

**Szafranski and Beyond:  
The Continuing Controversy Over Custody Rights to Frozen Embryos in Illinois.**

*By*  
**William G. Beatty**  
**Johnson & Bell, Ltd.**  
**Chicago, Illinois**

According to the latest information from the U.S. Department of Health & Human Services' Office of Population Affairs website, there are more than 600,000 cryo-preserved embryos in the United States today ([www.hhs.gov/opa/about-opa-and-initiatives/embryo-adoption/](http://www.hhs.gov/opa/about-opa-and-initiatives/embryo-adoption/)). These embryos are the products of *in vitro* fertilization procedures in which a woman is prescribed drugs to stimulate egg production, after which multiple eggs are harvested and then fertilized outside of her body with the sperm cells of her husband, a significant other, or in some cases an anonymous donor.

Several of the fertilized eggs are then implanted in the woman's body (either the egg donor or a surrogate), while the remainder of the embryos are typically frozen in liquid nitrogen and stored at a fertility clinic. The remaining embryos may be subsequently thawed and implanted in the woman at a later date if the initial attempt at childbearing was unsuccessful, or if additional children are wanted. Unused frozen embryos may be donated to infertile couples who are willing to bear and raise a child who is genetically unrelated to them. However, many of the embryos are thawed and discarded; though some remain frozen indefinitely, or until no longer viable.

Generally, there are written agreements, in the nature of a consent form, between the gamete donors and the fertility clinic. The consent forms spell out the rights and obligations of both the donors and the clinic, respectively, regarding storage costs, duration of viability of the frozen embryos, and dispositional rights in the event the embryos are not used. Less often, there

is also an agreement by and between the donors themselves regarding custody and dispositional rights to the embryos in the event of separation, divorce, death or incapacity of one or both of the donors. In the absence of such an agreement, or sometimes notwithstanding the existence of such an agreement, the courts throughout this country have been called upon to decide custodial or dispositional rights between the parties when there is a disagreement as to the fate of their frozen embryos.

As is more fully discussed in this article, courts in various jurisdictions have adopted varying approaches in adjudicating the issue of which partner has the superior right to use, donate or dispose of the couples' surplus frozen embryos. As more fully discussed below, these divergent approaches have become known as the "contractual approach," the "contemporaneous mutual consent approach," and the "balancing approach." See *Szafranski v. Dunston*, 2013 IL App (1<sup>st</sup>) 122975, 993 N.E.2d 502 (1<sup>st</sup> Dist. 2013) at pp.506-514.

The Appellate Court of Illinois, in a case of first impression, was faced with such a dispute over the rights to frozen embryos in *Szafranski v. Dunston*, wherein the Appellate Court determined the criteria to be applied regarding dispositional rights in disputes between contesting gamete donors. *Id.*

### **THE SZAFRANSKI DECISIONS**

The defendant in *Szafranski*, an unmarried female physician, was diagnosed with non-Hodgkin's lymphoma in March of 2010, and was informed that her upcoming chemotherapy treatments would likely render her infertile. *Id.* at 503. At the time of her diagnosis, the defendant was in a relationship with the plaintiff, a firefighter/paramedic. *Id.* Desiring a biological child, defendant asked plaintiff if he would donate his sperm to create embryos with her eggs in an *in vitro* fertilization procedure, and the plaintiff agreed. *Id.* A consent form

presented to the couple by the fertility clinic provided that “[n]o use can be of these embryos without the consent of both partners (if applicable) . . . .” 993 N.E.2d at 504 (emphasis added). Both parties signed the consent form. *Id.* at 503.

On the same day as their meeting with the fertility clinic, the couple also saw an attorney who presented them with two alternative agreement forms, a co-parenting agreement and a sperm donor form, neither of which was ever signed by both parties. *Id.* at 504. The proposed co-parenting agreement, as later opted for by the defendant, provided for co-parent status for both of the parties that would bind the plaintiff “to undertake all legal, custodial, and other obligations” regarding the resultant child, “regardless of any change of circumstances between the Parties.” *Id.*

The following month, eight eggs were retrieved from the defendant and sperm was donated by the plaintiff. *Id.* All eight eggs were fertilized by agreement of the couple, and three survived to viability. 993 N.E.2d at 504. Soon afterward, the plaintiff ended his relationship with the defendant and filed suit against her seeking an injunction to permanently prevent the defendant from having any of the embryos implanted, so as to prevent the plaintiff from fathering a child with the defendant against plaintiff’s will. *Id.* at 504-505. Defendant filed a counterclaim seeking sole custody and control of the embryos and the right to use them to bear children. *Id.* at 505. Following discovery, cross-motions for summary judgment were filed by the parties. *Id.* In deciding the motions the chancery judge considered the relative interests of the defendant in desiring to give birth to a biologically-related child against the interests of the male plaintiff in not wanting to father a child with the defendant against the plaintiff’s wishes. *Id.* As a result, the chancery judge granted the woman’s motion for summary judgment and

denied the man's motion, thereby affording the defendant with the opportunity "to use the embryos to become a biological parent." 993 N.E.2d at 505-06.

In the plaintiff's ensuing appeal, based upon his claims of privacy and liberty under the U.S. and Illinois Constitutions, he claimed that his consent was required in order for the defendant to use the embryos. *Id.* at 506. The Appellate Court examined the various approaches adopted by other state courts in determining dispositional rights between contesting parties for the use of frozen embryos. *Id.* Of these three approaches examined by the Illinois Appellate Court (the "contractual" approach, as adopted by the courts of New York, Oregon, Texas, Washington and Tennessee (although the latter ultimately applied a balancing of interests approach because of the absence of a written contract between the donors); the "balancing of interests" approach, as applied in New Jersey and Pennsylvania; and the "contemporaneous mutual consent" approach, as adopted in Iowa), the court characterized the contractual theory as "the proper approach" and adopted it as the test for determining competing custody claims over frozen embryos in Illinois. *Id.* at 506-514. An alternate approach, based upon the relative merits of the competing interests of the parties, would be used only in the absence of a binding contract between the gamete donors. 993 N.E.2d at 514.

Since the *Szfranski* trial court had used the balancing of interests test in deciding the case at the summary judgment stage, rather than the contractual approach, the case was remanded to the chancery court for application of the contractual approach to the evidence adduced by the parties in support of their respective and competing positions. *Id.* at 518.

The Supreme Court of Illinois denied the plaintiff's petition for leave to appeal (2013 Ill. LEXIS 1282, 996 N.E.2d 24 (2013)), and the case proceeded to a bench trial before the chancery judge who, on May 16, 2014, after applying the contractual criteria to the facts of the case, again

ruled in favor of the defendant. The ruling was based upon the existence of an enforceable oral contract formed between the parties when the plaintiff unconditionally agreed to donate his sperm in order for the defendant to bear a biological child. The chancery judge determined that the subsequently-signed informed consent form, providing that no use could be made of the couple's embryos without the consent of both parties, neither modified nor contradicted the prior oral agreement of the parties, thereby giving the defendant unfettered custodial and dispositional rights to the embryos resulting from the IVF procedure. The chancery judge based her ruling on the fact that the informed consent agreement was primarily a contract between the couple and the clinic, rather than between the donors themselves. Additionally, the informed consent form contemplated a subsequent amendment to its terms, based upon its recommendation that the couple consult counsel in order to further define their custodial and dispositional wishes as to the embryos.

Since there was no subsequent signed contract following the couple's execution of the informed consent agreement, the chancery court then reverted to a March 24, 2010 oral agreement between the parties that plaintiff would unconditionally donate his sperm for the defendant's unconditional use of the resulting embryos.

Since an appeal of the bench trial decision was expected, and in the event that the oral contract between the parties was thereafter found to be non-existent, unenforceable or negated by the informed consent agreement, the chancery court also examined the case from a "balance of interests" approach. Under the "balance of interest" approach the last, best chance for the defendant to bear a biological child took precedence over the objection of the plaintiff to becoming a father against his later wishes, despite his prior voluntary sperm donation.

Regardless of whether or not the Appellate Court reconsiders its adoption of the contractual approach to frozen embryo custody cases in the upcoming appeal, or simply determines how the facts of the *Szafranski* case comport with that standard, some comment on the advantages and disadvantages of the contractual approach appear to be in order.

### **BENEFITS OF THE CONTRACTUAL APPROACH**

In adopting the contractual approach as the law in Illinois to be applied in disputes over embryonic dispositional rights, the Illinois Appellate Court cited two principal reasons for following this approach. First, according to the court, “it encourages parties to enter into agreements that will avoid future costly litigation”, and secondly, “it removes state and court involvement in private family decisions.” 993 N.E.2d at 506.

Quoting from the New York Court of Appeals decision in *Kass v. Kass*, 91 N.Y.2d 554, 696 N.E.2d 174 (1998), the Illinois Appellate Court said in support of its adoption of the contractual approach that it encourages the parties:

“to think through possible contingencies and carefully specify their wishes in writing [so as to] minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision. Written agreements also provide the certainty needed for effective operation of *in vitro* fertilization programs.”

993 N.E.2d at 507, quoting *Kass*, 696 N.E.2d at 180, citations omitted. The *Kass* court further supported its adoption of the contractual approach by stating:

“[It is] particularly important that courts seek to honor the parties’ expressions of choice, made before disputes erupt, with the parties’ over-all direction always uppermost in the analysis. Knowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process. Advance agreements as to the disposition would have little purpose if they were enforceable *only in the event that the parties continue to agree*. To the extent possible, it should be the progenitors – not the State and not the courts – who by their prior directive make this deeply personal life choice.” *Kass*, 696 N.E.2d at 180. *See also J.B. v. M.B.*, 170 N.J. 9, 783 A.2d 707 (2001) (in which the Supreme Court of New Jersey held that “the better rule” in embryonic

dispositional disputes “is to enforce agreements entered into at the time *in vitro* fertilization is begun, *subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored pre-embryos.*”)

783 A.2d at 719 (emphasis added).

Commentators have also expressed the advantages of the contractual approach, stating that:

“well-drafted written agreements leave a clear record memorializing [the] parties’ intent, which can, in turn, allow the parties to rely on them; that they require the gamete providers to think carefully through their opinions and make reasoned decisions; that they lay out obligations and expectations between the fertility center and the gamete providers, *even if they do not accomplish the same result between the gamete providers themselves*; and that, whatever their shortcomings, advance agreements between the parties are more desirable than leaving the matter for a court to decide.”

See A. West, “*Reproductive Freedom or Forced Reproduction: An Analysis of Minnesota Statutory Law Dealing with Parentage of Frozen Embryos After Divorce*,” 34 Hamline J. Pub. L. & Policy, 259 at 263-4, Spring, 2013.

Perhaps the most compelling support for the contractual approach has its basis in the concept of “reliance,” which formed the grounds for Count III of the defendant’s Verified Counterclaim (asserting promissory estoppel) in *Szafrański*. 993 N.E.2d at 505. This involves a situation in which one partner to the advance embryonic directive relies upon the dispositional terms of the agreement as a condition of undertaking the IVF process, *i.e.*

“when partner A accepts participation in the IVF treatment on condition that partner B agrees to a specific disposition of the supernumerary embryos. The agreement on a certain option [regarding the fate of the embryos] can be seen as a *material condition* on which the other partner relied in creating and storing the embryos.”

See J. Robertson, “Resolving Disputes Over Frozen Embryos,” *Hastings Center Report Number 1989*; Vol. 19, pp.7-12.

In such instances, an agreement regarding “the specific disposition [of the preserved embryos] can be a necessary condition for starting IVF treatment, especially for religious people who attribute a high moral status to the embryos.” *Id.* Perhaps, for instance, “[one] partner would never have started the IVF procedure unless he or she had been able to rely on the certainty that all resulting embryos would be given a chance to implant.” *See* G. Pennings “The Validity of Contracts to Dispose of Frozen Embryos” *Journal of Medical Ethics*, Volume 28, Issue 5 (2002) at p.298, citing J. Fineberg, *Harm to Self*, Oxford University Press, 1986.

As Pennings points out, from a legal standpoint, the consent of each partner concerning the disposition of their embryos can be seen as a promise to each other, and while the expectations of one of the partners does not necessarily make the prior agreement more “valid,” such promise-based expectations may support the binding character of the agreement. *Id.*

**PROBLEMS WITH THE CONTRACTUAL APPROACH –  
DIFFICULTIES IN ENFORCING ADVANCE EMBRYONIC DIRECTIVES**

In analyzing the best approach to the issue of who controls the disposition of cryo-preserved embryos, the Illinois Appellate Court’s *Szafranski* decision recognized that:

“While a majority of courts utilized the contractual approach and have sought to give effect to the parties’ advance directives regarding the disposition of pre-embryos, *there is not a unanimous view that such agreements are within the public interest.*”

993 N.E.2d at 510 (emphasis added). Several problems with the contract approach, as adopted by the Illinois Appellate Court, include difficulty in enforcing the contract, possible lack of true informed consent to support the contract, and changes in the donors’ life circumstances.

**A. Judicial Variations in Contract Enforcement.**

Contracts concerning the disposition of embryos can be likened to those advance directives that originated in the context of end-of-life instructions regarding the nature and extent



of medical treatment for the terminally ill. The conceptual benefits of an advance embryonic directive is that “[w]hen prior instructions are available and are considered enforceable by law, the [gamete providers] keep control and need not submit to decisions by the court or the clinic,” thereby preventing judicial involvement and costly litigation at a later date. *See* G. Pennings, *supra*, at pp.295-298, citing J. A. Robertson, “Disposition of Frozen Embryos by Divorcing Couples Without Prior Agreement”, *Fertility and Sterility*, Vol. 71, pp.996-7 (1999).

It has been pointed out, however, that “the claim that prior agreements minimize disputes has not been corroborated in reality for the simple reason that an embryo disposition agreement, like any contract, can be disputed by one of the partners.” *See* Pennings at pp.295-6.

An example of a judicial end-run around a written advance embryonic directive is found in the case of *A.Z. v. B.Z.*, 431 Mass. 150, 725 N.E.2d 1051 (2000), a decision from the Supreme Judicial Court of Massachusetts. In this case, the couple in question underwent IVF treatments from 1988 through 1991. *Id.* at 1053. The wife gave birth to twin daughters in 1992 and the unused pre-embryos were frozen for possible future implantation. *Id.* During the egg-harvesting phase of the IVF treatment the couple had signed a series of seven consent forms, one at the outset of the IVF procedure, and another with each of the six egg-retrieval procedures, all of which said that should the couple become “separated,” each agreed to have the embryos resulting from the IVF procedures returned to the wife for later implantation. *Id.* at 1055. The couple thereafter separated. *Id.* at 1054. Following the husband’s filing for divorce, he moved for a temporary restraining order as well as a permanent injunction prohibiting the wife from utilizing the remaining frozen embryos, claiming that he did not want to father any more children with his former spouse. 725 N.E.2d at 1054. The wife claimed exclusive custody rights to the embryos based upon the series of seven consent forms that the couple had signed during the IVF

procedures, all of which provided that the embryos were to be retained by the wife in the event of the couple's separation. *Id.* at 1055.

The Probate Court in Massachusetts refused to enforce the terms of the consent forms, citing the “change in circumstances” experienced by the couple, and held that “the husband’s interest in avoiding procreation outweighed the wife’s interest in having additional children . . . .” *See* 725 N.E.2d at 1055.

In this case of first impression, the Supreme Judicial Court of Massachusetts, after citing cases from Tennessee and New York which had held that agreements between couples regarding the disposition of frozen embryos should be presumed valid and should be enforced (*see Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) and *Kass v. Kass*, 91 N.Y.2d 554, 696 N.E.2d 174 (N.Y. 1998)), ruled that the husband’s rights prevailed over the interests of his wife.

As Illinois public policy evolves on the issue of dispositional rights to frozen embryos, it may well be that, as in the *A.Z. v. B.Z.* case, despite the adoption of the contractual approach to this issue, the existence of a written agreement (or even a series of them) between the parties regarding embryonic custody in the event of a separation or divorce may not afford either of the parties the level of protection that each had anticipated.

**B. Whose Contract is it Anyway?**

When the parties fail to execute a comprehensive agreement detailing the dispositional rights to frozen embryos under virtually any contingency, oftentimes the only written document that either of the parties can produce as evidence of the couple’s alleged agreement is a consent form entered into between the couple and the fertility clinic that performs the IVF procedure and/or stores the frozen embryos. Such was the case in *Szafranski*, in which neither a co-parenting agreement nor a sperm-donor agreement were signed by the couple leaving the

defendant reliant upon the clinic's consent form's language for support of her claim to superior dispositional rights as to the frozen embryos at issue. 993 N.E.2d at 517. Both case law and commentary make it clear, however, that the shortfall in relying upon the clinic's consent form to establish a contractual basis for a claim of superior custodial rights over the embryos is the fact that such consent forms are often construed by courts as merely a contract between the gamete donors and the clinic with which they are working, rather than constituting an agreement between the donors themselves. *See A.Z. v. B.Z.*, 431 Mass. At 158, 725 N.E.2d at 1056; *see also* D.L. Forman, "Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer," 24 J. Am. Acad. of Matrimonial Law., 57 at pp.62-66 (citing cases).

**C. Lack of Genuine Informed Consent.**

Despite the existence of a presumptively valid and enforceable agreement as to the custodial and dispositional rights regarding frozen embryos, it may be argued by one of the parties to the agreement that the emotional pressure that the party was under at the time of signing vitiated genuine informed consent. This argument was raised in the case of *Roman v. Roman*, 193 S.W.3d 40 (Tex. 2006), at which testimony was taken from the husband and a doctor on the issue of whether the wife was "too emotionally upset to give consent," and whether the wife demonstrated "any outward signs of an emotional problem that would prevent [her] from understanding [the agreement] and making an informed consent." 193 S.W.3d at 52-3.

The wife, in an effort to nullify the agreement for lack of true informed consent testified that "she would have signed anything to move forward because her goal was to have a child." *Id.* at 53.

Such an argument, based upon the emotional intensity and outright desperation at the commencement of the IVF procedure, has not escaped the attention of commentators. *See A. D.*

Lyerly, et al., “Decisional Conflict and the Disposition of Frozen Embryos: Implications for Informed Consent,” *Oxford Journal of Human Reproduction*, Mar. 2000, pp.646-654; A. D. Lyerly, et al., “Factors That Affect Infertility Patients’ Decisions About Disposition of Frozen Embryos,” 85 *Fertility and Sterility* 1623, 1627 (2006); T. G. Schuster, et al., “Legal Considerations for Cryo-Preservation of Sperm and Embryos,” 80 *Fertility and Sterility* 61, 65 (2002).

**D. Changes in Circumstances.**

Major changes in life’s circumstances such as separation, divorce, death of an existing child or children, major illness, etc., occurring between the signing of the embryo custody agreement and the contested disposition of the frozen embryos of a couple, can arguably provide equitable grounds for setting aside the prior contract, and instead basing a dispositional decision as to the embryos upon the changes in the lives of the gamete donors. Such circumstances may go well beyond a mere change of mind and may entail such factors as physical and emotional ability to bear a child, the economic wherewithal to expand the family; or sheer capacity to raise a child because of the couple’s changed circumstances. Such contingencies were discussed by the Supreme Court of Iowa in the 2003 case of *In Re: Marriage of Whitten*, 672 N.W.2d 768 (2003), in which the husband and wife had signed a consent form prior to beginning the IVF process that required the consent of both parties for any “transfer, release or disposition” of any of the 17 frozen embryos that remained in storage at the time that the couple’s divorce proceedings began. The only exception to the mutual consent requirement in their embryo disposition agreement was the death of one or both of the parties. *Id.*

During the divorce proceedings the wife petitioned for custody of the embryos, expressing a desire to have them implanted either in her, or in a surrogate, in order to have a

genetically linked child, while adamantly opposing any destruction or donation of the frozen embryos. *Id.*

The husband, while not opposing donation of the embryos, objected to his wife using them herself, and sought enforcement of the mutual consent provisions of the form that the couple had signed at the outset of their IVF procedures. *Id.* The district court sided with the husband and the wife appealed, citing the absence of any provision in the consent form about the disposition or use of the embryos in the event of the dissolution of the parties' marriage. *Id.* at 773. The wife argued that her husband's position violated her fundamental right to bear children, and stated that the court should apply a "best interests" test, similar to that applied in child custody matters, under which the wife claimed superior entitlement to the custody and use of the embryos. 672 N.W.2d at 773.

The Iowa Supreme Court found that prior decisions regarding the legal status of an unborn fetus (for wrongful death recovery purposes, for example) did not "fit" a claim for the disposition rights of frozen embryos (672 N.W.2d at 776), and as a result examined each of the three methods adopted by other courts in resolving such disputes. The Court rejected the contract approach, citing criticisms of this theory by commentators who state that (1) "individuals are entitled to make decisions consistent with their contemporaneous wishes, values and beliefs" *i.e.* those that prevail at the time of the dispositional act; (2) that "requiring couples to make binding decisions about the *future use* of their frozen embryos ignores the difficulty of predicting one's *future response* to life-altering events" occurring in the post-agreement period; (3) that "conditioning the provision of infertility treatment on the execution of a binding dispositional agreement is coercive" in nature, and therefore "calls into question the authenticity of the couple's original choice;" and (4) that "treating couples' decisions about

*future use* of their frozen embryos as binding contracts undermines important values about families, reproduction and the strength of genetic ties.” 672 N.W.2d at 777, quoting C. H. Coleman, “*Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*,” 84 Minn. L. Rev. 55 at pp.88-89 (1999) (emphasis added).

As to the “balancing test” adopted by the New Jersey Supreme Court in *J.B. v. M.B.*, 170 N.J. 9, 783 A.2d 707 (2001), while that court recognized “the right of either party to change his or her mind about the disposition [of frozen embryos] up to the point of use or destruction of any stored pre-embryos,” (*id.* at 719), the *Whitten* court saw the balancing approach as flawed, given that weighing “the relative interests of the parties in deciding the disposition of embryos when the parties cannot agree” serves only to “substitute the court as decision makers in this highly emotional and personal area.” 672 N.W.2d at 779.

Instead, the *Whitten* court adopted the contemporaneous mutual consent approach, recognizing “the right of individuals to make family and reproductive decisions based upon *their current views and values*,” and that “such decisions are highly emotional in nature and *subject to a later change in heart*.” *Id.* at 782 (emphasis added).

In the end, the *Whitten* court ruled that “judicial enforcement of an agreement *between a couple* regarding their future family and reproductive choices would be against the public policy of this state.” *Id.* (emphasis in the original).

The Iowa Supreme Court, while rejecting the contract approach to frozen embryos disputes, ended up affirming the trial court’s ruling “*enjoining both parties from transferring, releasing, or utilizing the embryos without the other’s written consent*.” *Id.* at 783 (emphasis added). Ironically, in doing so, the Iowa Supreme Court essentially enforced the mutual consent aspects of the parties’ original agreement, as reflected in the consent form.

The decision of the Appellate Court of Illinois in the second *Szafranski* appeal, now pending, affords the court with an opportunity to re-examine its adoption of a contracts-based approach to the rights of custody and control over frozen embryos and, if such an approach is retained, to clarify the standard of proof required in order to prevail under such a standard.