STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

GLORIA KATO KARUNGI,

Plaintiff,

-vs-

RONALD LEE EJALU,

Defendant.
/

EMBRYO BRIEF AND PROOF OF SERVICE

FILE NO.: 2016-841198-DS

HON. LISA LANGTON

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INTRODUCTION

On June 13, 2016, this Court entered a Consent Judgment of Support. The Final Judgment included the following provision:

> Frozen embryos exist which purport to have been created by the Plaintiff and Defendant. The issue of these frozen embryos is a part of this case. The resolution of the embryos is not a part of this judgment, herein, but the embryo issue is preserved for resolution by this Court in this case.

On August 3, 2016 Plaintiff Gloria Kato Karungi (hereinafter "Mother" or "Plaintiff") filed for custody of the human embryos. Since 2016, this case has been to the Court of Appeals twice

and is now on remand to address "how this case should be resolved." *Karunji v Ejalu*, Case No 351165, at 11 (Mich Ct App) (Aug 19, 2021). Plaintiff seeks custody of the human embryos and the Court of Appeals specifically held that this Court is not "precluded from deciding the life-status of the embryos and whether child-custody law applies." *Id*.

Defendant asks this Court to play an uncomfortably intrusive role in Plaintiff's life and in the life of the embryos. First, Defendant wants this Court to interfere with a mother's reproductive choices post-fertilization. In all other contexts, the United States Supreme Court and Michigan law unanimously establish that once a man has made a decision that results in the fertilization of a mother's egg, the intermediary decisions regarding that child belong to the mother until the time of the child's birth—at which point a father's parental rights begin.

Second, Defendant seeks for human embryos to be treated as property. Michigan law, however, specifically recognizes that human embryos are persons deserving of the protections of the law and not mere property, and even criminalizes their destruction.

Third, Defendant asserts that his interest in destroying the human embryos is greater than Plaintiff's right to carry them to term when he is not being asked to do anything. Defendant is not being asked to be named on the child's birth certificate, pay child support, or behave in any parental role. The Michigan Court of Appeals has determined that parental rights statutes are "elastic enough" to accommodate the challenging circumstances created by in vitro fertilization. *Lefever v Matthews*, ___ Mich App ____, Case No 353106 (April 1, 2021).

It likewise should be "elastic enough" to allow Plaintiff to keep her reproductive rights, including the option to be a parent without requiring Defendant's involvement as a natural parent. Plaintiff asks this Honorable Court to award Plaintiff custody of the human embryos. Should

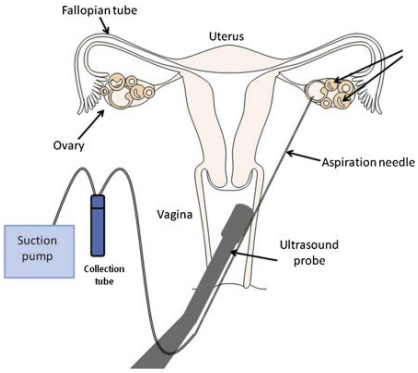
Plaintiff carry an embryo to term, she will not name Defendant on the child's birth certificate and seeks nothing further of this Court.

BRIEF FACTUAL BACKGROUND

Plaintiff is now 44-years-old and unmarried. She graduated to be a physician assistant and is awaiting her boards. Defendant has primary custody of their 10-year-old daughter and receives child support from Plaintiff. Defendant is remarried and has two additional children. Defendant consented to provide his sperm to fertilize Plaintiff's eggs through in vitro fertilization.

For women, the process of in vitro fertilization is profoundly difficult. Plaintiff went through a process called stimulation (also known as superovulation) by taking prescriptions containing follicle stimulating hormone, which carry several adverse side effects. Plaintiff underwent transvaginal ultrasounds and blood tests to monitor her ovaries and hormone levels. Once Plaintiffs' eggs were close to being ready to extract, Plaintiff received a hormone injection to further the development of her eggs before extraction.

Egg extraction is a surgical procedure called follicular aspiration. The procedure involves a large aspiration needle inserted through the vagina to reach one of the ovaries. Once penetrating the ovary, a suction pump transfers eggs from the ovary through the aspiration needle and the procedure is guided by the vaginal ultrasound probe and the eggs are collected. *See, e.g.*, https://www.nap.edu/read/11832/chapter/5#32, last visited Oct. 28, 2021. The procedure is considered to be quite painful and is frequently performed with anesthesia.



In contrast, to provide the sperm for a fertilized egg, a man is generally required to masturbate once. The fusion between the egg and the sperm at fertilization results in a live human being in the form of a single-cell human zygote with 46 chromosomes. The fertilized egg is also called a zygote. *See, e.g.*, Keith L. Moore and T.V.N. Persaud, The Developing Human, at pg. 2 (Philadelphia: W.B. Saunders Company, 1998) ("A zygote is the beginning of a new human being (*i.e.*, an embryo)."). The zygote immediately begins producing human proteins and enzymes. Kollias et al., "The human beta-globulin gene contains a downstream developmental specific enhancer," Nucleic Acids Research 15(14) (July, 1987). Human embryos are living beings, and like all living things, if given an environment and nutrition, naturally grows and develop.

While the male species can produce an infinite number of sperm throughout their lives, Plaintiff, being a woman, only has a finite number of eggs. She is also nearing the end of her window to have children. Menopause "usually occurs between 45 and 55 years of age, as a woman's estrogen levels decline." https://www.nhs.uk/conditions/menopause/, last visited Oct. 28, 2021. Plaintiff has paid and is still paying the cost to obtain the in vitro fertilization totaling over $40,000.00, without any financial contribution from Defendant. She is also solely financing the preservation of the embryos. Plaintiff desires to implant her eggs to have children of her own that she is able to enjoy within her custody.

Furthermore, if the preserved embryos are implanted, the umbilical cord of this child could help the serious health condition that their 10-year-old daughter faces, which requires hospitalizations, the use of chemotherapy drugs, and blood transfusions.

Plaintiff does not seek anything from the Defendant. Defendant does not need to be listed on a birth certificate. He does not need to pay child support. Plaintiff just seeks custody of the fertilized eggs and wants to prevent their destruction.

ARGUMENT

I. POST-FERTILIZATION—UNDER CURRENT U.S. SUPREME COURT PRECEDENT, A MOTHER HAS THE CONSTITUTIONAL RIGHT TO MAKE DECISIONS AFFECTING HER BODY AND HER PRE-BORN CHILDREN, WHILE A FATHER'S RIGHT TO VETO HER DECISIONS ENDS AT FERTILIZATION AND DOES NOT RENEW UNTIL BIRTH.

The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment grants a woman the "liberty" and right to "personal dignity and autonomy" with her reproductive decisions. *Roe v Wade*, 410 US 113, 129 (173); *Planned Parenthood of Southeastern Pa v Casey*, 505 US 833, 848 (1992); US Const amend 14 § 1. The Court has interpreted that right to include a woman's exclusive right to decide whether to bear a child, post-fertilization, without her husband's consent. *Casey*, 505 US at 881. The Court stated that "[o]ur cases recognize 'the right of the individual, married, or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" *Id*. at 851 (quoting *Eisenstadt v Baird,* 405 US 438, 453 (1972)).

And the Court clarified that in these decisions "the liberty of the woman is at stake in a sense unique to the human condition and so unique in law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . these sacrifices have from the beginning of the human race been endured by women . . . The destiny of

the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." *Casey*, 505 US at 852.

Defendant wrongly asserts that he controls whether Plaintiff can implant her fertilized eggs to bear a child. At this point, however, the decision is no longer his. Defendant made his decision when he consented to providing his sperm with the knowledge and consent that his sperm would be used to fertilize Plaintiff's eggs for the purpose of creating children. Defendant plays no further role in the development, pregnancy, or birthing of the child. Post-fertilization of the egg, no father in any legal context can force the mother to destroy her embryo or force her to carry an embryo to term, and it would be ultra vires to assume that Defendant holds that control of Plaintiff's rights and liberties in this instance.

Indeed, just three years after deciding *Roe*, the Supreme Court found that laws requiring spousal consent for post-fertilization reproductive decisions were unconstitutional, holding that while both the father and mother have an interest in the decision, when the two disagree only one party's position can prevail. Since the woman is the one who carries the pregnancy, "the balance weighs in her favor." *Planned Parenthood of Missouri v. Danforth*, 428 US 52, 90 (1976), *see also Casey*, 505 US at 898 (holding that a father need not even be notified of a woman's reproductive choices regarding his pre-born children). This is consistent with Michigan Law which criminalizes coerced abortion. *See* MCL § 750.213a(2) ("information that a pregnant female does not want to obtain an abortion includes <u>*any fact*</u> that would clearly demonstrate to a reasonable person that she is unwilling to comply with a request or demand to have an abortion) (emphasis added). The prohibition against coercion occurs at all stages of pregnancy, including when the pre-born child is at the embryo stage.

Here, Plaintiff does not want to destroy the embryos. Plaintiff and Defendant freely chose to undergo in vitro fertilization.[1] Plaintiff's eggs were harvested and fertilized with the agreement that Plaintiff would implant them into her uterus. And while the embryos were created from Defendant's DNA through his sperm, they equally are made of Plaintiff's DNA. Plaintiff's reproductive decisions regarding the embryos, however, will not equally affect the Defendant. She alone can become pregnant and give birth. Furthermore, she is willing to accept the sole responsibility of caring for and raising these pre-born children. Since Plaintiff and Defendant disagree, the rationale of the Supreme Court in its other reproductive decision cases apply. Only one position can prevail and the balance should weigh in Plaintiff's favor.[2]

II. DEFENDANT'S DESIRE TO DESTROY THE HUMAN EMBRYOS IS INCONSISTENT WITH MICHIGAN LAW, WHICH TREATS HUMAN EMBRYOS AS PERSONS DESERVING OF THE PROTECTIONS OF THE LAW AND NOT MERE PROPERTY

Destruction of human embryos is contrary to Michigan statutory authorities. The Supreme Court, in its abortion jurisprudence, has specifically recognized that a State may make a judgment about when life begins, so long as it is not used to regulate abortions. *Webster v Reprod. Health Servs*, 492 US 490, 506 (1989). Both criminal and civil law recognize the humanity of the embryo and pre-born child.

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[1] In the case of in vitro fertilization embryos, the mother and father *make the choice* to beget children when they create the embryos. Unlike conception that results as an accidental effect from sexual intercourse, the conception of frozen embryos is always intended; a frozen embryo cannot be the result of an accident or failed contraceptive. People engage in sexual intercourse for many different intents and purposes, which can inadvertently result in conception; creating frozen embryos has only one purpose and the sole intent in creating frozen embryos is to beget children.

[2] Defendant's desire to destroy the human embryos forecloses the option of adoption, which, similar to Plaintiff's position, would not affect his legal or financial interests. *See Snowflakes Embryo Adoption and Donation*, Nightlight Christian Adoptions, https://www.nightlight.org/snowflakes-embryo-adoption-donation, last visited Oct. 29, 2021.

Causes of action exist for wrongful death and other tortious injuries committed against the pre-born child, as well as criminal homicide. *See, e.g.*, *Womack v Buchhorn*, 384 Mich 718 (1971); *O'Neill v Morse*, 385 Mich 130 (1971); Paul Benjamin Linton, The Legal Status of the Unborn Child under State Law, 6 U. ST. THOMAS J. LAW & PUB. POL'Y 141, 146–48 (2012); MCL 600.2922a (protecting "embryo or fetus"); MCL 750.90a; MCL 750.90b; MCL 750.90c; MCL 750.90e. In *People v Kurr*, 253 Mich App 317, 321, 654 NW2d 651, 654 (2002), the court held that legal protection "should also extend to . . . a fetus, viable or nonviable, from an assault against the mother, and we base this conclusion primarily on the fetal protection act adopted by the Legislature in 1998."

Under Michigan law, even a pregnant mother's freedom over her body does not legitimize the use of illicit drugs resulting in the death of her pre-born child. *See, e.g.*, MCL 333.7404. Likewise, an embryo can hold property rights, and such rights can even result in appointment of a guardian ad litem to protect the pre-born child's interests. *See, e.g.*, MCL 600.2045. Matters such as inheritance rights and the paternity of a child can be determined as soon as the embryonic stage at the moment of conception or at birth. MCL 333.2824; 700.2114; 710.22; 710.34.

Michigan Law defines "human embryo" under MCL 333.16274 as "a human egg with a full genetic composition capable of differentiating and maturing into a complete human being." MCL 333.2688 refers to the use of a "dead embryo" in research. Of course, an embryo cannot be considered dead unless it was once living. *See, e.g.*, MCL 333.2688(1) (stating "[r]esearch may not knowingly be performed upon a dead embryo, fetus, or neonate unless the consent of the mother has first been obtained."). Michigan law provides that "[a] person shall not use a live human embryo...for nontherapeutic research if...the research substantially jeopardizes the life or health of the embryo..." MCL 333.2685(1). Performing such experimentation is a felony. MCL 333.2691.

MCL 333.2687 states that "[a]n embryo . . . is a live embryo . . . for the purposed of section 2685 to 2691 if, in the best medical judgment of a physician, it shows evidence of life as determined by the same medical standards as are used in determining evidence of life in a spontaneously aborted embryo or fetus at approximately the same stage of gestational development." MCL 333.2690 prohibits a person from selling, collecting a fee for, transferring, distributing, or giving away an embryo in violation of sections 2685 to 2689.

Notably there are no Michigan constitutional or statutory provisions that mandate human embryos *not be* treated as life. Treating human embryos as property clearly runs contrary to these existing statutes that are instructive to this Court's handling of the human embryos at issue in this case.

III. PLAINTIFF REQUIRES NO FURTHER ACTION OR SUPPORT FROM DEFENDANT

Concerning the human embryos, Plaintiff does not seek any involvement or financial support from Defendant. Defendant need not be named in a subsequent birth certificate. Under MCL 333.2824(6), "[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." However, notably here, a child would be born without the consent of the father. So, under MCL 333.2824(5), Plaintiff can decidedly omit Defendant's name and information from any birth registration.

The Court of Appeals recently recognized that the term "'natural parent' is not defined by statute" and that there is some flexibility in certain circumstances. *Lefever v Matthews*, ___ Mich App ____, Case No 353106 (April 1, 2021). The Court determined that two mothers, one who provided the egg for the in vitro fertilization, and the other who carried the child to term, could both be considered natural parents for purposes of custody. Here, it seems as equity requires, the

same principles of elasticity in recognizing parentage—or in this case, renouncing parentage—ought to apply.

CONCLUSION

This Court should award custody of the human embryos to Plaintiff and abstain from ordering their destruction with the condition that Plaintiff shall omit Defendant from any registration pursuant to MCL 333.2824(5), (6).

Dated: October 29, 2021.

Respectfully submitted,

/s/ Erin Mersino
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PROOF OF SERVICE

I, David A. Kallman, hereby affirm that on the date stated below I delivered a copy of Plaintiff's Embryo Brief, upon the counsel of record, via the Mi-File system. I hereby declare that this statement is true to the best of my information, knowledge, and belief.

DATED: October 29, 2021.

/s/ David A. Kallman
David A. Kallman (P34200)