 when we were in the Maricopa County detention officers academy together.
Q. Have you been in a relationship with her since 2003?
A. Yes.
Q. How has the relationship progressed?
A. From -- we were only together for a short time in 2003 then we meet back up in 2009.
Q. Okay. Can you --
A. And then --
Q. I'm sorry.
A. -- from 2009 we just dated off and on until we got married.
Q. When you say you "dated off and on," can you describe what you mean?
A. It wasn't a full relationship.
Q. How so?
A. We would just meet up like every once in a while.

Q. Okay. Did you fight with each other?
A. Throughout the relationship?
Q. Yes.
A. Yes. Frequently.
Q. What would happen when you would have a fight?
A. Well, usually it would just escalate and then we would kind of separate and then we'd get back together and it would just cycle all over again repeatedly.
Q. When did you get married?
A. July 15th, 2014.
Q. Okay. What was the purpose of getting married?
A. Why did we get married?
Q. Yes.
A. So she could get on my insurance.
Q. Why did she need to be on your insurance?
A. Because she was diagnosed with breast cancer.
Q. What -- did she have insurance at the time?
A. No.
Q. Did you love her at the time you got married to her?
A. Yes.
Q. Would you have married her if she had not presented to you that she had cancer and needed your insurance?
A. No.

Q. When she described her cancer diagnosis to you, how did she explain her prognosis?
A. The way I recall it, she had called me and she was in tears over it. And the way I understood it, she -- it was basically a death sentence.
THE COURT: As what?
THE WITNESS: It was like a death sentence.
THE COURT: A death sentence.
THE WITNESS: It was like a really bad type of breast cancer.
BY MS. STODDARD:
Q. Did she tell you that it was a terrible form of cancer?
A. Yes.
Q. Was she afraid for her life at that time?
A. Yes.
Q. Did you expect that she would survive the breast cancer?
A. No.
Q. Okay. You have a dog named Angel; correct?
A. Yes.
Q. When did you get Angel?
A. We found her abandoned at her mom's rental house in November -- I think it was November 2012.
Q. Were you with Ms. Torres when you found the dog?

and the mom had her and the dad wanted to get rid of her so I took her in.

Q. Do the dogs get along?

A. Yeah. They're like mom and daughter. Angel's like her mom.

Q. You do understand that if the court has to make a decision about Angel, that the court could order that Angel be sold?

A. Yes.

Q. Knowing that -- let me scratch that.

Do you want the dog to be sold?

A. No. I'd like to keep her.

Q. Okay. Let's switch gears now and talk about the frozen embryos.

You and Ruby own frozen embryos; correct?

A. Yes.

Q. Where are they stored?

A. The Bloom facility in Scottsdale, I think.

Q. Did you --

A. I guess in Scottsdale.

Q. Did you sign a contract with Bloom?

A. Yes.

MS. STODDARD: I'd like to share what's been marked as Exhibit 4 with Mr. Terrell.

//

BY MS. STODDARD:
Q. Is that the contract that you signed with Bloom?
A. Yes.
Q. Okay. Looking at the bottom of the first page, is that your signature?
A. Yes.
Q. Was Ms. Torres with you when you signed that contract?
A. I can't remember. I don't know if I signed it after she did.
I believe I did sign it after because I remember initialing after she had initialed it. I think she left the packet at my house when she was at work or something. I initialed and signed it.
Q. Okay. Do you recognize that to be Ms. Torres' signature?
A. Yes.
MS. STODDARD: Your Honor, I'd like to move to have Exhibit 4 admitted as evidence.
THE COURT: Any objection?
MS. LEVINE: No objection.
THE COURT: Four is admitted.
BY MS. STODDARD:
Q. Mr. Terrell, can you please turn to what's been numbered as 59, page 59, on the bottom of that exhibit.

A. Okay.
Q. I'm sorry. Let me ask you one question before that.
What was the date that you signed the agreement with Bloom?
A. July 11, 2014.
Q. Were you married at that time?
A. No. We didn't get married until the 15th.
Q. How many days later is that?
A. That's four days later.
Q. Okay. Why did you sign this contract with Ms. -- with Bloom and Ms. Torres?
A. The way that I felt at the time, like I was -- I thought she was going to die and I thought, you know, it's -- you know, it's something I had to do.
Q. Did she ask you to sign?
A. Specifically, I don't remember if she -- I think she did. It was something she really wanted. Like it took priority over, like, everything at that time. There was a rush to do it because she had to hurry up and start her treatment.
Q. Did you go to her and volunteer your sperm to her?
A. No.
Q. Were you doing her a favor?

A. In so many words, yes.
Q. Did you do it -- did you do this solely to preserve her fertility or did you do this thinking that the two of you would have a child together?
A. Well, I thought we would have a child together eventually.
Q. Did you intend for Ms. Torres to use the embryos without your consent?
A. No.
Q. Did you intend for her to use the embryos with you and have a child with you?
A. Yes.
Q. Did you intend to have children with her?
A. Yes.
Q. Did you expect that she would live to have children with you?
A. No.
Q. When you signed the agreement, did you intend to allow Ms. Torres to use the embryos regardless of your relationship with her?
A. No.
Q. If you look on page 59, again. If you look down at the bottom where it says "Note" and the first bullet point, can you read that out loud for the court.
A. Embryos cannot be used to produce pregnancy

against the wishes of the partner. For example, in the event of a separation or divorce, embryos cannot be used to create a pregnancy without the express written consent of both parties, even if donor gametes -- I don't even know that word -- gametes were used to create the embryos.

Q. Did you rely on that statement when you signed this agreement?

A. Yes.

Q. Why are you opposed to Ms. Torres being awarded the embryos?

A. I just don't want to have a biological child with her now.

And as far as like financial liability in the future, like as far as, like, my inheritance or, like, child support for a child that I never have seen. I just don't want to -- that's not something I want.

MS. STODDARD: No further questions, Your Honor.

THE COURT: Cross-examination.

MS. LEVINE: Just a couple questions, Your Honor.

CROSS-EXAMINATION

BY MS. LEVINE:

Q. Mr. Terrell, you testified that there were other

out there with someone that you're divorced to?

THE WITNESS: It's not something that I would really want. It's -- it's -- to me, it's like a ticking time bomb because of -- you know, as far as like child support or that child when coming of age coming back for me -- coming back to me for back-child support, you know, coming -- I don't know how my inheritance would be affected. And it's, you know, a child that I've never seen that could possibly have been poisoned, like her poisoning that child against me, you know, painting me into some monster and would that child even want to be in my life. There's a lot of factors I've thought about.

THE COURT: Do you think at this point that you could co-parent with her if she did get pregnant?

THE WITNESS: I don't think so. No. I don't believe we could.

THE COURT: What is your position -- so -- I'm sorry. One more question about -- so page 62, paragraph H.

So the box that's checked is -- says: A court decree and/or settlement agreement will be presented to the clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose.

If I was to find that placing the embryo in either of your possession was inappropriate -- or let me

back up. Strike that.

I have to get used to saying "strike that." People say "strike that" in here all the time and I always ask: There's no court reporter, who's striking it?

If put in a position to choose between the embryos being in storage in perpetuity requiring a joint agreement to do anything with them versus donating them to another couple for the potential of getting pregnant, what would be your position?

THE WITNESS: Probably donation versus just keeping them in limbo forever.

THE COURT: Okay. Does either counsel have follow-up questions based on my questions?

MS. STODDARD: I do not, Your Honor.

THE COURT: Ms. Levine?

MS. LEVINE: I have just maybe a couple.

THE COURT: Go ahead.

FURTHER EXAMINATION

BY MS. LEVINE:

Q. You testified that you had never had a discussion about child support or the potential of child support for an unborn child; is that correct?

A. Yes.

Q. In January of 2014, is it not true that Ruby was

pregnant at that time?
A. Oh, when she had the abortion?
Q. Yes.
A. Yes.
Q. At that time did you have a conversation that if you were to bear a child, there would be a financial obligation?
A. No. I don't remember a conversation like that.
MS. LEVINE: No further questions, Your Honor.
THE COURT: All right. Sir, thank you. You can take your seat next to counsel.
Have her send in Dr. Behera. She's on the line so we'll send her in.
And it's B-E-H-E-R-A?
MS. LEVINE: E-R-A.
THE COURT: And first name?
MS. LEVINE: Millie, M-I-L-L-I-E.
THE COURT: Okay.
Is she sending her in?
(Pause.)
THE COURT: Hi, Dr. Behera?
THE WITNESS: Yes. Hello.
THE COURT: All right. Could you please rise and raise your right hand so my clerk can swear you

Q. Do you hold any professional licenses?
A. Yes. I have my medical license from the Arizona Medical Board.
Q. Okay. Prior to this hearing, you were provided with a few exhibits that were relevant to your testimony.
A. Yes.
Q. Do you have those in front of you?
A. I do. Yes.
Q. Okay. If you could look at Exhibit 11.
A. Sure.
Yes.
Q. Is that your curriculum vitae?
A. Yes, this is.
MS. LEVINE: Your Honor, I'd like to offer Exhibit 11.
THE COURT: Any objection?
MS. STODDARD: No objection, Your Honor.
THE COURT: 11 is admitted.
BY MS. LEVINE:
Q. Does it accurately detail your education and professional background?
A. Yes, it does.
Q. How do you know the respondent, Ruby Torres?
A. I met Ruby as a patient in consultation back in July of 2014.

Q. And did you provide fertility services to Ms. Torres?
A. Yes, I did.
Q. Could you please describe those services to the court.
A. Yes.
Ruby was referred to me by a breast cancer specialist, Dr. Gunia, with a diagnosis of breast cancer at the time for fertility preservation therapy. And as it's fairly time sensitive, after consultation, in discussing all the options, she decided that she elected to go ahead and preserve her fertility in light of the fact that her chemotherapy and upcoming cancer treatment would be threatening to her future fertility. So she underwent a course of medication to support the growth of multiple follicles which carry eggs in the ovaries. And so she had 14 eggs that were developed from her treatment, approximately a two- to three-week treatment course. And of the 14 eggs that were then fertilized, seven embryos resulted which were then cryopreserved or frozen for potential use in the future to allow the option of a biological child.
Q. Okay. If you could now take a look at Exhibit 13.
A. 13.

Yes.
Q. Are these copies of lab reports from Bloom Reproductive Institute?
A. Yes, they are.
MS. LEVINE: Your Honor, I'd like to offer Exhibit 13.
THE COURT: Any objection to 13?
MS. STODDARD: No objection, Your Honor.
THE COURT: 13 is admitted.
BY MS. LEVINE:
Q. Can you tell the court the dates of these labs?
A. Sure.
There is one set of labs to assess ovarian function that were done in June, June 5th, 2017.
And then another set that were done in April, April 21st, of 2017.
Q. And then there should be one more set, I believe, in there.
A. Yes. There should be the original -- (inaudible).
THE COURT: What did you just say because you were inaudible to this court?
THE WITNESS: (Inaudible).
THE COURT: All right. Dr. Behera, for some reason you're suddenly inaudible. I don't know if you

moved in your office or something, but could you try going back to the spot --

THE WITNESS: Can you hear me now?

THE COURT: That's much better. Thank you.

THE WITNESS: Okay.

THE COURT: Can you repeat what you just said so that the court reporter can get it?

THE WITNESS: Sure.

Yes. The third set of labs that are included under this exhibit are those drawn from July 2nd of 2014, also labs to assess ovarian function.

BY MS. LEVINE:

Q. Okay. And looking at that July 2nd, 2014, lab report, was this test conducted prior to Ms. Torres' chemotherapy treatment?

A. Yes.

Q. And what do the lab results tell you about Ms. Torres' reproductive function at that time?

A. So at that time it looked like she had adequate ovarian reserve probably on the low -- on the low normal end for a woman of her age, but since the hormone we measured was made by resting eggs in the ovaries, she had an adequate number to be able to go through the treatment to preserve the eggs.

Q. And I'd like to direct your attention to the

April 21st, 2017, lab report. Was this test conducted after Ms. Torres' chemotherapy treatment?

A. Yes.

Q. And what do the lab results tell you about Ms. Torres' reproductive function?

A. Well, I can see a significant drop in ovarian function. The same tests that were drawn in comparison, that AMH level that is secreted by resting eggs or resting follicles was now in the undetectable or extremely low level, less than .015.

Q. Okay. And directing your attention to the June 5th, 2017, lab report, does this lab result indicate any change from the previous report on April 21st, 2017?

A. No. It is consistent with the other labs drawn two months prior as in low to no ovarian function.

Q. Okay. Are you aware that Ms. Torres had a salpingectomy in or about February 2015?

A. Yes. A salpingectomy, yes.

Q. I'm sorry. I may be pronouncing it incorrectly.

Can you describe the purpose of this procedure?

A. So as Ms. Torres has been diagnosed with carrying a breast cancer gene, the BRCA1 gene, this procedure was done by her oncologist, GYN oncologist, in attempt to reduce her risk of ovarian cancer. One of the potentially protective procedures that could be done, but still allow

her to maintain her -- to keep her uterus and her ovaries in place.

Q. Can Ms. Torres' ovaries be stimulated to produce viable eggs?

A. They can be stimulated which means taking the medication, but unfortunately it probably would not result in any viable eggs.

Q. And without the ability to produce more eggs, is Ms. Torres able to have biological children without using the embryos which are currently cryopreserved?

A. No. Unfortunately her hormone levels are consistent with menopausal level.

Q. And if Ms. Torres were to be permitted to use the embryos to achieve pregnancy, how many embryos are required to be implanted at a time?

A. We typically recommend one to two. And we have conservative recommendations because the success of implant cases should be good with hormonal support in the beginning part of her pregnancy and otherwise being healthy.

Q. Okay. And final question, does Ms. Torres have the ability to have biological children without the use of the frozen embryos currently stored at Bloom Reproductive Institute?

A. No. Without the ability to have eggs at this

time, they would not be -- her other alternative would not be biological children.

MS. LEVINE: No further questions, Your Honor.

THE COURT: Cross-examination?

MS. STODDARD: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. STODDARD:

Q. Good afternoon, Doctor. My name is Allie Stoddard.

A. Good afternoon.

Q. When Ms. Torres sought your assistance to have her eggs fertilized to create embryos --

A. Yes.

Q. -- she had all 14 eggs fertilized with Mr. Terrell's sperm; correct?

A. Yes, she did. With 13 out of the 14 that were mature that could be exposed to the sperm, but yes.

Q. Did she have the option of not fertilizing all 14 eggs with Mr. Terrell's sperm?

A. Yes, that is an option.

Q. Did Ms. Torres have the option of freezing just her eggs?

A. Yes, that was an option as well.

Steiner. I have a couple questions.

THE WITNESS: Of course.

THE COURT: Are you aware of any research in place that would -- I guess I'm trying to think of the term -- that -- that would increase the potential of her having viable eggs at this point?

THE WITNESS: No, there really aren't. It's definitely an area where we are struggling with research. There's currently -- there really isn't any viable research protocols in the United States that would allow to kind of revive or rescue any ovarian function once we reach this level of low to no ovarian function into menopause.

THE COURT: Do you -- as part of your practice, I assume you assist in the reproduction efforts of parties who cannot get pregnant by donation of embryos?

THE WITNESS: Yes.

THE COURT: And are those some of the embryos that would be donated from patients or couples that provide embryos or cryopreserve embryos in your facility?

THE WITNESS: Yes. Absolutely. That is an option that more and more couples are able to achieve pregnancy with, through donated embryos.

THE COURT: So while it would not be a

biological child, is that something that Ms. Torres could look at if that's what she was left to -- within your fertility clinic or other clinics?

THE WITNESS: Yes. So that would be one of the alternative options, would be as long as she is anatomically healthy and has her uterus and (indiscernible) she would be able to carry an embryo to term, biologic or not. She'd support a pregnancy as long as she had her uterus.

THE COURT: And to your knowledge, she currently can support a pregnancy; correct?

THE WITNESS: Yes.

THE COURT: What is the process of attempting to get a donated embryo? What's that like? Is it difficult? What can you tell me?

THE WITNESS: There's a fairly long waiting list for couples that desire an embryo. It's one of those national dilemmas across all fertility centers. A lot of times the way these donated embryos come about are typically from couples who have achieved their success in their family size with the embryos created through a fertility cycle. And of the options given to them as to what to do with excess embryos, the majority of the couples will struggle with that and just hold on to their embryos until they're absolutely sure they have made the

right decision what to do. But one option is this ongoing storage which is what most couples do. There are research programs. And then we bring up the option of donating their embryos to another couple, which is a more, I guess, closer intimate way than adoption. So for a lot of couples that is a choice for them, but a lot of times it's hard to get these embryos because the couples that are donating them struggle with that decision.

And then of course the final decision would be to discard embryos which, again, couples struggle with as well. So because they're limited options as to what to do with excess embryos, there aren't a lot of embryos waiting for adoption or embryo donation, per se.

THE COURT: And how -- I mean, do people store the embryos in perpetuity?

THE WITNESS: They do. They do. That's the national dilemma is just ongoing storage.

THE COURT: So do they -- so I noticed in the contract from your facility that -- I forget the length, maybe it said ten years after a certain period of time?

THE WITNESS: Ten years, yes.

THE COURT: Okay. They have to be transferred to long-term storage?

THE WITNESS: Exactly. So we've now started

to introduce that topic in advance, lay the groundwork for them to have some long-term decision or planted a seed to think about things if they did have excess embryos beyond ten years, they would either need to think about an outside facility where we would transfer them to or choose one of the other options that are available for transfer.

THE COURT: And at some point in the age of the embryo -- not the age as in when it's cryopreserved but the age in terms of, you know, its length sitting in storage, at some point it becomes less likely to be viable; correct?

THE WITNESS: So because we don't have a lot of data beyond 10 years, 15 years, we tentatively practice -- like that would be in that 10 to 15 year time frame. But part of that is based on the technique for freezing and so -- nowadays we use a flash fusion technology called vistrafication that minimize the impact of time on success rate. So we have yet to see how far we can push that, but at this point we're not seeing a decline in success rates even 5 to 10 years out. Success seems to be the same as when they're doing it initially at the time of therapy.

THE COURT: Have you reviewed the contract -- or the written agreement, whatever you will call it, that the center offers to patients to sign? Have

you ever seen it, read it?

THE WITNESS: Yes.

THE COURT: Okay. And I'm not sure if they've changed it since then, but the document that the parties signed says: Revised form January 10, 2014.

Do you know if your facility has revised it since then?

THE WITNESS: Yes, I believe we have since 2015.

THE COURT: Do you know in particular what the basis of the revisions were? Why they needed to change it? Was there something that happened or some additional medical information that needed to be added?

THE WITNESS: I don't think so. I can't remember exactly. I don't think it was a major clause or anything that was added. I just think we just revised it as we -- because we became a new practice, so it was an opportunity to make sure everything appeared clear and read clear to the couple.

THE COURT: All right. And if you don't know the answer, please -- obviously, I'm not asking you to guess or to provide any legal interpretation. I just want to know if you know from your standpoint what the intentions were -- not of the parties -- I'll be specific about the clause, but this agreement talks about -- at

least the one they signed talks about the parties -- let me actually get to it.

The agreement -- you don't have it in front of you, do you?

THE WITNESS: I do actually.

THE COURT: Oh, you have Exhibit 4. Perfect.

Okay. If you would take a look at page number -- is it Bates stamped, hers, or no?

MS. LEVINE: Yes.

THE COURT: Do you have little numbers on the bottom that say like 000059 or is it just like --

THE WITNESS: No.

THE COURT: All right.

MS. LEVINE: But she does on the bottom left.

THE COURT: So look at page 13 of 19.

THE WITNESS: 13 of 19. All right.

THE COURT: All right. So on page 13 of 19 it says -- hold on. Let me get to the place.

Under where it says, Note: Embryos cannot be used to produce pregnancy against the wishes of the partner and then it gives for example.

THE WITNESS: Yes.

THE COURT: Okay. Do you -- just from your

vantage point and your experience with this contract, do you -- does your clinic offer this information to make sure that everybody understands that regardless of what happens, it's going to require the consent of the other side to determine what happens to the embryos?

THE WITNESS: Yes.

THE COURT: So --

THE WITNESS: Part of that is to explain that so they are thinking -- thinking ahead.

THE COURT: Okay. And then if you go to page 16 of 19.

THE WITNESS: Okay.

THE COURT: Under paragraph H where it talks about divorce or dissolution.

THE WITNESS: Uh-huh.

THE COURT: Again, just from your vantage point -- I'm not asking you to get into these two parties' heads, but from your vantage point, in working with the clinic in this contract, is it your perspective that if someone picks the box, a court decree or settlement agreement, et cetera, that that still requires both parties' approval depending on what the court directs the clinic to do?

THE WITNESS: I believe that's part of the intention is that they both initial and make an agreement

as to what they might do in that setting.

THE COURT: Okay. All right.

Do either counsel have any quick follow-up based on my questions?

MS. STODDARD: No, Your Honor.

MS. LEVINE: I have one quick question.

FURTHER EXAMINATION

BY MS. LEVINE:

Q. Does Ms. Torres require medical clearance from her oncologist to try to become pregnant?

A. I believe she's already brought that up and she's clear. And in the setting of that breast cancer gene, the recommendation is the sooner the better so then she can have the rest of her organs removed to minimize the risk of cancer because it's so high with that gene.

MS. LEVINE: No further questions, Your Honor.

THE COURT: All right. Dr. Behera, thank you very much. You're free to hang up whenever you'd like. We appreciate your cooperation.

THE WITNESS: You're so welcome. Thank you very much.

THE COURT: Bye-bye.

THE WITNESS: Bye-bye.

gun on the table in the living room.

And so I didn't choose -- I didn't think it was wise to return as the gun is actually not registered to him. It's a .45 caliber that belonged to his father who -- that was gifted to him, so there's no way to know whether or not he has that gun in his possession and I don't want to risk my life.

Q. What would you like the court to order with regard to Angel?

A. I would like the court to order that she be returned to me.

Q. Okay.

A. Because she's mine. And I -- and I understand John's concern for Badger and Angel being bonded, but if that's the case then I'm okay with taking two dogs.

Q. Okay. Let's move on to the issue of the embryos.

Let's talk a little bit about why the embryos were created in the first place.

In June of 2014, what news did you receive about your health?

A. The final diagnosis was that I had bilateral breast cancer, triple negative. And I was -- initially I was -- in June of -- June 18th of 2014, I was informed that I had left breast cancer that was triple negative which is the most aggressive form of cancer because it

cannot be controlled. Subsequently, I was going to be a part of a study and in July I received the diagnosis after an MRI that I had bilateral breast cancer.

In August, after starting my chemotherapy, I was informed that I have a genetic mutation which is BRCA1 which highly increases my cancer risk.

Q. Okay. And as a result of this diagnoses -- you touched on it a little bit, but what medical treatment did you require?

A. I was informed by my oncologist that I would need to undergo chemotherapy. So I underwent chemotherapy, Taxol and carboplatin.

And then I also had to have a bilateral mastectomy with skin-sparing.

And then I was also to undergo radiation to ensure that there was no cancer remaining.

And I also had to -- the medical research indicates that I needed to have a full hysterectomy.

Q. Were you advised that these treatments may affect your ability to get pregnant in the future?

A. I was advised that chemo does place your body into menopause and there is no guarantee that my body would recover, my ovaries would recover and come out of menopause.

Q. And did you proceed with taking steps to preserve

your ability to have children in the future?

A. Yes. I was referred to Dr. Behera and so I met with her on -- in beginning of July when I discussed with my oncologist, Dr. Sachdev, I was informed that she would only give me a month. So I had actually from July to August to start my chemotherapy. There wasn't much time. At which point John and I were in a relationship and I did ask him if he would be -- he actually refused.

And I went to the classes and did everything to create these embryos on my own and had asked a prior partner who had agreed. And it wasn't until later that John actually decided that he wanted to be the donor.

Q. Did you and petitioner enter into an informed consent as it related to the fertilization of your eggs and cryopreservation of the embryos?

A. Yes, we did. We actually had reviewed it prior to going into meeting with Dr. Behera's office staff on July 11. We discussed it. We talked about the options. And then when we went in together to meet with the staff, we signed the contract, initialed where we both wanted to initial. And we also discussed the options that we had at that point.

Q. Is there a specific provision as it relates to a divorce or dissolution of the relationship?

A. Yes.

Q. Do you have Exhibit 4 in front of you?
A. I do.
Q. Okay. Could you look at page 16, section H.
What are the two options as it relates to divorce? What are the two options provided as it relates to divorce or dissolution of the relationship?
A. The two options are that a court decree and/or settlement agreement will be presented to the clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose.
The second option was to destroy, which we both agreed we wouldn't do.
Q. So which option did you select?
A. We selected and we both initialed and marked it, a court decree and/or settlement agreement will be presented to the clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose.
Q. In any of the provisions provided in the contract to you and petitioner regarding the disposition of the embryos, did you and petitioner ever select destroy the embryos?
A. We did not.
Q. Since completion of your chemotherapy and radiation, have you been told that you do not have the

choose to.

Q. So even if the petitioner was not financially responsible or not paying you support, would you have any objection to him seeing a -- the child?

A. No.

Q. Have you considered other options available to you as it relates to becoming a parent?

A. I have. I've thought about adoption. Unfortunately, because of my medical history, it's unlikely that I will be given that opportunity to actually be given a child to adopt just because it is more difficult.

And I've also thought about a donor of embryos but unfortunately, again, that requires, like Dr. Behera said, a long waiting list and more financial requirements on me.

Q. What are you asking the court to order with regard to the embryos?

A. I'm asking the court to order that they be awarded to me with use or in the alternative to be donated just like the contract. I want -- you know, we both made this agreement when we were okay. And I understand things didn't go the way we planned -- or at least the way I planned, I'm not sure. But we did sign a contract and we agreed to these provisions. We agreed to donate them.

Never did we select to destroy them.

Q. Is there a reason you do not want the embryos to be destroyed?

A. It's my only chance. It's -- at this point it's the only opportunity or the only -- it's the only opportunity I will ever have to have a biological child. My only legacy. That's all I have left.

Q. If the court is not inclined to award the embryos to you, are you seeking any financial reimbursement as it relates to the IVF process?

A. Yes.

Q. Could you explain?

A. When I signed this -- when I went in to see Dr. Behera and because I was a cancer patient, the Live Strong Foundation provided an amount that I needed to pay to be able to proceed because IVF isn't cheap. So the Live Strong Foundation because I was a cancer patient -- had had a cancer diagnosis, agreed to an amount and I paid that amount prior to him and I becoming married. And I actually paid -- I'm looking at Exhibit 4, page 69 of his indicates the part where I paid $3,500 prior to our marriage.

Q. Last -- we're going to wrap this up -- oh. Sorry. I want to go back to the issue of Angel really quickly.

the dog, three days prior to mediation; correct?
A. I don't recall the exact date but I did raise it prior to mediation.
Q. Ms. Torres, it is possible for you to have frozen just your eggs; correct?
A. Was it possible in 2014, yes.
Q. But you chose not to; correct?
A. Based on the information -- yes.
Q. Was it possible at that time for you to choose a different donor rather than Mr. Terrell?
A. Yes, and I had a different donor.
Q. Did you use a different donor, Ms. Torres?
A. No. Mr. Terrell said he would do it so I went with him.
He was my -- he was my boyfriend.
Q. There's not a question. It's just "yes" or "no".
Do you have Exhibit Number 4 in front of you?
A. Yes.
Q. Can you turn to page -- it's Bates stamped there at the bottom 59.
A. Yes.
Q. At the bottom where it says, Note, the first bullet point -- you realize that this states neither of you -- neither you, nor Mr. Terrell may use the embryos without the express written consent of the other; correct?

A. Yes.
Q. And you had every egg of yours fertilized with Mr. Terrell's sperm; correct?
A. Yes.
Q. Under the -- under -- in conjunction -- I'm sorry. Strike that.
Every egg of yours was fertilized using Mr. Terrell's sperm in conjunction with an agreement that stated neither of you could use them without the express written consent of the other; correct?
A. Yes.

MS. STODDARD: No further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. LEVINE:

Q. You testified about this earlier but let's maybe break it down a little bit.
When you made the decision to go through the IVF process and produce the eggs, what was your intent at that time with regard to the fertilization of those eggs?
A. I had been informed that they preserved better and they unthaw better, so if I froze an egg there was no -- there was a potential that there was no viability, so my intent was to preserve my right to have a child.

I, SCOTT M. CONIAM, a Certified Court Reporter, Certificate No. 50269, do hereby certify that the foregoing pages constitute a true and correct transcript of my stenographic notes taken at said time and place, all done to the best of my skill and ability.

I FURTHER CERTIFY that I am in no way related to any of the parties hereto, nor am I in any way interested in the outcome hereof.

DATED at Phoenix, Arizona, on November 14, 2017.

/s/ Scott M. Coniam

SCOTT M. CONIAM, RMR, CRR
Certified Court Reporter
Certificate No. 50269