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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY  \_\_\_\_\_  
DEPUTY

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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In re the Marriage of:

AIMEE GUARDADO  
Respondent

and

OTTO GUARDADO  
Appellant

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ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR CLARK COUNTY

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REPLY BRIEF OF APPELLANT

OTTO GUARDADO  
Appellant  
800 NW 75<sup>th</sup> St.  
Vancouver, WA 98665  
360-713-2448

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## I. STATEMENT OF ISSUES IN REPLY

1. Aimee cannot supplement the record without this Court's permission.
2. The trial court improperly made contradictory rulings which caused prejudice and irregularity.
3. The trial court was obliged to address Aimee's discovery violations, which was continually challenged in the trial court.
4. Instead of compelling compliance with discovery rules, the trial court placed the fault and burden of discovery production on Otto.
5. By failing to effectuate an *Ishikawa* analysis, the court improperly sealed evidence, which prevented their review in this Court.
6. The treatment of the Dezsofi records does not fall under *Bennett's* "good cause" standard simply because the trial court avoided making any findings on them.
7. The embryo is property. No national case supports the trial court's decision to forego awarding the embryo to either party and leaving it "ownerless".
8. An IVF contract exists, but that does not preclude a balance of the parties' interest with regard to an embryo award. Neither party appears to have an overriding interest unless a "right to not procreate" interest is weighed.
9. A "right to not procreate" interest has not prevailed yet in Washington, but would likely prevent Otto from utilizing the embryo.

10. The courts are statutorily tasked with property disposition, but not with the ultimate disposition of the embryo, which resides with the parties.
11. The trial court erred by applying a community property interest analysis to Otto's retirement plan, but not to Aimee's retirement plan or the family home equity.
12. The trial court ignored Aimee's previous admission that the retirement plan and family home had community interest.
13. This Court should guide the lower court on issues that could create error in a new trial on remand.
14. Aimee should be sanctioned for her discovery violations and Otto should receive certain costs on appeal.

## II. ARGUMENT IN REPLY

### A. THE RESPONDENT IMPROPERLY APPENDED CLERK'S PAPERS.

Aimee's brief appends an order listed as "Exhibit D" (Clark County sub #421. *See* Br. of Appellant at App. B at 18), which neither party designated as clerk's papers. *See* RAP 9.1, RAP 9.6. This court should not consider it. *Cf. Stevens Cnty. v. Loon Lake Prop. Owners Ass'n*, 146 Wn.App. 124, 131, 187 P.3d 846 (2008) (Appellate court refused to consider matters not in the record).

### B. THE TRIAL COURT CONTINUALLY FAILED TO REIN IN THE RESPONDENT'S DISCOVERY VIOLATIONS.

1. *Additional efforts to mitigate the prejudicial effect of the Dezsofi records would have been useless.*

Aimee unreliably states that Otto did not move for discovery violations during trial. Br. Respondent at 2. In fact, Otto argued vigorously in closing

arguments (CP 355-56, 357, 358-59) and his motion for reconsideration (CP 525-29) that Aimee had committed discovery violations. Further efforts would have uselessly, as the court made numerous contradictory rulings.

The court first faulted Otto for not taking action on the Dezsofi records: “Now, if discovery had been pursued as to Ms. Dezsofi and deposition and subpoena of records and whatnot and that had been -- not been responded to timely like they weren't here, and the further step of motions to compel and orders and whatnot were pursued, *we'd be in a different situation.*” Trial RP at 580-81 (emphasis added). But when Otto reminded the court that he had attempted to compel the Dezsofi records (Trial RP at 652), he was met with indifference (Trial RP at 654-55): “I don't recall right now if what Mr. Guardado suggests here is true that she was a subject of a motion to compel. She may have been. Why I didn't grant that at the time I don't recall.” At first, the court suggested it would offer relief if Otto had pursued a motion to compel, then demonstrated insouciance after learning he had.

This was just one instance where the court shifted its opinion after making a ruling. Other instances include ordering Aimee's health care records for in camera review (CP 234-35), then ignoring her disobedience (CP 281-82); faulting Otto for not moving the court to compel Ms. Weber to a deposition (Trial RP at 174), then faulting him for too many motions (CP 607); ordering the Dezsofi record to be read in Ms. Gaffney's office (CP 334; *see also* Trial RP at 294, 577, 579), then suggesting it wouldn't have been a violation if he had (Trial RP at 579); releasing Dezsofi records (Trial RP at 168, CP 334), then

withdrawing them (Trial RP at 657); ordering the records “destroyed” (CP 334), then sealing them sua sponte (CP 380); requiring an *Ishikawa* (*Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982)) analysis (“I -- I don't think I can seal exhibits absent the *Ishikawa* factors analysis.” Trial RP at 504-05), then disregarding that requirement (CP 380); issuing a subpoena for Pauline Weber's deposition (CP 669-75), then allowing her to testify at trial despite her defiance (Trial 173-74). Otto often found himself on the wrong side of the court's inconsistent opinion. Aimee's assertion that Otto did not move for discovery violations is not only wrong, it would have been completely useless. A party does not waive the right to assert error on appeal by declining to engage in useless acts. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498-99, 933 P.2d 1036 (1997).

The court also did not explain why it would not enforce its October 30, 2015 order that “[b]oth parties shall inform the other of any counselors they have seen between May 8, 2015 and today so that discovery may ensue.” CP 281-82. The court had the power under RCW 2.28.010(4) to enforce its own order. Instead, the court left Aimee's conduct unchecked.

2. *Despite arguments to the contrary, the Respondent did not comply with discovery rules.*

Otto had no idea until he learned on the last day of trial that Aimee was visiting Ms. Dezsofi for over a year. Until then, he had no idea that she had failed conduct discovery truthfully. The purpose of interrogatories is to prepare for trial and avoid surprise. *Lampard v. Roth*, 38 Wn. App. 198, 201, 684 P.2d 1353 (1984). Failure to respond or supplement interrogatories, or failure to

comply with discovery orders without excuse is willful. *Id.* at 202. A party who obtains information that a discovery response is incorrect must amend the response to reflect the correction. *Hyundai Motor America v. Magaña*, 141 Wn. App. 495, 528, 170 P.3d 1165 (2007), *rev'd*, *Magaña v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009) (Bridgewater, dissenting). The purpose of discovery rules is to ensure trials are fair and the truth is not lost. *Matter of Firestorm 1991*, 129 Wash.2d 130, 153, 916 P.2d 411(1996) (Talmadge, concurring).

In her response, Aimee claims that she did disclose the Dezsofi records. Br. Respondent at 3. This statement fails for two reasons: a medical records release is not a notice; plus it was clear that the court and Otto's attorney were as surprised as Otto by the appearance of the Dezsofi records:

MS. GAFFNEY: ...I know these records I believe were requested in May of '15, and they suddenly appear the eve of trial. It's like, oh...

THE COURT: Yeah, I was a bit put off by that.  
Trial RP at 581-82.

Aimee argues that even if she had failed in her duty, the proper remedy was to "exclude" the records from trial. Br. Respondent at 3. This also fails for two reasons: first, the records were not really "excluded" from trial because they clearly stirred disorder among the litigants and court; and second, the proper remedy was to declare a mistrial. Although Otto did not move for mistrial, he did move for a new trial. CP 511-44. A unanimous Washington Supreme Court ruled that a party need not move for mistrial to preserve a claim for error based on misconduct. *Teter v. Deck*, 174 Wn.2d 207, 226, 274 P.3d 336 (2012)

Aimee also says that she did not testify from the Dezsofi records, but upon her own recollection. Br. Respondent at 3-4. This is specious since Aimee's case-in-chief is completely absent of any mention of the Dezsofi records. It was not until her rebuttal, after both parties received access to the records, that any testimony about their contents was elicited. Trial RP at 801, 804-05. This also does not explain why Otto also had to testify from the Dezsofi records (Trial RP at 638, 648, 661), despite never having read them at all (*Id.* at 802).

Aimee's discovery violations were willful, although willfulness is not a requirement for issuing sanctions. *Carlson v. Lake Chelan Community Hosp.*, 116 Wn. App. 718, 738, 75 P.3d 533 (2003).

Aimee cannot deflect responsibility for producing the Dezsofi records. Aimee's medical records are under her legal control and she has a right to demand them from Dezsofi. *See Sastrawidjaya v. Mughal*, 196 Wn. App. 415, 421 n.3, 384 P.3d 247 (2016).

Aimee's statement that she complied with discovery orders is to deny reality. Aimee equivocated regarding the Dezsofi records on six discrete occasions:

1. January 16, 2015: Otto asked her about health care providers (CP 807) and specifically if she had visited any counselors (CP 808). Aimee certified she did not visit Dezsofi. CP 712-13, 853-54. Otto asked for reports from mental health professionals (RFP No. 33). CP 832. Aimee objected in part (CP 719, 860) and provided only records relating to the IVF procedures (CP 720-43)

2. May 8, 2015: In a pre-hearing declaration, Aimee says her primary therapist is “Otto’s and my marriage therapist” (i.e. Dr. Pamela Kimsey). CP 224. The trial court ordered that her health care records be sent to the parenting evaluator. CP 234-35. The Dezsofi records were not included in the released records and Aimee made no effort to notify Otto or the court. CP 250.
3. October 23, 2015: Otto moved to compel the Dezsofi records, clearly accusing her of evading compliance with the May 8 order. CP 267-69. Aimee equivocates, saying that she has not seen an “undisclosed” counselor. CP 273.
4. October 30, 2015: The court (again) orders that provider records be sent to the court for in camera review. CP 280, 281-82; 10/30/15 RP at 27:13-23. Aimee did not send these to the court for in camera review until two days before trial. CP 331.
5. October 30, 2015: Aimee’s attorney told the court that there were no records from Jeannette Dezsofi from June until the October hearing, except for the August 1 and 15 visits. 10/30/15 RP at 26:16-17. It is undisputed that Aimee had bi-weekly sessions with Ms. Dezsofi from December 24, 2014 until trial (January 2016). CP 350.
6. November 2, 2015: Suspicious that Aimee’s first answer about counselors was false, Otto renewed his interrogatory. CP 898. Aimee referred to her first answer that she was not seeing Ms. Dezsofi. CP 838.

Aimee repeatedly withheld from Otto any knowledge about the Dezsofi records. It was clear that she was not going to allow discovery on the Dezsofi records. She even takes the position with this Court that she was in compliance. Aimee continually shifted the truth to conceal her mental health treatment with Jeannette Dezsofi and in doing so, contravened the word and spirit of discovery rules.

3. *The trial court placed the burden of producing discovery on the Appellant instead of the Respondent.*

During the hearing for Otto's motion to compel, the trial court impermissibly placed the burden of compelling the Dezsofi records on him. 10/30/15 RP at 38-39; Trial RP at 580-81. The court should not have required Otto to go through extraordinary effort to obtain discovery. *See Seals v. Seals*, 22 Wn. App. 652, 654-55, 590 P.2d 1301 (1979) (wife was not required to resort to subpoenas when husband argued that "more diligence" would have revealed hidden assets despite misleading answers to interrogatories).

It was Aimee who had the burden to either: a) produce the answers and records pursuant to interrogatories and for the May 2015 order, or b) petition for a protective order. She did neither. A litigant cannot unilaterally limit the scope of discovery. *Johnson v. Jones*, 91 Wn. App. 127, 134, 955 P.2d 826 (1998). A party must seek a protective order to be relieved of answering interrogatories or request for production. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009).

Aimee justifies her actions by saying that the “remedy was to exclude the records from trial”. Br. Respondent at 3. This does not square with discovery rules:

Counsel and parties may not unilaterally decide to withhold properly requested information on the ground it is not relevant or admissible. Nor should the courts sit back and wait for an incipient *Fisons* case to ripen. Where there is an indication a serious potential exists for abuse of civil discovery, the courts are obliged to act.

*Matter of Firestorm 1991*, 129 Wn.2d 130, 152, 916 P.2d 411 (1996) (referencing *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993)) (Talmadge, concurring).

The trial court continually demanded that Otto remedy Aimee’s discovery violations. In reality, the court should have imposed limits and sanctions on her conduct. Because her conduct went unchecked, it incubated into many errors within the proceedings, the findings, and the court’s conclusions. By gaming the system with her discovery violations, Aimee ensured that Otto never was able to prepare for his trial and was denied his day in court.

C. THE COURT MADE ERRONEOUS SEALING DECISIONS THAT FALL WITHIN THE ‘DECISION-MAKING PROCESS’ CONTEMPLATED BY BENNETT.

1. *The Respondent makes unreliable statements about the trial court’s sealing decisions.*

Aimee claims that the sealing decisions (CP 257, 380) are not before this Court because they were not “appealed”. Br. Respondent at 4. Generally, appeals are taken from final judgments. RAP 2.2. As a practical matter, evidentiary rulings are brought up with a final judgment designated in a notice

of appeal. Wash. State Bar Ass'n, WASHINGTON APPELLATE PRACTICE  
DESKBOOK § 5.6(2) (4th ed. 2016).

Her argument that Otto did not “object” to having the records sealed (Br. Respondent at 4) is specious; when the sealing decisions were made, no parties were present and there was no way that Otto could have known that the Clark County Clerk would “hard seal” (their term) these records. Unlike every other sealed document in the file, the clerk did not permit the Dezsofi records to be submitted to the Court of Appeals for review. No explanation is given why these received different treatment from the dozens of other sealed records in the trial court file.

Aimee’s argument that the Dezsofi records were “not part of the trial record” (Br. Respondent at 4) is incorrect. Outcry regarding the Dezsofi records dominated Otto’s case-in-chief. Trial RP at 502-06, 576-82, 638-39, 649-61, 693-94, 800-804. Otto attacked them as soon as his counsel read them.

2. *The Respondent misplaces reliance on Bennett.*

She also says that the court appropriately sealed the Dezsofi records sua sponte and in camera after trial. She inappropriately relies on *Bennett v. Smith Bunday Berman Britton, PS*, 156 Wn. App. 293, 234 P.3d 236 (2010) for support, which is inherently distinguishable. In this unusual case, the trial court was petitioned by an intervenor to unseal specific documents that were never read by the court, and never ruled upon because the parties settled hours after the subject documents were filed. *Id.* at 298-99. On these novel facts, the appellate court held that because the documents were not part of the court’s

“decision-making process”, the documents were not subject to public scrutiny. *Id.* at 303.

But Aimee misapplies this to the instant case. The *Bennett* trial court did not read or rule upon the subject documents, so they did not implicate the decision-making process. The *Bennett* Court of Appeals decision held: “To the extent they enter into the court’s decision-making process *in making any ruling*, the documents must be unsealed...” *Id.* at 296 (emphasis added). The Washington Supreme Court<sup>1</sup> nuanced *Bennett* further: “some conduct by the judge or judiciary is necessary for the public’s constitutional interest in the proceedings to arise.” *Bennett v. Smith Bundy Berman Britton, PS*, 176 Wn.2d 303, 311-12, 291 P.3d 886 (2013). And: “The meaning of “conduct” is broad and can include omissions and failures to act.” *Id.* at 312 n.3.

Aimee’s sole support that the Dezsofi records were not part of the trial court’s “decision-making process” is that the court conspicuously failed to make findings at all about the Dezsofi records. *See* Br. Appellant at 31-32. But unlike in *Bennett*, the trial court here actually did read some or all of the records. Trial RP at 168, 577. The language of the subsequent sealing order suggests that the court may have finished reviewing them. CP 380. Regardless, the Supreme Court *Bennett* decision was clear: when the conduct of the court is implicated, then the openness presumption prevails.

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<sup>1</sup> This case had no majority opinion and has been infrequently cited (i.e. *State v. Herron*, 183 Wn. 2d 737, 356 P.3d 709 (2015); *In re Det. of Reyes*, 176 Wn. App. 821, 315 P.3d 532 (2013); *State v. Sykes*, 182 Wn.2d 168, 339 P.3d 972 (2014)).

The fact that the trial court did not make written findings with regard to the Dezsofi records does not make their impact immaterial. *Cf. In re Custody of Nunn*, 103 Wn. App. 871, 14 P.3d 175 (2000), *abrogated by In re Custody of Shields*, 157 Wn.2d 126, 136 P.3d 117 (2006) for other reasons. In *Nunn*, an aunt was granted custody of a child amid unfounded allegations of the mother's alcoholism and prostitution. *Id.* at 873, 877, 879-80. The trial court relied heavily on the aunt's narrative and omitted several "facts" in its written findings. *Id.* at 877-80. Division 1 excoriated the trial court because it clearly made its decision "based on a petition containing allegations of parental unfitness that ultimately proved to be false." *Id.* at 888.

The trial court here should not avoid accountability for its handling of the Dezsofi records just because it failed to make findings on them. If all trial courts had to do to avoid review of a subject was to omit reference in its findings, then it would perversely encourage the judiciary to bury any facts it deemed controversial. This would not only chill any subsequent review, but contravenes the openness doctrine of Washington courts.

This Court should find that *Bennett* does not control in this case to the extent that the Dezsofi records are sealed away forever.

#### D. THE TRIAL COURT DID NOT PROPERLY DISPOSE OF THE EMBRYO.

Otto argues that the court should have: a) held the embryo to be property of a special character; b) awarded it to a party; and c) restrained the parties from using it. Aimee calls this argument "simply bizarre". Unfortunately, bizarre circumstances foster bizarre outcomes.

A recent Missouri Court of Appeals case illustrates this. Jalesia McQueen and Justin Gadberry created embryos while married. *McQueen v. Gadberry*, 507 S.W.3d 127, 133-34 (Mo. Ct. App. 2016), *transfer to Mo. denied* Dec. 15, 2016 and Jan. 31, 2017; *see table*, Appendix A. Upon divorce, McQueen argued for “custody” of the frozen pre-embryos as they were “persons” under Missouri’s “life begins at conception” law (Mo. Rev. Stat. §1.205 (1986)). *Id.* at 136. Gadberry said that allowing use of the embryos would violate his rights to privacy and to not procreate under U.S. Const. amend. XIV, § 1. *Id.* at 136-37. A split appellate court affirmed the trial court’s decision that the embryos were marital property of a *special character* (emphasis in original), awarded them to the parties jointly, and ordered an injunction against their use. *Id.* at 157. The court reasoned that unusual circumstances justified the unusual practice of joint award of property upon dissolution. *Id.*

In *A.Z. v. B.Z.*, 431 Mass. 150, 725 N.E.2d 1051 (2000), the court placed a permanent injunction on use of a parties’ embryos, holding that the consent form was not binding (*Id.* at 151) and that parenthood could not be forced upon individuals who reconsider (*Id.* at 162).

Generally, courts have decided that disposition of frozen embryos turns on the contract, if one exists. The Washington Supreme Court noted with approval the Massachusetts Supreme Court’s opinion that dispositive agreements regarding embryos should be “presumed valid and binding”. *Litowitz v. Litowitz*, 146 Wn.2d 514, 525-26, 48 P.3d 261 (2002). In *Kass v. Kass*, 91 N.Y.2d 554, 696 N.E.2d 174 (1998), New York’s highest court also felt that the court should

honor the intent of parties when they sign consent forms (*Id.* at 569) and that consents should be interpreted like contracts (*Id.* at 566).

In an unusual decision, the Appellate Court of Illinois went so far as to determine that an oral contract controlled the disposition of embryos. *Szafranski v. Dunston*, 2015 IL App (1st) 122975-B, 34 N.E.3d 1132, 1154, 393 Ill. Dec. 604, *appeal denied*, 39 N.E.3d 1012 (Ill., Sep. 30, 2015) (No. 119428), *cert. denied*, 136 S.Ct. 1230 (U.S. Feb. 29, 2016) (No. 15-912). The *Szafranski* court also examined the interests of the parties and found that Dunston's interest outweighed Szafranski's. But it was the dispositive effect of the oral contract, and not Dunston's circumstances (she undertook IVF to preserve her eggs from chemotherapy damage (*id.* at 1137)), that controlled. *Id.* at 1161.

In *Litowitz*, the case turned solely on a upon contract because Becky Litowitz was not a progenitor. *Litowitz* at 527. Other courts have weighed the relative interests of the parties because there was no binding contract (*See Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), *J.B. v. M.B.*, 170 N.J. 9, 783 A.2d 707 (2001)). The *Szafranski* court was unique in that it expressly rejected the idea set forth in other cases (*See J.B. v. M.B.*) that a progenitor could veto use of an embryo if he or she had a change of heart. *Szafranski* at 1151. It also cast doubt that the informed consents the parties signed evinced their intentions in the event of separation. *Id.* at 1157.

In the instant case, the trial court failed to give effect to the part of the agreement that the embryo was "understood to be your property, with rights of survivorship". CP 736. The trial court erred by not awarding the embryo to

either party, and thus made a decision that cannot stand in law. The court was required by RCW 26.09.080 to make a disposition of property. An award to one party with instructions against use is the most reasonable solution. There is nothing preventing the parties from making a future disposition if they change their minds. Theoretically, they could later agree to destroy it, donate it, or allow the other party to use it.

There are no known cases where a court revoked all ownership in frozen embryos. Only in *Cahill v. Cahill*, 757 So. 2d 465, 468 (Ala. Civ. App. 2000) did the court make an ambiguous ruling. There, the parties contracted with the University of Michigan to create and store embryos. *Id.* at 466. Deborah Cahill, as the only one who could obtain medical records, defied multiple orders to produce the contract. *Id.* at 466-67. Patrick Cahill submitted a blank copy of the agreement, purporting that the parties signed a similar one. *Id.* at 466. Because the agreement stated that the university would retain possession in a divorce, the court ruled that the university “appeared” to be the legal owner (*Id.* at 467) and apparently left it to the parties and the university to work it out (*Id.* at 468). Despite this ambiguous ruling, the Alabama court did not do what the trial court did here: that is, leave property dangling with no owner. This Court should reverse and order the trial court to make a dispositive opinion.

The trial court does not need to decide the *ultimate fate* of the embryo; it is only tasked with making an *equitable distribution* of property. After all, if the trial court awarded a contested Honda to a wife, the court would not instruct her to subsequently destroy it. The court is not mandated to determine what happens

to the embryo after it has completed its job distributing it. In fact, there is no agreement between the parties to destroy the embryo in the event of divorce.

In her brief, Aimee now seems to dismiss the IVF consent, calling it the “alleged contract” and saying it is not dispositive.<sup>2</sup> However, she relied on this consent in the trial court (even calling it a “contract” at CP 306) and should not now be allowed to repudiate her earlier position.

In her trial brief, she also incorrectly argued that “no jurisdiction in the United states has awarded embryos...over the objection of either parent”. CP317. However, Division I did this very thing: *In re Marriage of Nash*, No. 6253-5-I, 150 Wn. App. 1029, WL 1514842 at \*4 (2009) (in an unpublished case, the Court of Appeals affirmed a trial court decision that weighed the interests of the parties and awarded embryos to husband). The Superior Court of Pennsylvania affirmed a decision that awarded embryos to a wife over the husband’s objections. *Reber v. Reiss*, 2012 PA Super 86, 42 A.3d 1131, 1142 (2012). *Szafranski* was decided right before Otto and Aimee’s trial, and may not have been considered, but similarly doesn’t support Aimee’s statement. There is nothing barring the trial court from making a balance of the parties’ interest.

Although the court may award the embryo to either party, a weighing of their interests to use the embryo is more challenging. Besides CG, Otto has two children. Aimee has three. They cannot claim lack of parenthood to overcome

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<sup>2</sup> Aimee also makes other statements without explanation, reference to the record, or support in the record, such as: that the court’s order to replace CG’s Oregon birth certificate with a Washington one is “background information” (*compare* CP 615 *with* Br. Respondent at 5), and; that the medical testing is a moot issue (Br. Respondent at 5). Since CG has not had the medical testing, it is not moot. It is not a function of the appellate court to unearth a litigant’s claims within the record. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 819, 828 P.2d 549 (1992).

objections. *See Reber, Szafranski*. Aimee does not want either party to use the embryo. Several cases weighed one party's desire use embryos vs. the other's desire to not procreate. *See Davis, A.Z., J.B., Witten, McQueen*. In these cases, the courts reasoned that the interest to not procreate tipped the balance. But in this state, the *Litowitz* court made a strict contract determination, and the *Nash* court expressly found that the wife would not be forced to become a biological parent against her will (*Id.* at \*4). This Court should offer some direction to the trial court should it need to weigh the interests of the parties.

The disposition of the embryo has no bright-line rules. Still, this trial court did something without precedent in the short but protean history of frozen embryos in the United States: it removed the property ownership of the progenitors and therefore made a reversible error. Upon remand, this Court should offer guiding language to the trial court and stress that the parties can still come to a dispositive arrangement.

E. THE COURT DID NOT PROPERLY ANALYZE THE PARTIES' COMMUNITY PROPERTY INTEREST.

Otto relied on Aimee's statements that there was community property interest in both her retirement plan and house equity. CP 67, 95, 172, 564, 651, 660; 11/12/14 RP at 4, 5; Trial RP at 484, 485, 604, 739, 742-43. After all, Otto readily admitted that there was community property interest in his retirement plan. CP 360. However, the court inexplicably ignored the evidence and ruled that Aimee's retirement plan and home equity was hers alone.

The court should have recognized that Aimee was barred from reversing her earlier position that there was community property interest. In *Markley v.*

*Markley*, 31 Wn.2d 605, 613, 198 P.2d 486 (1948), the court quoted with approval the language taken from 19 AM. JUR. *Estoppel* § 72 (1939)<sup>3</sup>:

“Generally speaking, a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him [or her], at least where he [or she] had, or was chargeable with, full knowledge of the facts and another will be prejudiced by his [or her] action.” *Id.* at 613.

The court did not apply any analysis to Otto’s claim that the home equity and Aimee’s retirement plan was partially community property. Not only did the court not analyze the character of the parties’ property, it made findings that were unmoored from any evidence in the record. The appellate court will uphold findings supported by substantial evidence. *In re Marriage of Fahey*, 164 Wn. App. 42, 55, 262 P.3d 128 (2011). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted. *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). Inexplicably, the court held that that “Otto admitted at trial that the family home is Aimee’s separate property”. Finding of fact No. 49 at CP 602. Otto never admitted this at all and is unsupported by any evidence. In fact, he said the exact opposite. Trial RP at 586, 736; Ex 47, 48; CP 293, 296, 363. He and Aimee already agreed there was community property interest. CP 172.

The court made the conclusory finding that, “Aimee does not have a 401k [*sic*] or other retirement account; she had a separate account that she liquidated

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<sup>3</sup> This text remained intact until at least 28 AM. JUR. 2D *Estoppel and Waiver* § 68-69 (1966, Supp.1971). It has apparently been superseded by other language. A substantially similar discussion is now found in 28 AM. JUR. 2D *Estoppel and Waiver* § 65-66 (2017).

during the litigation.” Finding of Fact No. 57 at CP 603. Again, insofar that her account was “separate” is unsupported. Substantial evidence shows otherwise: Trial RP at 484, 485, 742-43; CP 564-65. Characterization of property as separate or community is reviewed de novo. *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002). The name on a title does not determine separate or community character of property, or even provide much evidence. *In re Estate of Borghi*, 167 Wn.2d 480, 488, 219 P.3d 932 (2009).

The test of a property’s character is “whether it was acquired by community funds and community credit, or separate funds and the issues and profits thereof,” *In re Marriage of Chumbley*, 150 Wn.2d 1, 7, 74 P.3d 129 (2003) (quoting *In re Marriage of Sedlock*, 69 Wn.App. 484, 849 P.2d 1243 (1993) at 506). When real property is purchased with both community funds and clearly traceable separate funds, it will be divided according to the contribution of each. *Id.* at 8.

Although Aimee purchased the family house before marriage, Otto paid for half of the mortgage and home expenses once the parties married. Ex. 47, 48; CP 586; Trial RP at 586. In fact, Aimee correctly determined this early in the separation when she admitted to community property interest in the home equity and retirement plan. It is likely that once the parties stopped “playing nice”, then her attitude changed, but that does not erase her earlier admission that there was community interest (CP 172, 564-65). It also does not excuse the trial court from applying an analysis to the characterization of their property.

Ultimately, it is the court who was tasked to determine the character of the property and erred here. The court calculated Otto's retirement plan from the start-date<sup>4</sup> (Trial RP at 694-95) of the marriage to the end-date<sup>4</sup> (Trial RP at 696) and divided the growth to reach Aimee's community interest (Trial RP at 697; Finding of fact No. 55 at CP 603.). The court did not explain why it chose to give Aimee the community property of Otto's retirement plan, but to withhold the community portion of Aimee's retirement plan from Otto. After all, they were both married at the same time, worked, and jointly contributed to their retirement. It follows that the court should have used the same analysis.

Since this Court may review property characterization de novo, it should ignore Aimee's slippery reversals and find that Otto had community interest in both the home sale proceeds and Aimee's retirement plan. Upon a new trial, the trial court should be instructed to make a determination of the pro-rata amounts that the parties contributed to the home, and a start-point to end-point determination for Aimee's retirement plan. In the event that Aimee cannot produce evidence of this, the court should make a determination that it is all community property. Uncertainty in tracing assets should favor a finding of community character. *In re Marriage of Gillespie*, 89 Wn. App. 390, 400, 948 P.2d 1338 (1997); *Also see In re Marriage of Chumbley*, 150 Wn.2d 1, 5-6, 74 P.3d 129 (2003) (A party must present clear and convincing evidence that property acquisition fits within a separate property provision; property that

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<sup>4</sup> Approximately, not exactly. Yet, this was fair. Property division does not require mathematical precision. *In re Marriage of Crosetto*, 82 Wn. App. 545, 556, 918 P.2d 954 (1996).

becomes commingled to the point of indistinguishability is community property).

F. THE COURT MADE IMPROPER RESTRICTIONS ON THE APPELLANT'S PARENTING TIME.

The court imposed parenting plan restrictions that Otto could not pick Clara up early, but did not identify why it imposed this restriction, or identify any harm that would come by allowing him to pick her up early. By requiring trial courts to identify specific harms to the *child* before ordering parenting plan restrictions, RCW 26.09.191(3) prevents arbitrary imposition of the court's preferences. *In re Marriage of Chandola*, 180 Wn.2d 632, 655, 327 P.3d 644 (2014) (emphasis in original).

This is particularly important in the family law context, where the trial court is empowered to regulate intimate aspects of the parties' lives. By making improper restrictions without effectuating RCW 26.09.191, the court significantly reduced Otto's parenting time and erred.

G. THIS COURT SHOULD INSTRUCT THE LOWER COURT UPON REMAND ON CONTESTED ISSUES.

It is possible to rule for a new trial on one of the main errors (discovery violations, embryo disposition), and never reach the merits of the other claims. Because many of these issues could reintroduce error upon remand, this Court should state its opinion on key issues. The trial court should not "piecemeal" its decisions upon remand. Interdependent family issues should not be bifurcated. *Little v. Little*, 96 Wn.2d 183, 194, 634 P.2d 498 (1981).

1. Embryo- Following *Davis*, if there is a contract, it should be given effect. A weighing of the parties' interest is optional. The embryo should be given to either Otto or Aimee. The ultimate disposition (e.g. destruction, donation, research) may be reserved for the parties to decide.
2. Birth Certificate- There is no precedent or authority for the trial court's order and should be completely reversed.
3. Discovery violations- This Court should recommend sanctions that are the least severe (*See Fisons*) to punish Aimee's conduct, deter her future violations, compensate Otto for losses due from her conduct, and educate litigants about discovery rules:

The purpose of the discovery rules is to ensure trials are fair and the truth is not lost. We must continually affirm these principles, until litigation counsel get the unmistakable message we will apply these principles in discovery and we will sanction lawyers who do not take us at our word.

*Firestorm*, 129 Wn.2d at 152 (Talmadge, concurring).

4. Testimony of Pauline Weber- Ms. Weber should not be allowed to testify if she cannot comply with a lawful subpoena.
5. Distribution of property- The trial court should distribute the residual property or property value that Aimee retained, including the community interest in the family home equity, and her retirement plan.
6. Sealing of Records- The trial court should not be allowed to seal documents from review from this Court. This Court should also give guidance on openness of records and sealing standards.

7. Medical testing- The trial court should not order medical tests for CG in the absence of a physician's testimony.

### III. FEES AND COSTS

Aimee states that she ought to receive attorney fees, alleging intransigence for his "sprawling" brief, failure to state legitimate grounds for relief, and frivolous claims (none conceded). But these are not definitions of intransigence. *See Chandola*, 180 Wn.2d at 657 (2014).

Otto pointed out numerous errors, but only because the court erred repeatedly. To ignore the errors would have been to waive them. *In re Marriage of Stern*, 57 Wn. App. 707, 710, 789 P.2d 807 (1990) (RAP 10.3 and RAP 10.4 require appellants to make separate assignments of error in the brief or appendix, or the court may not consider it). Otto should not be faulted for pointing out the breadth of the trial court's errors.

Even if Aimee were entitled to attorney fees apart from the alleged intransigence, she made no attempt to supplement the record with the affidavit or cost bill to defend the trial court's award of attorney fees. As such, this Court cannot review them, and should reverse.

The trial court did not say how it resolved the dispute about Otto's alleged intransigence even though he directly challenged it. "The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis." *Berryman v. Metcalf*, 177 Wn. App. 644, 658, 312 P.3d 745 (2013). Here, the court did not resolve the disputed intransigence, instead making the conclusory statement, "Any other issues raised by respondent are

dismissed pursuant to Paragraph 1 herein; the Court stands by its written trial decision.” CP 629. The court also did not analyze the facts accurately. *Compare* CP 591, 607, 614 (court’s analysis of Otto’s alleged intransigence) *with* CP 521-23 (Otto’s trial attack) *and* Br. Appellant at 45-48 (appellate attack).

This Court should reverse the attorney fees for lack of showing of intransigence, failure of the trial court to resolve contested facts, and absence of any record of the attorney fee bill (*Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998)).

**Sanctions for discovery violations.** Although Otto moved to compel the Dezsofi records, an order to compel discovery is not needed to impose sanctions. *Carlson v. Lake Chelan Community Hosp.*, 116 Wn.App. 718, 739, 75 P.3d 533 (2003). In fact, “even an inadvertent failure to disclose is enough if there is a violation of the rule without a reasonable excuse.” *Id.* Because the trial has already occurred, and because Otto never had his day in court, the minimum sanctions that can be imposed is that a new trial be ordered. Additionally, to prevent Aimee from future violations, Otto should be allowed to recover fees and costs associated with her discovery violations.

#### IV. CONCLUSION

Aimee not only engaged Jeannette Dezsofi for therapy, but evaded answering Otto’s lawful interrogatories about it. She then willfully failed to submit these records to the court after two direct orders. This wasn’t a case of forgetfulness – this was a long-term hustle.

The court made Delphic interpretations of its own rulings several times, causing confusion in how the Dezsofi records should have been handled during trial. Then, without warning, it shuttered them away in an evidence cabinet away from this Court's review.

The record is replete with errors such as an unprecedented birth certificate creation, unwarranted medical testing, and the failure to distribute an embryo and other property. Because they are all interdependent, this Court should remand for a new trial with a new judge, and offer the relief outlined in the briefs.

Respectfully submitted July 10, 2017,



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Otto Guardado, Appellant

INDEX TO APPENDIX: REPLY BRIEF OF APPELLANT

In re the Marriage of Guardado

Court of Appeals, Division Two, No. 49345-4-II

<u>Number</u>	<u>Description</u>
A	Table of cryogenically-preserved embryo cases

Appendix A

Table of applicable, known cases re cryogenically-stored embryos  
(chronological)

(This table is included for aid of reference, and does not imply that the Appellant relies on the holdings.)

Case and history	Court	Key findings and holdings
<p><i>Davis v. Davis</i>, 842 S.W.2d 588 (Tenn. 1992), <i>cert denied sub nom. Stowe v. Davis</i>, 507 U.S. 911 (Feb. 22, 1993)</p>	<p>Tennessee Supreme Court</p>	<ul style="list-style-type: none"> <li>-Mary Davis sought control of frozen embryos to procreate; Junior Davis objected. At 589.</li> <li>-The trial court held the embryos were “human beings” and awarded custody to Mary. At 589, 594. The Tennessee Court of Appeals reversed, holding the parties have an “equal voice” (at 589) and awarded joint custody to the parties (at 595).</li> <li>-No written agreement controls. At 590, 598.</li> <li>-Preembryos are neither “persons” nor “property”. At 597.</li> <li>-Disposition agreements between progenitors are presumed valid and enforceable. At 597.</li> <li>-Humans have a right to procreate or avoid procreation. At 592, 601.</li> <li>-The parties are considered equal gamete providers of an embryo in vitro. At 601.</li> <li>-But at the moment of pregnancy, the balance of personal liberty weighs in favor of the woman. At 601 n.24.</li> <li>-The state does not have sufficient interest to overcome the gamete providers’ interest. At 602.</li> <li>-If the parties are in dispute regarding disposition of embryos, a prior</li> </ul>

		<p>agreement should be carried out; if no agreement, the court should weigh the relative interests of the gamete providers. At 604.</p> <p>-Junior's interest in not procreating outweighed Mary's interest in using the embryos. At 604.</p> <p>-Affirming the Court of Appeals, Mary was not entitled to use the embryos for procreation. At 604.</p>
<p><i>Kass v. Kass</i>, 91 N.Y.2d 554, 696 N.E.2d 174 (1998)</p>	<p>Court of Appeals of New York</p>	<p>-Maureen and Steven Kass contributed gametes to cryopreserved pre-zygotes before they separated. At 560.</p> <p>-Before separating, they experienced multiple failures to get pregnant through IVF. At 558, 560.</p> <p>-They signed four consent forms regarding the IVF process and subsequent cryopreservation. At 558-560.</p> <p>-Almost immediately after separation, the parties, apparently pro se, entered a separate agreement to dispose of the remaining pre-zygotes. At 560.</p> <p>-Maureen requested custody of the pre-zygotes, while Steven argued for disposal pursuant to the parties' agreement (i.e. donate to research). At 560.</p> <p>-The Supreme Court granted custody and control of the pre-zygotes to Maureen, reasoning that females have exclusive authority over fertilized eggs, and that she did not waive her rights in the consents or subsequent agreement. At 561.</p> <p>-The Appellate Division reversed and concluded that a woman's right of bodily integrity is not implicated before implantation, and if parties make agreements in the IVF process, they</p>

		<p>should control. At 561.</p> <ul style="list-style-type: none"> <li>-Pre-zygotes are not “persons”. At 564.</li> <li>-Dispositions of pre-zygotes does not implicate a woman’s bodily integrity. At 564.</li> <li>-Dispositive agreements should be presumed binding. At 565.</li> <li>-Neither party disputed the consent agreements, and they entered those agreements freely and knowingly. At 566.</li> <li>-Informed consents are interpreted like contracts. At 566.</li> <li>-The consents manifest the parties’ intention that the pre-zygotes should be donated for research. At 567.</li> <li>-The court should honor the intent of the parties when they signed the consents. At 569.</li> <li>-The court ordered that the pre-zygotes be donated for research purposes, pursuant to the parties’ agreement. At 569.</li> </ul>
<p><i>A.Z. v. B.Z.</i>, 431 Mass. 150, 725 N.E.2d 1051 (2000)</p>	<p>Supreme Judicial Court of Massachusetts</p>	<ul style="list-style-type: none"> <li>-A.Z. (husband) and B.Z. (wife) married in 1997. At 151.</li> <li>-The parties had twin daughters as a result of IVF in 1992, and had pre-embryos cryopreserved from that procedure. At 153.</li> <li>-In 1995, B.Z. implanted a preembryo in herself without A.Z.’s knowledge. At 153.</li> <li>-The parties signed a cryopreservation consent form. At 153.</li> <li>-This and other forms were signed blank by husband and later completed and signed by the wife. At 154-55.</li> <li>-The consent form was not intended to be a binding agreement should they later disagree. At 158.</li> <li>-While divorcing, the family court</li> </ul>

		<p>placed an injunction prohibiting use of pre-embryos, in favor of A.Z. At 151.</p> <p>-The court will not enforce an agreement that compels one donor to become a parent against his/her will, as a matter of public policy. At 159-60.</p> <p>-Parenthood should not be enforced against individuals who reconsider their decisions. At 162.</p>
<p><i>Cahill v. Cahill</i>, 757 So. 2d 465, 468 (Ala. Civ. App. 2000)</p>		<p>-Deborah and Patrick Cahill married in 1993. At 465-66.</p> <p>-The parties contracted with the Medical School of University of Michigan to create and cryopreserve embryos. Three were implanted and Deborah gave birth to triplets in 1995, of which, two died. At 466.</p> <p>-The parties separated in 1996. One week before their August 6, 1998 trial, Deborah filed a counterclaim for the remaining three embryos. At 466.</p> <p>-Patrick answered claiming the embryos were not property. At 466.</p> <p>-The parties apparently were not able to produce the contract with university of Michigan and were ordered to produce it within a week. At 466.</p> <p>-Patrick declared that he could not produce the contract as it was associated with Deborah's health records. At 466.</p> <p>-In lieu of this, he did submit a boilerplate contract that suggested the embryos would belong to the Medical School upon dissolution. At 466.</p> <p>-The wife did not produce or dispute any contract. At 466-67.</p> <p>-In August, the court ordered the wife to produce the contract. She failed to comply. At 467.</p> <p>-In November, Patrick moved for contempt. Again, Deborah failed to</p>

		<p>produce the contract. The trial court, for whatever reason, did not find her in contempt. At 467.</p> <p>-The trial court ruled that the “University of Michigan appears to be the current owner of the zygotes.” At 467.</p> <p>-The appellate court reasoned that the trial court could not award property that did not belong to the parties, and found no error. At 468.</p>
<p><i>J.B. v. M.B.</i>, 170 N.J. 9, 783 A.2d 707 (2001)</p>	<p>Supreme Court of New Jersey</p>	<p>- J.B. and M.B. were married in February 1992. At 12.</p> <p>-The parties sought help from Jefferson Center for Women’s Specialties for infertility. At 12.</p> <p>-Before the March 1995 IVF process, the parties signed a consent form to relinquish their “tissues” in a dissolution, unless the court made a dispositive order. At 14, 19.</p> <p>-The parties had a child the next year. At 14.</p> <p>-During separation, JB (wife) sought to have the embryos discarded. At 14.</p> <p>-MB (husband) certified that he and JB had extensive discussions and an agreement that pre-embryos would be used by JB or donated to infertile couples. MB’s family concurred. At 15, 18.</p> <p>-JB stated that no additional agreements were entered into by the parties. At 15.</p> <p>-The trial court found that the reason for IVF (i.e. to create a family as a married couple) no longer existed; that no written contract memorialized the parties’ intentions; and that JB’s interest in destroying the pre-embryos prevailed over MB’s interest in donating the pre-embryos. At 15.</p>

		<ul style="list-style-type: none"> <li>-The Appellate Division affirmed. At 16-17.</li> <li>-The consent form did not manifest a clear intent by the parties regarding disposition if they divorced. At 19.</li> <li>-Because the parties did not enter a formal, unambiguous memorialization, they did not enter into a binding agreement. At 21.</li> <li>-JB's right to not procreate would be extinguished if use of the pre-embryos was allowed. At 25.</li> <li>-The JB court held that parties had veto power over enforceable agreements. At 29.</li> <li>-Both parties' interests should be weighed. At 30.</li> <li>-Ordinarily the party favoring non-procreation will prevail. At 30.</li> <li>-In oral argument, JB pivoted, saying she would be open to indefinite cryopreservation if MB paid for it. If so, then the court would allow this. At 30.</li> </ul>
<p><i>Litowitz v. Litowitz</i>, 146 Wn.2d 514, 48 P.3d 261 (2002), <i>cert. denied</i> 537 U.S. 1191 (Feb. 24, 2003) (No. 02-916)</p>	<p>Washington Supreme Court</p>	<ul style="list-style-type: none"> <li>-Becky and David Litowitz married in 1982. They had a child in 1980. Shortly thereafter, Becky had a hysterectomy and was unable to produce eggs. At 516-17.</li> <li>-In 1996, the parties went through IVF using an egg donor and a surrogate host. At 517.</li> <li>-The gametes from the husband were used, but the other gametes came from the egg donor. At 517.</li> <li>-The couple had a child from IVF in 1997, and two pre-embryos were preserved. At 517.</li> <li>-The contract with the egg donor specified that the eggs could not be used by another party except with written authorization from the egg donor. At</li> </ul>

		<p>518.</p> <ul style="list-style-type: none"> <li>-The parties also entered an agreement with Loma Linda Center for Fertility that in the event of cryopreservation lasting more than 5 years, the pre-embryos would be destroyed. At 519-20.</li> <li>-David asked to trial court to put the pre-embryos up for “adoption”. At 520.</li> <li>-Becky asked that the pre-embryos be transferred to a surrogate for an intended pregnancy. At 520.</li> <li>-The trial court awarded them to David based on the “best interest of the child”. At 520-21.</li> <li>-The trial court stayed any enforcement of this issue until after “all appeals”. At 521.</li> <li>-The Court of Appeals affirmed. At 521.</li> <li>-To the Supreme Court, Becky argued that she had the right to use the pre-embryos. At 525.</li> <li>-David argued that the egg donor contract did not allow for disposition to Becky or any dispositive effect upon divorce. At 525.</li> <li>-The egg donor contract did not control the pre-embryos, as their character had changed. At 527, 530.</li> <li>-The cryopreservation agreement states that the parties would have to petition a court for appropriate disposition of the pre-embryos. At 527-28.</li> <li>-Neither party disputes the validity of the agreement. At 528.</li> <li>-More than five years passed since they signed the agreement. At 529.</li> <li>-The Washington Supreme Court declined to determine if the pre-embryos were children. At 533.</li> <li>-Giving effect to the intent of the parties’ agreement with Loma Linda,</li> </ul>
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		they reversed the Court of Appeals. At 534.
<i>In re Marriage of Witten</i> , 672 N.W.2d 768 (Iowa 2003)	Supreme Court of Iowa	<ul style="list-style-type: none"> <li>-Trip and Tamara Witten were married for about 7.5 years before their separation in 2002. At 772.</li> <li>-They signed a cryogenic agreement with University of Nebraska Medical Center that allowed use only with both parties' consent. At 772.</li> <li>-Tamara asked for award of the embryos and opposed donation or destruction. At 772-73.</li> <li>-Trip opposed Tamara's use, but did not want them destroyed. He was unopposed to donation. He asked the trial court to put an injunction on either party using the embryos. At 773.</li> <li>-The trial court gave effect to the agreement that restricted use without consent from both parties. At 773.</li> <li>-On appeal, Tamara argues that the agreement was silent about divorce, that it should be awarded to her based on the "best interest" standard, that the embryos should go to her based on her right to bear children, and that Trip should not be allowed to back out of his agreement to have children. At 773.</li> <li>-The court noted three analytical approaches that other jurisdictions have applied: (1) the contractual approach, (2) the contemporaneous mutual consent model, and (3) the balancing test. At 774.</li> <li>-The "best interests" standard does not apply to embryos. At 776.</li> <li>-No public policy requires the use of embryos over the other's objections. At 780.</li> <li>-It is against public policy to force procreation when one party has</li> </ul>

		<p>withdrawn consent. At 781.</p> <p>-Written agreements are enforceable but subject to veto before use or destruction of embryo. At 782-83.</p> <p>-Because one party opposed use, the appellate court affirmed that they would remain preserved without use until the parties could agree (if ever). At 783.</p>
<p><i>Roman v. Roman</i>, 193 S.W.3d 40 (Tex. App. 2006), <i>review denied</i>, (Tex. Aug 24, 2007) (No. 06-0554), <i>cert. denied</i>, 553 U.S. 1048 (May 12, 2008) (No. 07-926)</p>	<p>Texas Court of Appeals</p>	<p>- Augusta and Randy Roman married in 1997. At 42.</p> <p>-In March 2002, the parties signed an informed consent to (a) have the embryos frozen; (b) implant embryos in Augusta with mutual consent; (c) destroy the embryos upon divorce and; (d) withdraw consent to the disposition of the embryos. At 42.</p> <p>-In April, the parties had embryos created and frozen. The night before a scheduled implantation, Randy demurred, and halted the procedure. At 42.</p> <p>-The parties later made an agreement to implant the embryos contingent upon counselor approval, which never occurred because the parties did not complete counseling. At 43.</p> <p>-The parties separated. At trial, Randy argued that the contract be honored. At 43.</p> <p>-Augusta asked for an award of the embryos. The trial court held the embryos were community property and awarded the embryos to the wife as fair and equitable. At 43.</p> <p>-Randy's request for a new trial was apparently denied by the trial court. At 43.</p> <p>-On appeal, Randy argues that the trial court erred by not honoring the agreement to discard the embryos in the</p>

		<p>event of divorce. At 44.</p> <ul style="list-style-type: none"> <li>-Although the contract specifies that the embryos would be considered “joint” property, the court declined to decide this as their ultimate decision was dispositive. At 44 n.7.</li> <li>-Texas public policy is best served when the parties have enacted a cryopreservation agreement, and the parties are allowed to mutually change their mind. At 50.</li> <li>-The parties do not dispute that they signed the contract. At 52.</li> <li>-Augusta argued that she understood that the embryos could be destroyed only after implantation, and that she never agreed to destroy them before having a chance at reproduction. At 52.</li> <li>-The appellate court rejected this interpretation. The contract clearly contemplated that the embryos would be destroyed upon divorce. At 52.</li> <li>-The parties could have withdrawn their consent to the agreement, but did not. At 54.</li> <li>-Augusta argued that a meeting of the minds on the agreement could not occur because Randy “deceived” her. The trial court found no deception. At 54.</li> <li>-Augusta argued the cryopreservation agreement was superseded by the trial court order and thus moot. The appellate court rejected this theory. At 54.</li> <li>-The trial court abused its discretion by not enforcing the contract. At 55.</li> </ul>
<p><i>In re Marriage of Dahl and Angle</i>, 222 Or.App. 572, 194 P.3d 834 (2008), review</p>	<p>Oregon Court of Appeals</p>	<ul style="list-style-type: none"> <li>-Laura Dahl and Darrell Angle married in 2000. At 574.</li> <li>-In 2004, they attempted IVF unsuccessfully, and had embryos frozen. Soon after, they separated. At 574.</li> <li>-The parties signed an agreement with</li> </ul>

<p><i>denied</i> 346 Or. 65 (Or. Mar. 04, 2009)</p>	<p>Oregon Health and Science University (OHSU) saying that if they were unwilling to decide jointly on disposition of the embryos, then the wife would have the right to direct OHSU to donate them for research or dispose of them. At 575-76.</p> <p>-Dahl understood that if they disagreed on disposition, she would have exclusive right to direct OHSU to transfer or dispose of the embryos. At 576.</p> <p>-She did not want to produce another child “with” husband. At 576-77.</p> <p>-Angle denied initialing the agreement (although his initials appeared to be on every page (at 576)). At 577.</p> <p>-He opposed their distribution or donation for research, apparently arguing that they were already alive. He was open to donating them to other couples. At 577.</p> <p>-The trial court ordered that the embryos be destroyed. At 577.</p> <p>-Angle appealed, arguing for control of the embryos under just distribution of property, and that his interests to preserve life was more important than wife’s desire to avoid having a child. At 577-78.</p> <p>-Dahl argued that embryos are not property and not subject to court disposition. At 578.</p> <p>-She argued that the contract be upheld and the embryos destroyed or donated. At 578.</p> <p>-Contractual rights to possess or dispose of frozen embryos are personal property. At 580.</p> <p>-Courts should give effect to intent of the progenitors’ signed advance</p>
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		<p>directives. At 583.</p> <p>-The agreement evinced the parties' intent. At 583.</p> <p>-The court declined to weigh the interests of the parties. At 584.</p> <p>-The trial court correctly gave effect to the parties' agreement that the wife direct transfer or destruction in the event of a conflict. At 585.</p>
<p><i>In re Marriage of Nash</i>, Not Reported in P.3d, 150 Wash.App. 1029, 2009 WL (2009)</p>	<p>Court of Appeals of Washington, Division 1</p>	<p>-<i>Unpublished case. Included for study due to proximity.</i></p> <p>-Tina and James married on August 14, 2004. At 1 (Westlaw format).</p> <p>-On March 4, 2005, they entered into a cryopreservation agreement with Reproductive Medicine Laboratory, stating that Tina (the "Patient") would determine the disposition of embryos upon divorce, <i>if not addressed by a divorce settlement.</i> At 2.</p> <p>-Two months later, they entered into an agreement with an anonymous egg donor that the "RECIPIENTS" (i.e. Tina and James) can direct disposition if there are multiple pre-embryos cryopreserved. The Agreement was effective for six months from the date of the egg retrieval. At 2.</p> <p>-Tina and James had two sons from the pre-embryos. At 2.</p> <p>-The pre-embryos have no gametes from Tina. At 4.</p> <p>-The parties agreed at mediation that the disposition of the remaining four embryos would be determined at trial. At 3.</p> <p>-At trial, Tina argued that the March 2005 cryopreservation agreement controlled, and was not modified by the mediation agreement. At 3.</p> <p>-James argued that Tina would have</p>

		<p>control of disposition if not for the mediation agreement. At 3.</p> <ul style="list-style-type: none"> <li>-The court agreed with James' argument. At 4.</li> <li>-It weighed the relative interests, and awarded control of the pre-embryos to James, including use of them. At 4.</li> <li>-The trial court properly addressed the disposition of the pre-embryos, and therefore, superseded the limiting language of the cryopreservation agreement. At 5, 7.</li> </ul>
<p><i>Reber v. Reiss</i>, 2012 PA Super 86, 42 A.3d 1131 (2012) <i>appeal denied</i>, 619 Pa. 680 (Pa. Dec. 27, 2012)</p>	<p>Superior Court of Pennsylvania</p>	<ul style="list-style-type: none"> <li>-Bret Reber and Andrea Reiss married in 2002. At 1132.</li> <li>-In 2003, after a diagnosis of cancer, they created several pre-embryos from both their gametes. At 1133.</li> <li>-Reber filed for divorce in 2006. At 1133.</li> <li>-The parties and the court agreed that the embryos were marital property. At 1133.</li> <li>-Reiss underwent extensive radiotherapy that threatened her childbearing ability. Still childless, she asked the court for the frozen pre-embryos. (Reber apparently favored destruction.) At 1133.</li> <li>-In 2011, the trial court acknowledged that a balance of interests will normally favor the party avoiding procreation, but because of the "unique" facts, awarded the pre-embryos to Reiss. At 1134.</li> <li>-The court analyzed 3 approaches: contractual, contemporaneous mutual consent (i.e. <i>Witten</i>), and balancing of interests. At 1134.</li> <li>-The court did not favor the contemporaneous mutual consent model. At 1135.</li> <li>-The parties did not sign the portion of</li> </ul>

		<p>consent form relating to disposition upon divorce. Ergo, the correct test is to balance interest. At 1136.</p> <ul style="list-style-type: none"> <li>-Wife had compelling interest because it was her only likely chance at genetic parenthood. At 1140.</li> <li>-Reber's interest was that he would be feel obligated to be part of child's life emotionally or financially (at 1140, 1141), that he never intended to actually have a child with Reiss (at 1140), it is against public policy (at 1142).</li> <li>-Reiss testified that Reber would not be financially or parentally responsible for a resulting child. At 1141.</li> <li>-Pennsylvania public policy is silent on issue of forced procreation. At 1142.</li> <li>-Reiss's interests in using the pre-embryos outweighed Reber's interests. At 1142.</li> </ul>
<p><i>Szafranski v. Dunston</i>, 2015 IL App (1st) 122975-B, 34 N.E.3d 1132, 393 Ill. Dec. 604, <i>appeal denied</i>, 39 N.E.3d 1012 (Ill., Sep. 30, 2015) (No. 119428), <i>cert. denied</i>, 136 S.Ct. 1230 (U.S. Feb. 29, 2016) (No. 15-912)</p> <p>First Appeal:</p> <p><i>Szafranski v.</i></p>	<p>Appellate Court of Illinois, First Dist., Div. II</p>	<ul style="list-style-type: none"> <li>-Before their non-marital relationship ended, Jacob Szafranski and Karla Dunston created pre-embryos. At 1136.</li> <li>-The parties signed an informed consent. At 1138-39.</li> <li>-The parties failed to enact proposed written agreements regarding disposition. At 1139, 1141.</li> <li>-After weighing the parties' interests, the circuit court awarded Karla custody and control of the pre-embryos. At 1136.</li> <li>-In the first appeal, the appellate court reversed, holding that disputes should be settled 1) by prior agreement and 2) by weighing the parties' interests. At 1136-37, 1147.</li> <li>-On remand, the trial court held there was an oral agreement allowing Karla to use the pre-embryos and the balance of interests favored Karla. At 1137, 1146-</li> </ul>

<p><i>Dunston</i>, 2013 IL App (1st) 122975, 993 N.E.2d 502, 373 Ill. Dec. 196</p>		<p>47, 1155.</p> <ul style="list-style-type: none"> <li>-Jacob emailed Karla that he wanted her to have a child “on [her] own”. At 1140, 1149.</li> <li>-Jacob argued that he only agreed for her to use his sperm to <i>create</i> pre-embryos and did not intend to give Karla future <i>use</i> of the pre-embryos. At 1150.</li> <li>-Karla argued that Jacob now seeks to add limiting language (<i>i.e.</i> veto authority) to their oral contract. At 1150.</li> <li>-Jacob passed on the opportunity to negotiate limiting terms with Karla several times. At 1152.</li> <li>-Karla was entitled to use the embryos without restriction. At 1153, 1161.</li> <li>-The informed consent did not contradict or modify the binding oral contract, which was controlling. At 1154.</li> <li>-The court acknowledged that cases from other jurisdictions found that the boilerplate informed consent indicated dispositional intent. At 1157-58.</li> <li>-On remand, the trial court indicated it did not need to complete the second prong of test (<i>i.e.</i> balancing interests of the parties), but did so to provide a complete record. At 1161.</li> <li>-Karla’s interests in using the pre-embryos outweighed Jacob’s interest to not use them. At 1162.</li> <li>-But, Jacob’s interest was not insubstantial. At 1163.</li> <li>-In the previous ruling, this court found “no constitutional obstacle” in honoring the oral agreement regarding embryos, or a balance of interests in the absence of one. At 1164.</li> </ul>
<p><i>McQueen v.</i></p>	<p>Missouri Court</p>	<p>-Jalesia McQueen and Justin Gadberry</p>

<p><i>Gadberry</i>, 507 S.W.3d 127 (2016), <i>transfer to Mo. denied</i> Dec 15, 2016 and Jan 31, 2017</p>	<p>of Appeals, E. Dist., Div. III</p>	<p>were married at the time they created pre-embryos. At 133.</p> <ul style="list-style-type: none"> <li>-The couples offer conflicting testimony on the disposition of the embryos. At 135-36.</li> <li>-No valid, enforceable agreement on disposition controls (at 144, 156) because McQueen may have altered the contract after Gadberry signed it. At 155.</li> <li>-Missouri has a “life at conception” statute (Mo. Rev. Stat. §1.205 (1986)). At 139-40.</li> <li>-The trial court found that: a) embryos were marital property of a special character, and not children; b) awarded to the parties jointly, with orders not to use them. At 149.</li> <li>-On appeal, McQueen again argued that the pre-embryos should be considered children; Gadberry, as marital property of a special character. At 138-39.</li> <li>-Gadberry argued that allowing use of the pre-embryos would violate his constitutional rights to not procreate (U.S. CONST. amend. XIV, § 1). At 143.</li> <li>-Balancing the interests of the parties, the not-pregnant McQueen’s reproductive liberty did not outweigh Gadberry’s interest in avoiding parenthood. At 145, 146 n.19.</li> <li>-Application of §1.205 to frozen pre-embryos would harm the parties’ constitutional rights. At 146 n.19, 147.</li> <li>-Allowing McQueen to utilize the embryo would extinguish Gadberry’s right to not procreate. At 147.</li> <li>-Frozen pre-embryos are not children. At 147-48.</li> <li>-Classifying pre-embryos as “children” complicated situations where fertility</li> </ul>
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