

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

Sarah Marie Markiewicz,
Plaintiff-Appellant,

v.

David Randal Markiewicz,
Defendant-Appellee

Supreme Court No.: 166782
Court of Appeals No.: 363720
Macomb County Circuit Court
Case No.: 2019 - 3236 - DM

AMICUS CURIAE BRIEF OF THE
STATE BAR OF MICHIGAN FAMILY LAW SECTION

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Family Law Section Council (“The Council”) is the governing body of the Family Law Section of the State Bar of Michigan. The Council is comprised of over 2,500 lawyers in Michigan practicing in, and committed to, the area of family law. The Section members elect the members of the Council. The Council provides services to its membership in the form of educational seminars, monthly Family Law Journals (an academic and practical publication reporting new cases and analyzing decisions and trends in family law), advocating and commenting on proposed legislation relating to family law topics, and filing Amicus Curiae briefs in selected cases in the Michigan Courts. Because of its active and exclusive involvement in the field of family law, and as part of the State Bar of Michigan, the Council has an interest in the development of sound legal principles in the area of family law. The instant case pertains to the division of marital property, specifically frozen embryos. The Council presents its position on the issues as invited by this Court in its September 27, 2024 Order.

ARGUMENT

The Family Law Section Council (“The Council”) submits this brief as amicus curiae to advocate for the adoption of a clear, equitable framework for resolving disputes over cryogenically preserved embryos. The Council is uniquely positioned to offer practical insights into the resolution of these disputes, as its members routinely handle complex family law cases involving issues of custody, property division, and reproductive rights. The Council does not advocate for a specific result for either Plaintiff-Appellant or Defendant-Appellee.

This case presents the Michigan Supreme Court with the opportunity to adopt a principled approach to embryo disposition disputes by endorsing the framework set forth in *Jocelyn P v. Joshua P*, 250 Md App 435; 250 A3d 373, 405 (2021). See also, *In re Marriage of Rooks*, 429 P.3d 579 (Colo. 2018). The *Jocelyn* approach first looks to the parties’ agreement with the fertility clinic, enforcing their contractual intent wherever possible. If the agreement leaves the matter unresolved, the court then applies a balancing of interests test to weigh each party’s competing desires to procreate or avoid procreation. This two-step framework ensures that embryo disputes are resolved in a manner that respects both parties’ interests and promotes predictability in family law cases. The Council advocates that this will strike the proper balance between respecting the autonomy of individuals in their reproductive choices and providing courts with a practical framework for resolving deeply personal and emotionally charged disputes.

A. The *Jocelyn* Approach Provides a Fair and Practical Framework for Resolving Embryo Disputes

The Michigan Supreme Court has not yet established a clear standard for resolving disputes over the disposition of cryogenically preserved embryos in divorce proceedings. Courts across the country have adopted various approaches, generally falling into three categories: the contractual approach, the balancing of interests approach, and the mutual contemporaneous consent approach.

The Maryland Supreme Court in *Jocelyn* took the best elements of these approaches by creating a two-step framework. The court first looks to the parties' agreement with the fertility clinic to determine their intent regarding the disposition of the embryos. If no enforceable agreement exists, the court then balances the competing interests of the parties. This hybrid approach avoids forcing individuals into genetic parenthood against their will while also recognizing the importance of honoring the parties' intent wherever possible. Michigan Courts should follow this well-reasoned framework to ensure consistency and fairness in embryo disputes.

B. The Court Should Enforce the Parties' Contractual Intent with Fertility Clinics Wherever Possible

Contracts with fertility clinics often contain provisions regarding the disposition of cryogenically preserved embryos in the event of divorce or other contingencies. These agreements reflect the parties' intentions at the time they embarked on the emotionally and financially taxing process of in vitro fertilization (IVF).

Courts should enforce these agreements wherever possible, as doing so provides predictability and stability in an otherwise uncertain area of the law. Enforcing such

contracts also respects the principle of party autonomy, which is a cornerstone of contract law and a guiding principle in Michigan family law.

As the *Jocelyn* court noted, enforcing these agreements helps to minimize misunderstandings and preserve the parties' procreational liberty. 250 Md App 435, 489; 250 A3d 373, 405 (2021). The Michigan Supreme Court should adopt this approach to provide clarity to Michigan families navigating the IVF process.

C. In the Absence of a Controlling Contract, Courts Should Balance the Parties' Competing Interests in Procreational Autonomy

If no enforceable agreement exists, this Court should advise trial courts to balance the competing interests of the parties in awarding the embryos. For this, as with any case involving a dispute over marital property, Courts are to follow the list of factors set out in *Sparks v. Sparks* "to be considered wherever they are relevant to the circumstances of the particular case:"

- (1) duration of the marriage,
- (2) contributions of the parties to the marital estate,
- (3) age of the parties,
- (4) health of the parties,
- (5) life status of the parties,
- (6) necessities and circumstances of the parties,
- (7) earning abilities of the parties,

(8) past relations and conduct of the parties, and

(9) general principles of equity.

440 Mich. 151, 159; 485 NW2d 893 (1992). Importantly, this Court also found that this list of nine factors “is not exhaustive” and there “may be additional factors that are relevant to a particular case.” *Id* at 160. Given a frozen embryo’s “special character” as marital property and unique “potential for human life,” the Council supports adoption of the additional five factor test, outlined by the Maryland Supreme Court in *Jocelyn*, to help balance the interests of parties. 250 A3d 373, 393 and 402 (Md App 2021). Specifically, when addressing the marital division of frozen embryos, the following factors would be considered:

- (1) the original reasons that the parties underwent IVF treatment;
- (2) the parties’ positions related to the disposition of the embryo;
- (3) whether the party seeking procreation would have any other reasonable means of achieving parenthood were the embryos at issue to be destroyed;
- (4) as to the party seeking to destroy an embryo, it is appropriate to consider the implications of imposing unwanted parenthood on that party, including possible financial and psychological consequences of doing so, and;
- (5) the presence of any party’s bad faith and attempt to use the frozen pre-embryos as leverage in the divorce proceeding.

Id. at 403; *In re Marriage of Rooks*, 429 P3d 579, 592 (Colo 2018). This balancing test provides a fair and equitable method for resolving these disputes while taking into account the unique circumstances of each case, with no single factor being dispositive and no viewpoint being overly favored.

Importantly, the Council notes that the lower Courts in *Markiewicz I* and *II* did not analyze the additional “improper” considerations that were identified in both *Jocelyn* and *Rooks*, which included banning assessment of the following:

- 1) whether the party seeking to become a genetic parent using the pre-embryos can afford another child.
- 2) the sheer number of a party's existing children, standing alone, [cannot] be a reason to preclude preservation or use of the pre-embryos
- 3) whether a spouse seeking to use the pre-embryos to become a genetic parent could instead adopt a child or otherwise parent non-biological children.

Id. at 403; *In re Marriage of Rooks*, 429 P3d 579, 592 (Colo 2018); *Markiewicz I* (Docket No. 355774) and *Markiewicz II* (Docket No.: 363720). Given Michigan’s framework for assessing the division of marital property, including application of the *Sparks* test, we believe that these “improper” considerations are with Michigan’s jurisprudence on this issue and should not be off limits when assessing division of frozen embryos as marital property.

D. In Balancing the Parties' Competing Interests, the Court Cannot Pre-Adjudicate Parentage, Child Support or Custody

In addition to supporting adoption of the *Jocelyn* test, the Council seeks to clarify issues of parentage and financial responsibility to ensure proper application of the proposed embryo test. Factor (4) of the test, which addresses the potential harm experienced by the party that would be forced into unwanted parenthood, the issues of parentage and financial responsibility, must be read within the context of Michigan family law regarding parentage, child support and custody. Specifically, Courts must recognize that this factor cannot be considered “resolved” simply because the party seeking to achieve parenthood promises not to seek financial support or involvement from the party hoping to avoid post-divorce parenthood.

In this case, it was generally accepted that Appellant-Wife would, and possibly could, “absolve” Appellant-Husband from “financial obligations related to a child born from the embryo.” (*Markiewicz II*, Pg. 13). Appellant-Wife further argued that the Michigan Department of Health and Human Services has a form (MDHHS Form DHS-998) that would relieve the non-custodial genetic parent of the obligation to pay child support. (Brief on Leave to Appeal, Pg. 17-18). These assertions imply that Appellant-Husband would not have a role in the future child’s life and thus would not be confronted with the burden of its financial needs.

In addition to the insouciant treatment of future financial obligations, the record does not fully address the implications a future child would have on the parties existing

family. When weighing the harm to Appellee if the pre-embryo were awarded to Appellant, the trial court noted Appellee's testimony that he was troubled by the idea that a child would be "out there and he has no role in it." (Plaintiff-Appellant's Application for Leave to Appeal, Pg. 20 and 36). However, the reality would be that the child would not just be "out there" but rather in the Appellant's household, being raised alongside the four children that Appellee is actively co-parenting with Appellant. Neither the trial court nor the Court of Appeals considered the foreseeable psychological hardship and harm to relationships with the other children arising from a scenario where a genetically related younger sibling, for example, must be left behind with the Appellant while Appellee has his other four children for parenting time or where the older children come to understand that their father is genetically but not legally related to their younger sibling. The focus on whether Appellee could be spared financial and practical responsibilities for the child who could potentially be born from the pre-embryo, which is emphasized by the *Jocelyn* factors, overlooks harms related to an individual's genetic child being raised as a sibling to his existing children without, as the trial court speculated, any ability to parent that child.

The assumption that financial and emotional obligations can be waived in the event that a child is born from the embryo at issue, fails to address what Illinois Courts referred to as the "remaining elephant in the room." *Szafranski v. Dunston*, 34 N.E.3d 1132, 1162 (Ill. Ct. App. 2015). This argument – that the party seeking parenthood will allow the other off the hook of parental responsibility – is one that is repeated nationally by

parties seeking to use embryos to achieve parenthood post-divorce. It is also one that is repeatedly corrected by Courts. In *Szafranski* the Court cautioned that a decision about an embryo “should not be construed as a ruling on [Appellant’s] legal status under any applicable parentage or child support statutes.” *Id.* Similarly, in *Reber v. Reiss*, the Pennsylvania Justices warned that “a party could not bargain away a child’s right to support” and that those issues are more “appropriately left open . . . until the issue becomes an actual case or controversy before the court.” 42 A.3d 1131, 1141-1142 (Pa. Super. 2012). In Indiana, although the Wife “unequivocally stated that she will require no financial support” from Husband so he would be “relieved of this burden,” the Court clarified that “any questions regarding support are hypothetical” and that issues of child support “would require a separate hearing when the issue is squarely before the court.” *Freed v. Freed*, 227 N.E.3d 954, 971 (2024 Ind. App.).

This same concern was raised in *Karungi v Ejalu* by Justice McCormack in her Concurring Opinion. 501 Mich 1051 (2018). She agreed that “trial court[s] should not avoid the question argued by the parties: whether frozen embryos are persons subject to a custody determination.” 501 Mich. 1051, 909 N.W.2d 269 (2018). While this brief does not argue that embryos are persons, the fact remains that they could be and that “parties cannot stipulate to circumvent the authority of the circuit court in determining the custody of children.” *Karungi* citing *Harvey v Harvey*, 470 Mich 186, 194; 680 N.W.2d 835 (2004). The fact that one party seeks to destroy an embryo is not dispositive of their future

parental rights or financial responsibilities if the embryos are awarded to the party seeking to achieve parenthood and a child is later born.

The Council recommends that this Court, when adopting this new test, provide guidance to lower courts about how to weigh the potential harm to the party opposing implantation of the pre-embryo. Specifically, the Court should provide additional guidance to lower courts that the property disposition of a pre-embryo is unrelated to legal parentage of the possible future child. We agree with counsel for Appellee that, even though he opposes implantation, Appellee retains the right to establish his legal parentage of any child born to Appellant from the pre-embryo. We also agree that the Assisted Reproduction and Surrogacy Parentage Act of 2024, MCL 722.1701 et seq, is not applicable to this case because it does not take effect until 2025. However, MCL 333.2824(6), which was not cited by either party, provides a clear answer under current statutory law. It provides: “A child conceived by a married woman with consent of her husband following the utilization of assisted reproductive technology is considered to be the legitimate child of the husband and wife.”¹

Further, the Amici Council offers a clarification of the purpose and use of the Michigan Department of Health and Human Services form cited by Appellant in support of the argument that Appellee would suffer no financial harm if the Appellant births a child from the implanted pre-embryo. The trial court weighed whether Form DHS-998

¹ PA 25 of 2024 amends MCL 333.2824 by deleting this provision specific to "husband" and "wife" from the Public Health Code while PA 24 of 2024 creates a gender-neutral definition of intended parent of a child conceived by assisted reproduction for both married and unmarried individuals in the new section MCL 722.1703(f).

could be used by the parties to permanently waive any right to child support for the later born child. The Department's published IV-D policy manual specifies that the purpose of the form is to waive the otherwise mandatory requirement that a custodial parent of a child receiving public benefits cooperate with the child support program to establish paternity. (Michigan IV-D Child Support Manual Michigan Department of Health and Human Services, Sec. 2.10 "Assisted Reproduction, at p. 4)² The policy manual further explains that the Department's "decision not to require the [custodial parent's] cooperation in establishing paternity when ART resulted in the conception of a child does not preclude a donor from applying for and receiving IV-D services. Nor does this decision preclude the [custodial parent] from applying for and receiving IV-D services at a later date if desired." *Id.* at 4-5. We agree with counsel for the Appellee that this form, even if it were executed by the parties, does not terminate his parental rights nor irreversibly waive child support for the possible future child.

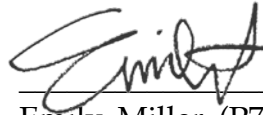
F. Conclusion

The State Bar of Michigan Family Law Section does not advocate for a specific result for either the Plaintiff-Appellant or Defendant-Appellee. Instead, we merely urge the Court to consider adoption of the two-step framework of assessing the language of the IVF contract, and then, if the contract is unclear, using the *Sparks* and *Jocelyn* tests to

² <https://mdhhs-pres-prod.michigan.gov/ChildSupport/policy/Documents/2.10.pdf>

resolve disputes over the disposition of cryogenically preserved embryos in divorce proceedings.

Respectfully Submitted,



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Date: 1/24/25

WORD COUNT CERTIFICATION

I certify that, pursuant to MCRs 7.212(B)(1), 7.312(A), and 7.312(H)(3), this brief contains 2,988 countable words.