STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR
FAMILY DIVISION

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JUDE STRATFORD

Plaintiff

V File No.: B08-000111-DO

JAYANE STRATFORD

Defendant
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OPINION AND DECISION

The parties in this case ended their marriage by Judgment of Divorce that was entered on August 8, 2008. At that time they consented to the resolution of all matters of property and debt as well as the issue of spousal support and there were no children born of the parties.

Almost two years later they apparently remembered that there was one matter left unresolved. On June 14, 2010 the plaintiff filed a motion to modify the Judgment of Divorce based upon mutual mistake of the parties in order to address the disposition of what was identified in the motion as an embryo. The plaintiff seeks an order directing the fertility clinic to donate the embryo for embryo adoption by an anonymous couple who seek to have a child for the purpose of implantation and the possible creation of a fetus and birth of a child.

The defendant in her answer contends that she has a right to pro-creational autonomy and the right to refuse to be a parent. She is asking the court for an order directing that the embryo be used for medical research only.

The Judgment of Divorce does not address this issue and both parties acknowledge that it was an oversight. In doing so the defendant characterizes the embryo as property.

The stipulated facts gleaned from the motion, answer and argument are that while married the parties were attempting to have children and created several embryos through the process of in vitro fertilization (IVF). In this process the defendant provided several eggs that were fertilized by the plaintiff's sperm in order to implant the fertilized egg into the defendant's womb in an effort to create a fetus and ultimately provide the parties with a child. Apparently several attempts were made at this procedure, all of which failed to be successful. At some point thereafter the parties decided to end their marriage and the argument of the defendant at the hearing on the motion indicated that this failed effort was a problem in the marriage. The court held an evidentiary hearing and both parties testified. Testimony from the defendant was that the plaintiff wanted to keep trying to have a child and that she was done trying and that it was this issue that ultimately led to the breakdown of the marriage. As the parties turned their concentration on other matters involving their relationship they apparently were either unaware that there was another unused embryo or they simply forgot that it existed.

The parties further stipulated that there was no agreement that the parties entered into at the time that this process began, either between them or with the clinic addressing the disposition of the unused embryos.

According to the testimony of the plaintiff, it was he who, because of some genetic problems, was unable to conceive a child through natural means. As a result both he and the defendant were involved in surgically invasive procedures. The plaintiff could not just donate sperm; his sperm had to be retrieved surgically through a process that he called a testicular biopsy.

The defendant went through a series of shots and oral medication for a month to enable her to produce several eggs and at the proper time they were surgically removed from her, fertilized with the plaintiff's sperm and implanted in her uterus. She underwent three separate implantations of three fertilized eggs, only one of which was successful. However, after a short period of time the pregnancy failed. Both parties testified as to the emotional impact this failed pregnancy had on them personally.

In her argument the defendant indicates that there is no appellate court decision or statutory provision in Michigan addressing this issue and points to the decision from the Tennessee Supreme Court in Davis v Davis, 842 S.W.2d 588 (Tenn 1992) for guidance in deciding this issue. She argues that based upon this decision that she has a constitutional right to pro-creational autonomy and that her decision not to have offspring is paramount to the plaintiff's right to allow the embryo to be used in the attempt to create a child.

The plaintiff has argued that because of his religious beliefs, which is that this embryo is in fact human life albeit in a preserved state, that it would be a violation of those sincerely held beliefs to kill this embryo.

The plaintiff testified that he feels strongly and deeply that he and the defendant agreed to create life and that this embryo is human life and deserves a chance at continuing in the process of life. He believes that to donate the embryo as the defendant desires would end this human life.

The plaintiff further testified that when this issue first came up it was his understanding that the defendant had agreed that he could dispose of the embryo any way that he saw fit. But that she later e-mailed him that she had changed her mind and took the position that if they had been successful in their effort to have a child together then she would agree to donate the embryo for adoption but because they weren't able to have a child together then she didn't want some other woman to have her child.

The defendant testified that she wasn't being vindictive by this e-mail but that she wants closure on this effort at producing a child and that if there was a possibility of a child with a biological connection to her being born, she would not have closure. She wants the embryo donated for a scientific purpose.

The parties are correct in their position that there is no statute or precedential appellate decision in this state that addresses this issue. The court was able to find an unpublished case from the Michigan Court of Appeals that touches on the issue but is not very helpful in deciding this case. In Bohn v Ann Arbor Reproductive Medicine Associates, P.C., 1999 WL 33327194, (Mich. App. 1999) the plaintiff ex-wife sued the fertility clinic after it refused to implant the zygotes in her without her ex-husband's consent. In affirming the trial court's findings on behalf of the clinic, the Court of Appeals stated, "We agree that this situation raises questions of the utmost gravity, and there is no question that the State has an interest in protecting potential life. The question of when life begins was not, however, raised or resolved below, and this Court's review is generally limited to issues decided by the trial court. Accordingly, we decline to address questions that reach beyond those issues framed by plaintiff in her complaint and decided by the trial court. We urge the Legislature's attention, however, to this profoundly complicated and unexplored area." The court also affirmed the trial court's decision not to apply the Child Custody Act to the embryos.

In searching for decisional assistance in this case this court has reviewed several cases from other states (and there are not many) on this issue. The cases that do exist show that there is no universal agreement as to the correct result under virtually the same facts. The defendant argues that this court should accept the analysis of the Davis decision; of course its outcome supports her position. The problem however is that in this court's opinion the Davis decision contains internal inconsistencies which will be addressed further below and is result oriented and therefore not entirely persuasive. This court is more inclined to agree with the dissent in Kass v Kass, 235 A.D. 2d 150 (1997 N.Y.) that will be outlined further below which essentially is a logical extension of the basis of the Davis decision in applying a balancing test.

Davis v Davis, supra. is generally recognized as the first decision to address this issue. In that case the parties, former husband and wife, were dealing with a post-divorce issue

involving the disposition of embryos that had been "frozen" through the cryopreservation process. The ex-wife originally wanted the embryos transferred to her for the purpose of continuing the effort to become pregnant and produce a child. The ex-husband objected to this and took the position that the embryos should be left in their frozen state until he decided whether or not he wanted to become a parent outside the bounds of marriage. By the time the case reached the Supreme Court of Tennessee the parties respective positions had already changed. At that point both parties had remarried and the ex wife had moved out of the state and no longer wished to utilize the frozen embryos for herself but wanted to be able to donate them to a childless couple. The ex-husband was now adamantly opposed to the donation and would prefer the frozen embryos be destroyed.

The Tennessee court went through an exhaustive analysis of whether the issue in the case involved pre-embryos or embryos, none of which assists in the decision. Whether they are considered pre-embryos or embryos there is no question that the matter involves the disposition of a human egg harvested from the ex-wife and fertilized by the sperm of the ex-husband while the parties were married and for the purpose of creating a pregnancy from which a child would be produced. This is the same issue before this court.

In this court's opinion the fact of a biological connection of both parties to the subject matter of this issue is a necessary pre-condition to any consideration by the court. Clearly if this case were dealing with the disposition of harvested and preserved eggs that have not been fertilized, or collected and preserved sperm, only the donor would have an interest in the dispositional decision of those respective items. However, when an egg is fertilized, from that point on "the resulting one-cell zygote contains 'a new hereditary constitution (genome) contributed to by both parents through the union of sperm and egg'". (Davis, supra at p. 593)

In the Davis case as well as all other cases addressing the issue before this court there was agreement that a human embryo or pre-embryo is not property and that by its very nature is afforded special consideration because of its potential to be human life. (See Davis, supra. at p. 597). All decisions also agreed as did the Michigan Court of Appeals as indicated above that the embryo or pre-embryo is not a child that would bring into play a best interest consideration under the Child Custody Act or its equivalent.

As part of its analysis the Davis court determined that there were three major ethical positions articulated in the debate over pre-embryo status. At one end of the spectrum is the position that a pre-embryo is a human which requires it to be accorded the rights of a person. At the other end is the position that the pre-embryo is no different than mere human tissue and there should be no limits upon those persons who have decision making authority over the pre-embryo. The third view and that most widely accepted is that the pre-embryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The Davis court concluded that the parties to that case did not have a property interest in the pre-embryo but rather had "an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the pre-embryo, within the scope of policy set by law." (p. 597)

The Davis court discussed the extensive comment and analysis in legal journals in which medical-legal scholars and ethicists have proposed various models for the disposition of frozen embryos. Those models include 1) a rule requiring that all embryos be used by the gamete-providers or donated for uterine transfer, 2) a rule that would require any unused embryos to be automatically discarded, 3) a rule that would vest control in the female gamete-provider in every case, 4) a rule that would infer from enrollment in an IVF program that the clinic has authority to decide in the event that the parties cannot and 5) a rule that would infer from the parties participation in creation of the embryos that they had made an irrevocable commitment to reproduction and would require transfer either to the female provider or to a donee. (pp. 590-591)

After a lengthy analysis of scientific studies and literature on this subject the Davis court determined first that because the embryo was not a fetus and remains outside the mother's body the constitutional right to privacy set forth in Roe v Wade, 410 U.S. 113 (1973) does not apply and that the decision as to the disposition of the pre-embryo did not rest solely with the mother as would a decision to have or not have an abortion, because the disposition of a pre-embryo did not affect the integrity of her body. As a result both husband and wife "must be seen as entirely equivalent gamete-providers." (Davis, supra. p. 601).

The Davis court held first that because the parties were equal gamete-providers and that they had equal decision making authority regarding the disposition of the pre-embryo that "an agreement regarding disposition of any untransfered pre-embryo in the event of contingencies (such as … divorce…) should be presumed valid and should be enforced as between the progenitors". (p. 597)

The Davis court went on to state "[A]t the same time we 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 the events may take as the IVF process unfolds. Providing that the initial agreements may later be modified by agreement will, we think, protect the parties against some of the risks they face in this regard. But, in the absence of such agreed modifications, we conclude that their prior agreements should be considered binding." (p. 597)

In this court's view, the conclusion of the Davis court that the original agreement should be binding if the parties do not agree to alter it ignores their own reasoning as to why the parties should be able to agree to alter the original agreement. Life is not static and circumstances do change. That is evident in the facts of the Davis case alone where as indicated above the parties changed their positions between the time the case began and the time it reached the Tennessee Supreme Court.

Clearly if the Michigan Legislature established that in order for people to engage in the IVF procedure they must first agree to the disposition of any unused embryos and that the agreement may be changed only by mutual consent, it would reflect a policy decision on

the part of the state. The parties would then know right from the beginning what would be required and they would know that the decision they make could be final. Absent such a law relating to the agreement or as here where there is no agreement, courts should recognize that things do not always remain static and should balance the interests of the parties in deciding the case. Even in cases where there was an agreement, the position of one party or both may have changed to the extent that one or both no longer believes as they did when they entered into the agreement. In that case the fact and content of the agreement should be taken into consideration and given weight because the refusal of one party to consent to a change or even the desire to seek a change may be motivated by spite or a desire to hurt the other party during divorce.

This conclusion of the Supreme Court of Tennessee was an issue for the Supreme Court of Iowa in In re the Marriage of Arthur Lee Whitten III and Tamera Jean Whitten, 672 N.W.2d 768 (Io 2003) and the Iowa Supreme Court did not follow that conclusion which will be addressed further below.

The Davis court then went on to hold that in cases where there was no prior agreement and the parties cannot contemporaneously agree as to the disposition of frozen pre-embryo, the court should use a balancing test to determine the respective interests of the parties in making its decision. In doing so the court found a "right to procreational autonomy grounded in the right to privacy inherent in the Constitution of the State of Tennessee and held at p. 600: "In terms of the Tennessee state constitution, we hold that the right of procreation is a vital part of an individual's right to privacy." The court further stated at p. 601: "For the purposes of this litigation it is sufficient to note that, whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance-the right to procreate and the right to avoid procreation. Undoubtedly, both are subject to protections and limitations."

The Davis court then addressed the balancing test at p. 603 by stating: "One way of resolving these disputes is to consider the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions." In applying the balancing test the court then holds: "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 pre-embryo in question." (p. 604)

In so holding the Tennessee court essentially eliminated any balancing of the interests of the parties. In their view, unless the party that wants to use the pre-embryo to procreate wants to use them herself or himself because they would have no other means to achieve parenthood then the person who does not want to procreate has sole decision making authority as to the disposition of the pre-embryo. If that is so then the conclusion is inconsistent with the stated concept, not only that the court should balance the respective interest but also the stated concept that each party should have equal decision making authority. Based upon the facts of the Davis case the court could have legitimately used a true balancing test and ended with the same result. The ex-wife had no significant reason for her position. She merely wanted to give the embryo to someone else.

In Whitten, supra. the facts involved the disposition of frozen embryos at the time of divorce however the parties had executed an agreement at the time they began the IVF procedure. In that case the wife wanted to be awarded the embryos so that she could continue in her effort to give birth to a child. If she was successful she would agree to let the husband have parenting time or have his rights terminated. She was unwilling to donate the embryos to another couple. The husband was against the wife using the embryos but also did not want the embryos destroyed. He wanted them donated to another couple.

In the Whitten case the Iowa Supreme Court indicated that there are three primary approaches to resolving disputes over the disposition of frozen embryos. The contractual approach, the contemporaneous mutual consent model, and the balancing test. In addressing the contractual approach the Whitten court referred to the decision of the New York case of Kass v Kass, supra..

In Kass, the court took the position that "knowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process. Advance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree. To the extent possible, it should be the progenitor--not the State and not the court--who by their prior directive make this deeply personal life choice". (p. 180)

The Iowa court rejected this approach for three reasons. They indicated that decisions about the disposition of frozen embryos implicate the rights central to individual identity and that individuals are entitled to make decisions consistent with their contemporaneous wishes, values and beliefs. They also indicated that requiring prior binding decisions ignores the difficulty of predicting one's own future response to life altering events. They further held that conditioning an IVF procedure on the existence of binding agreements is coercive and calls into question the genuineness of the couples consent in the first place.

In addressing the contemporaneous mutual consent model the Whitten court indicated that this approach shared the same underlying premise as the contractual approach: that decisions about the disposition of frozen embryos belong to the couple that created the embryo, with each partner entitled to an equal say in how the embryos should be disposed. In addressing this approach and in fact adopting this approach the Iowa court stated at p. 778: "One's erroneous prediction of how she or he will feel about the matter at some point in the future can have grave repercussions." The court went on to quote from Coleman, 84 Minn. L.Rev. at 96-97 as follows: "When chosen voluntarily, becoming a parent can be an important act of self-definition. Compelled parenthood, by contrast imposes an unwanted identity on the individual, forcing her to redefine herself, her place in the world, and the legacy she will leave after she dies. [On the other hand], for some people, the mandatory destruction of an embryo can have equally profound consequences, particularly for those who believe that embryos are persons. If forced destruction is experienced as the loss of a child, it can lead to life-altering feelings of mourning, guilt, and regret."

The Whitten court also examined the balancing test and referred to the New Jersey case of J.B. v M.B., 783 A.2d 707 (2001) which rejected the contractual approach and the contemporaneous mutual consent approach because of "the public policy concerns that underlie limitations on contracts involving family relationships". (p. 719). In J.B., the court went on to state that "if there is a disagreement between the parties as to disposition…, the interests of both parties must be evaluated". (p. 719) The Whitten court also rejected the balancing test of Davis, supra. that would be used if there were no prior agreement when the Davis court indicated at p. 604 that "the relative interests of the parties in using or not using the pre-embryo must be weighed".

The Whitten court rejected the balancing test stating: "Public policy concerns similar to those that prompt courts to refrain from enforcement of contracts addressing reproductive choice demand even more strongly that we not substitute the courts as decision makers in this highly emotional and personal area." (P. 779)

In Whitten, the Iowa court held that in a situation wherein the parties cannot contemporaneously agree as to the disposition of a frozen embryo, the embryo is to remain in storage until they do agree. That would be the easy position to take in this case but questions remain as to how long the frozen embryo can remain frozen before it loses any usefulness in its intended purpose. Like the New Jersey court stated in its decision in J.B., supra. some cases require a decision to be made and this is one such case.

In Kass, supra. the majority developed a hard and fast rule that an agreement entered into must be enforced (p. 583). That case involved facts of an IVF procedure in which the parties did enter into an agreement at the beginning of the procedure which called for the destruction of any unused pre-zygotes. After several unsuccessful attempts at implantation there were 5 pre-zygotes remaining. At the time of their divorce the wife had changed her mind as to the disposition of the remaining pre-zygotes and wanted them preserved for her continued efforts to become pregnant. But the court majority found that the agreement the parties entered into was unequivocal as to their decision and their informed consent and should be honored.

Like the other cases mentioned herein, the Kass court rejected any argument that the female has a superior interest in an IVF procedure prior to the act of implantation and stated at p. 586: "A woman's established right to exercise virtually exclusive control over her own body is not implicated in the IVF scenario until such time as implantation actually occurs, for it is only then that her bodily integrity is at issue."

The record in Kass was unclear as to whether or not the wife had other means of continuing to become pregnant or whether there were conditions relative to her that would otherwise prevent the same, making the continued use of this IVF procedure the only possible way that she could become pregnant. Because of this the dissenting opinion felt that the case should be sent back to the lower court for an evidentiary hearing of facts and that a true balancing test should be used to decide the respective interests of the parties and the disposition of the pre-zygotes in this case.

At p. 599 the dissent stated: "While I recognize the concurrence's concerns that the constitutionally-recognized right to avoid procreation can be irrevocably lost by unwanted implantation, it is equally important to recognize the procreational rights of a woman desiring implantation. These rights are just as fundamental, and, depending upon the circumstances of a given case, the right to procreate may be just as irrevocably lost as a result of the other party's veto. Simply stated, the competing fundamental, personal rights of both parties must be taken into consideration and balanced utilizing a fact-sensitive analysis."

This applies equally to cases such as this wherein the competing interests involve the desire not to procreate and the strongly held religious belief concerning when life begins and the destruction of that life. As noted in Coleman, 84 Minn. L.Rev. at 96-97 set forth above, both positions deserve consideration because of the emotional toll that may result to either party.

The dissent in Kass went on to indicate that there may be moral and psychological impacts upon a man who is compelled to procreate with an ex-wife by allowing her to continue the IVF process after divorce. If indeed the evidence establishes the ex-husbands genuine psychological objections to be committed to a child genetically his, though unwanted he could be faced with visitation and custody disputes or child support issues and at the very minimum he "might be forced to accept the fact that his genetic offspring walks the earth without his love and guidance. … Clearly, objections to involuntary procreation should not be lightly cast aside." (P.601) Most of these concerns are not present however when the embryo is donated anonymously as the plaintiff seeks to do in this case.

"On the other hand, there are undeniably numerous men who callously and thoughtlessly father children without any concern for their offspring. For such a man the psychological and emotional impacts of unwanted fatherhood would be less severe or even nonexistent. The motivation behind the objections should therefore be carefully scrutinized." (Kass at p. 601)

Although there may be a different standard involved when an egg is fertilized by coital relations because it does involve a woman's bodily integrity, from a procreational autonomy perspective however there is also a difference. From coital relations, an egg can be fertilized intentionally or unintentionally and in fact may result from an affirmative representation by the female that she is using birth control or that she cannot become pregnant. In that circumstance the male does not intend to procreate. In either situation whether the fertilization of the egg is intentional or unintentional by accident or affirmative misrepresentation, the male looses all control of the matter and no longer has procreational autonomy. In the IVF procedure on the other hand the parties consent to the exercise of procreational autonomy and mutually agree to begin the process by fertilizing the egg knowing full well, its intended purpose. With no agreement to the contrary it is clear that the parties began the process with the intent to use the embryos to procreate and in fact made efforts to do so. The Davis court referred to this as an implied

contract, but it is more than that as it gives a clear indication of the parties' original intent which is deserving of consideration.

The defendant's position is now that it was only her intent to procreate if it was between the parties as husband and wife and that she no longer wants to do so because they are divorced and she never intended that the embryo be used by someone else. She states that the eggs should be donated to science and ultimately destroyed because she doesn't want to know that there is a possibility that she has biological offspring in existence that she would have no connection to. The Tennessee court in Davis, supra. gave significant weight to this argument; that a person should not be forced to be a parent and that she should have the ability to stop the process that she voluntarily started. That she should not be forced into a situation where she would wonder whether or not she had offspring that she would never have the ability to connect with.

Being forced into a situation where a parent would wonder whether or not they had offspring and that they would never have the ability to connect with has already been addressed by the Michigan Legislature. Although it is in a different context the result is the same and the Legislature has created a statement of public policy on this point. This is exactly the same situation that many men find themselves in all the time. There are many cases from the Michigan Court of Appeals and the Michigan Supreme Court that have held that a man who fathered a child with a married woman is not a legal parent and has no rights as a parent to know or associate with the child that he has a biological connection to. (See Barnes v Jeudevine, 475 Mich 696 (2006); Numerick v Krull, 265 Mich App 232 (2005)) Unlike the defendant in this case who is concerned that there might be a child in existence in the future if the plaintiff is allowed to donate the embryo, in the situation just described the father actually knows of the existence of his biological offspring and cannot develop a relationship with the child.

Thus the Michigan Legislature in the clear language of the Paternity Act (MCL 722.711 et.seq) and Michigan Courts in interpreting that act have not given great weight to the concern that a person may have a biological connection to a child he can have no association with. Although in the context of this case the defendant's position must be given consideration it would be inconsistent with the manner in which the Michigan Legislature and Michigan Appellate decisions have addressed biological fathers in the Paternity context described above, to give that position the kind of weight that the Tennessee Supreme Court gave it in Davis.

As indicated above the plaintiff in the instant case has expressed deeply held religious beliefs that the embryo in this case is human life and although not yet viable, given the proper circumstances has the capacity to be a human child. It is his belief that the whole purpose of the parties engaging upon the IVF procedure was to create a child not stop that process. It is his belief that to donate the embryo to science for destruction would essentially kill the progress of a human life by other than natural means and he cannot agree to that destruction. As a medical doctor and also based upon he and the defendant's personal experience, he recognizes that even if donated there is no guarantee that a child will be the result. He also recognizes that he will have no connection to the

child if the embryo is donated and the recipient is successful in having a child but it is his belief that he could accept that rather than accept the destruction of the embryo.

The defendant on the other hand has indicated in an e-mail that what the plaintiff wants would have been agreeable to her had the parties been able to have a child but since they were not able to she does not want there to be a possibility of a child with a biological connection to her being raised by another person because she will not have closure.

Having reviewed the various cases from other states on this issue this court is of the opinion that the contemporaneous mutual consent model is the most appropriate model to adopt and if the parties are unable to agree then the court should make a decision using a true balancing test. In this court's opinion both parties have procreational autonomy. Each had the right to decide for themselves to procreate or not procreate, however once the decision to procreate is made by both parties and they act upon that decision by providing the egg and sperm and creating an embryo, their procreational autonomy has diminished. Thereafter they both have an equal interest in the dispositional decision of the embryo that has been created. When they cannot agree, the court should use a true balancing of the respective interests to determine which of the parties' dispositional decision should be followed.

In weighing the respective interests, an agreement between the parties whether it is written or implied from their intent and conduct, should be given some weight. Clearly a written agreement would have more weight than no agreement or one implied from the parties original intent. But there are other factors to consider as well. For example, there may be cases in which one of the parties wants to continue to use the embryo in an attempt to have a child with a biological connection to him or her and they are unable to produce more eggs or sperm due to medical reasons, or cases in which the disagreement of one party is out of spite or a desire to cause emotional injury to the other party, or many other possibilities. In the case before this court the balancing of interests pits the plaintiff's religious beliefs about the beginning of life and the view that to destroy this embryo would in fact destroy human life and the attendant emotional feelings caused by such a decision, against the defendant's position that to allow the embryo to be donated to another couple has the possibility of creating a child with a biological connection to her that she will never know or have a relationship with.

In weighing these two positions, this court is of the opinion that the plaintiff's deep rooted religious beliefs and the attendant emotional consequences that would occur if the embryo was destroyed weighs more heavily than the defendants position. Especially considering the manner in which that position has been viewed by the Michigan Legislature and the Michigan Courts in the context of paternity cases. Particularly considering that her position stated in her e-mail to the plaintiff suggested that she would be agreeable that an offspring of hers existed that she knew nothing about had the parties been able to have their own child. It is therefore, the decision of this court that the plaintiff may provide for the embryo to be donated anonymously by the fertility clinic for the purpose of adoption by another willing couple.

Understanding the seriousness of this decision, it is also the decision of this court to stay the effect of the order to be entered consistent with this opinion for 21 days to allow the defendant to appeal this decision should she decide to do so. In the event that such an appeal is filed the effect of this decision will be stayed by this court until the Michigan Court of Appeals addresses the matter.

The attorney for the plaintiff shall prepare an order consistent with this decision and submit it for entry within 14 days of the date of the decision.

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Elwood L. Brown
Probate Judge, Family Division
September 23, 2010