IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

In re the Marriage of STEPHEN E. FINDLEY, Petitioner, and MIMI C. LEE, Respondent.	) Case No. FDI-13-780539)) TENTATIVE DECISION AND PROPOSED) STATEMENT OF DECISION
The Regents of the University of California, Claimant.	

The Court is required in this case to determine the rights of a now-divorced wife, Mimi Lee, and husband, Stephen Findley, to five fertilized embryos ("the Embryos") frozen during their marriage. Before undergoing the *in vitro* fertilization[1] ("IVF") procedure that resulted in the Embryos, Lee and Findley completed and signed a Consent & Agreement For Cryopreservation Disposition Of Frozen Embryos ("Consent & Agreement"). One provision of

[1] The process of "in vitro fertilization" is "fertilization of an ovum outside the body, the resultant zygote being incubated to the blastocyst stage and then implanted in the uterus." (Oxford Concise Medical Dict. (8th ed. 2010) p. 387.)

the Consent & Agreement addressed the disposition of unused embryos upon the occurrence of certain eventualities, including divorce. Lee and Findley agreed that in the event of divorce, the Embryos would be thawed and discarded.

After Findley informed Lee he wanted a divorce, Lee informed Findley that she wanted to use one or more of the Embryos and attempt to create a viable pregnancy. Findley denied his consent. In her response to the petition for dissolution of their marriage, Lee requested that some or all of the Embryos be transferred to her, an option she specifically declined before the divorce proceeding began.

There are over 4 million frozen, or "cryopreserved," embryos maintained in assisted reproductive technology ("ART") clinics in the United States.[2] The vast majority—approaching 90%—are designated for family preservation.[3] The Center for Reproductive Health at the University of California, San Francisco ("UCSF") alone stores approximately 100,000 such embryos, all of which are maintained by UCSF under the same type of Consent & Agreement signed by the parties in this case.

No federal regulations or statutes govern the disposition of frozen embryos created through ART. The states follow a patchwork of legislative and judicial approaches to the various issues that arise around the use and disposition of frozen embryos. In 2002 and 2003, the California Legislature enacted Health and Safety Code section 125315 which governs the disposition of human embryos. As part of the overall scheme created by the Legislature, the statute required that prior to undergoing fertility treatments that may result in the

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[2] Dave Snow, Alana Cattapan & Françoise Baylis, *Letter to the Editor*, 33 NAT'L BIOTECHNOLOGY 909, 909 (2015).

[3] David I. Hoffman, Gail L. Zellman, C. Christine Fair, Jacob F. Mayer, Joyce G. Zeitz, William E. Gibbons & Thomas G.Turner, Jr., *Cryopreserved Embryos in the United States and Their Availability for Research*, 79 FERTILITY AND STERILITY 1063, 1063 (2005).

cryopreservation of an embryo or multiple embryos, fertility health care providers "shall provide a form to the male and female partner, or the individual without a partner, as applicable, that sets forth advanced written directives regarding the disposition of embryos." The statute requires the gamete progenitors[4] to be given choices addressing four specific life events, including the disposition of embryos upon separation or divorce. (Health & Saf. Code, § 125315, subd. (b), subd. (3).)

UCSF, the health care provider selected by Lee and Findley, followed the requirements of the statute. UCSF created and provided to Lee and Findley a Consent & Agreement that, among other things, addressed the statutorily required choices regarding the disposition of the Embryos. Lee and Findley completed the document, initialing it in 15 places and signing it at the end. Directive 4 on page 7 addresses "the event of the DIVORCE, DISSOLUTION or LEGAL SPEARATION," and both Lee and Findley initialed next to "thaw and discard." The Consent & Agreement stated in the preamble the parties' "understand[ing] that the embryos are subject to [their] joint disposition and, therefore, all future decisions about their disposal must be joint decisions . . . ."

The Court holds that the Consent & Agreement Lee and Findley signed prior to their divorce controls and the intent of the parties at the time, as evidenced by that document, must be given conclusive effect. This result is dictated by the statutory scheme enacted by the California Legislature to regulate IVF procedures, the plain language and circumstances of the Consent & Agreement, and public policy. Neither party contends that the relevant California statutes are unconstitutional and the Court concludes that holding Lee to her agreement with Findley at the time of the procedure does not interfere with any constitutional right to procreate that she might

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[4] A "progenitor" is "[a] precursor, ancestor; one who begets." (Stedman's Medical Dict. (26th ed. 1995) p. 1434.) "gamete" is " a mature sex cell: the ovum of the female or the spermatozoon of the male. Gametes are haploid, containing half the normal number of

have at this time. Specifically, the Court holds that while Lee might have a right to procreate in other circumstances not before the Court, she does not have a right to procreate with Findley, which is the issue presented.

Decisions about family and children often are difficult, and can be wrenching when they become disputes. The policy best suited to ensuring that these disputes are resolved in a clear-eyed manner—unswayed by the turmoil, emotion, and accusations that attend to contested proceedings in family court—is to give effect to the intentions of the parties at the time of the decision at issue. " '[I]f there is one thing which, more than another, public policy requires, it is that men [and women] of full age and competent understanding shall have the utmost liberty of contract, and that their contracts, when entered into freely and voluntarily shall be held sacred, and shall be enforced by courts of justice.' " (*In re Garcelon's Estate* (1894) 104 Cal. 570, 591 [quoting from the opinion of Sir G. Jessell, M.R., in *Printing Numerical Registering Co. v. Sampson,* L.R. 19 Eq. 465]; accord, *Vernon v. Drexel Burnham & Co.* (1975) 52 Cal.App.3d 706, 716.)

It is a disturbing consequence of modern biological technology that the fate of the nascent human life, which the Embryos in this case represent, must be determined in a court by reference to cold legal principles. However, only an infinitesimally small percentage of the four million frozen embryos currently in storage in the United States are destined to be implanted and brought to life. There must be rules to govern the disposition of the rest. The California Legislature has prescribed such rules, which were implemented by UCSF and followed knowingly and voluntarily by Lee and Findley as a precondition to being permitted to have the procedure. The role of a court here at the intersection of a constitutional statute and the agreement of two competent adults is clear.

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chromosomes. (Oxford Concise Medical Dict. (8th ed. 2010) p. 295.)

I. PROCEDURAL BACKGROUND

On December 6, 2013, Petitioner, Steven E. Findley ("Findley") filed for a dissolution of his three year marriage to Respondent, Mimi C. Lee ("Lee").[5] On April 15, 2015, this Court issued a judgment of the dissolution of that marriage and reserved for trial the sole issue of the disposition of the Embryos created by Findley and Lee shortly after they were married. Prior to the judgment, Findley filed a complaint seeking to join UCSF as a claimant because, as a party to the Consent & Agreement, he wanted UCSF to act in accordance with the original disposition and thaw and discard the Embryos. On February 6, 2015, The Regents of the University of California ("The Regents"), of which UCSF is a part, consented to the joinder and answered the Amended Complaint for Joinder filed by Findley.

A trial on the disposition of the Embryos commenced on July 13 through 17, 2015. The Court received pre-trial briefs and responses, heard testimony from four witnesses, reviewed documentary evidence and deposition transcripts, heard oral argument from counsel, reviewed responses to questions the Court posed to the parties after the presentation of evidence, and reviewed proposed statements of decision, all of which were considered in making this decision. The matter was submitted for decision on August 28, 2015. Pursuant to Code of Civil Procedure section 632 and California Rule of Court 3.1590, subdivision (c)(1), the following is the Court's Proposed Statement of Decision and Tentative Decision in this matter.[6]

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[5] For ease of use in this opinion, the Court will refer to the parties by their last names. In addition, the Court will use the terms "embryo" "frozen embryos" and "cryopreserved embryos" interchangeably to refer to pre-embryos. "Pre-embryo" is defined as "[a] fertilized ovum up to 14 days old, before uterine implantation." (The American Heritage Medical Dict. (Updated ed. 2007) p. 660.)

[6] Parties under CRC 3.1590, subdivision (g) should be familiar with the authorities that describe the limited purposes of objections.

II. ISSUES PRESENTED

Lee contends that the Contract & Agreement was only a contract between Findley and Lee, on one hand, and UCSF on the other, and to the extent she had an agreement with Findley about the disposition of the Embryos in the future, it is akin to an advance medical directive which she can unilaterally change at any time. She also contends that the Consent & Agreement is invalid and should not be enforced; that her informed consent was not properly obtained; and she urges the Court to adopt a balancing test weighing her right to procreate under both the United States and California Constitutions against any interest Findley has in avoiding use of his biological material for parenthood.

Findley requests that the Court enforce the "Thaw and Discard" directive in the Consent & Agreement. He further contends that he too has federal and state constitutional rights not to procreate with Lee; that he does not want to have a child or children with Lee; and he fears that if Lee is awarded the Embryos, she will use any resulting child(ren) to take financial advantage of him.

The Regents and UCSF request, for public policy reasons, the Court find: (1) that the Embryos are property; (2) that the Consent & Agreement is neither a contract of adhesion, nor invalid on its face; and (3) that UCSF received informed consent from Findley and Lee when they signed it. UCSF further requests that this Court find that the written directives executed by progenitors of embryos are presumptively valid and enforceable.

III. EVIDENCE PRESENTED AT TRIAL

A. Marriage through Divorce

Findley and Lee, now in their mid-40's, first met when they were students at Harvard College in 1988. Lee graduated with an A.B. in chemistry and in East Asian languages and civilizations. She also studied piano at the Julliard School of Music. Lee went to medical school at the Albert Einstein College of Medicine in New York where she obtained a joint M.D./Ph.D.

in neuroscience. Lee trained in neurological surgery for three years and transitioned to anesthesiology thereafter. Findley went on to work in finance and became a Senior Vice President and Senior Research Analyst at Alliance Bernstein, a global wealth management firm in New York.

For the next two decades, Findley and Lee remained friends.[7] In January 2010, their friendship became a romantic relationship with Lee working and living in the Bay Area and Findley working and living in New York City. Both testified that they discussed the idea of whether each wanted children and under what circumstances. During these discussions, Lee told Findley that she only wanted to have a child if she was married. Lee also disclosed to Findley that on four prior occasions she terminated pregnancies, the most recent when she was 37 years of age, because she had not yet found the right person with whom she wanted to have a child. According to Findley, he and Lee were both open to the idea of having children but it was important to each of them to find the right person with whom to have a family first, and then make reasoned choices about children thereafter. Lee did not dispute this testimony.

Lee also told Findley that previously she had been unsure about whether to have children because her career was important to her, and she acknowledged that children were a lot of work. Findley testified that when he and Lee were visiting Singapore in early 2010, Lee informed him that she was 41 years of age. Findley interpreted her comment to mean if he wanted children, Lee's age might play a factor because it is more difficult for a woman to conceive a child as she gets older.

Lee testified at trial that while she thought about having a child for many years, her career and the demands on her time took precedence. She said that it was not until she and Findley became romantically involved that she really wanted to start a family with him.

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[7] Lee was married once before but the dates of that marriage is unclear from the testimony. That marriage ended in divorce and there were no children.

Lee practiced anesthesiology in the Bay Area. She also performed anesthesia services for the Zouves Fertility Center in San Mateo, California in 2008, 2009 and 2010. When asked during trial if she ever considered freezing her eggs during that time, Lee said "no." In a 2009 e-mail to her sister, however, Lee stated that she was then considering freezing her eggs with the Zouves clinic. After reviewing the e-mail at trial Lee testified that she was already at an advanced age in 2009 and considered the success rate for freezing her eggs low. Due to the low success rate, Lee chose not to freeze her eggs because she was busy with her anesthesiology practice and the procedure would have required downtime from her work and it was too expensive. The parties stipulated at trial that the Zouves Fertility Clinic began freezing eggs in 2009.

Findley proposed to Lee in May 2010 and their wedding was set for September 4, 2010. In an e-mail on June 1, 2010, Lee told a friend that she and Findley were trying to conceive a child. Because they were involved in a bi-costal relationship, Lee and Findley could only try and conceive when they visited each other, which, according to the testimony, was every other week.[8]

Around May 2010, Findley discovered a lump in Lee's left breast and urged her to have it checked by a medical professional. At first Lee was not concerned but Findley continued to press her to seek medical care. During trial Lee explained that in hindsight she was very grateful to Findley because if it were not for both his discovery and insistence that she seek medical care, her cancer would have remained undiagnosed.

Lee saw her treating obstetric/gynecology physician ("OB/GYN") about the lump and eventually a biopsy was performed. Given her age and the presentation of the lump, neither Lee

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[8] Lee's expert testified that a diagnosis of "infertility" in a woman 35 years of age or older is made after a woman unsuccessfully attempts to conceive a child for 6 months. Lee had not been attempting to become pregnant for 6 months prior to her cancer diagnosis and thus did

nor her OB/GYN seemed concerned about the results.

Lee testified that shortly after the biopsy was performed she was driving on the freeway on her way to work when she received a call on her cell phone from her OB/GYN. She said that her OB/GYN asked her to pull over, which she did. The news that ensued was, as Lee described, devastating. The biopsy results were positive for an estrogen receptor-positive malignant tumor. Lee testified that immediately after she finished speaking with her OB/GYN she made two phone calls: The first to the clinic where she was supposed to be at work that afternoon and the second to Findley, who was in his office in New York. Both Findley and Lee testified that they were shocked by the news.

Lee immediately began to design a treatment plan for her breast cancer. On August 27, 2010, she underwent a lumpectomy and a week later was married in Calistoga, California. During her honeymoon in Bali, Lee learned that the original pathology from the lumpectomy that came back negative around the margins was now considered inconclusive. When she returned from her honeymoon, Lee testified that she began to design a treatment plan for her breast cancer, which included securing second opinions from MD Anderson in Texas. Because her cancer was slow growing, Lee ultimately did not need to undergo chemotherapy or radiation; instead, she decided to take Tamoxifen for five years.

Lee and Findley also began to explore IVF as a way to preserve the option of having a family given Lee's cancer diagnosis and possible courses of treatment. Findley, who had not yet moved out of his New York apartment, was flying back and forth while Lee who took the lead in finding an IVF clinic. Lee testified that after making some inquiries about IVF clinics, she made the decision that she and Findley would use the services of UCSF to explore their fertility options.

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not then qualify as "infertile" based on this definition.

On September 2, 2015, Lee had a phone consultation with Dr. Mitchell Rosen ("Dr. Rosen"), the Director of the Fertility Preservation Program and the director of the Reproductive Laboratories at the UCSF clinic. In addition to his duties as the clinic director, Dr. Rosen is also an oncofertility specialist.[9] Lee previously knew Dr. Rosen in a professional capacity as she too was employed by UCSF for a period of time as an anesthesiologist.

Dr. Rosen testified both as Lee's treating physician and as the person most knowledgeable ("PMK") regarding the UCSF clinic and its procedure. Lee was unable to recall with any detail what was said during her initial phone conversation with Dr. Rosen. However, Dr. Rosen testified that based on his review of the medical record events[10] in Lee's file, they most likely discussed ovarian reserve,[11] the IVF process, her cancer treatment, and the options of cryopreserving eggs and embryos. Dr. Rosen testified that not much discussion went into the option of freezing eggs because Lee told him that she and Findley were actively trying to conceive a child together at the time. Because of Lee's cancer diagnosis and treatment, and her expressed intent to want to start a family with Findley, Dr. Rosen recommended that the best chance she and Findley had to have a child or children of their own was to cryopreserve any embryos that resulted from the IVF procedure.

The nurse assigned to assist Lee and Findley during the IVF procedure was Audra Katz ("Katz"). Katz was unavailable to testify at the time of trial and both parties stipulated that

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[9] Oncofertility is a specialty that concerns the treatment of patients who have been diagnosed with cancer and are considering IVF or other fertility treatments. (Teresa K. Woodruff, *The Emergence of a New Interdiscipline: Oncofertility,* ONCOFERTILITY 3, 3 (Teresa K. Woodruff & Karrie Ann Snyder eds., 2007).)

[10] Medical record event is a form placed in the electronic medical record each time UCSF has a communication with a patient.

[11] "Ovarian reserve is a test or marker of the number of eggs that are remaining in the ovary." (RT 112:12–14.)

neither would object to the introduction of Katz's notations in Lee's medical records. In Katz's notes on September 21, 2010, she referred to the consent signing or consent forms that needed to be signed before the IVF procedure could begin. On September 21, 2010, Katz wrote:

> "Spoke to pt today. Pt will meet with me after appt with Dr. Rosen tomorrow. Pt to be taught medication administration and consents. *Pts partner is out of town so they will have them notarized.* Gave pt website info. Pt to call with any further questions."

(Trial Ex. PX-7, italics added.)

The following day, September 22, 2010, Lee attended an appointment with Dr. Rosen where he performed a vaginal ultrasound to determine Lee's ovarian reserve. Dr. Rosen testified that he made a conservative estimate at the time that Lee had six antral follicles, which is a measure of egg supply for the future. [12] Lee and Dr. Rosen spent an hour total during the consultation discussing ovarian reserve; the hormone therapy that would be used to stimulate the ovarian reserve; and age-related fertility.

On September 22, 2010 Katz wrote:

> "Met with pt today. REviewed [sic] things needed before cycle start 1)SAN for partner 2)consent signing . . . ."

(Trial Ex. PX-8.) Neither Findley nor Lee was able to recall if either received the consent forms prior to the date they were signed.

On September 27, 2010, Lee informed Katz that she was considering transferring embryos that resulted from the procedure instead of freezing them. Katz note stated:

> "Spoke to pt today. Stephen and her to come in Wed morning for SAn [sic] and consent signing. Pt to call Alelie today to put insurance info in so I can order medications. Pt may decide to transfer with this cycle as she may not need adjunct therapy. Dr. Rosen notified. Pt knows to have ID labs drawn ASAP. Pt verbalized good understanding."

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[12] Antral follicles are "a good predictor of the number of mature (dominant) follicles in woman's ovaries that can be stimulated by medications leading up to IVF." (JEAN NOEL BUY & MICHEL GHOSSAIN, GYNECOLOGICAL IMAGING 102 (2013).)

(Trial Ex. PX-9.) Dr. Rosen testified that this meant that instead of freezing all of the embryos, Lee was in fact contemplating transferring some embryos into her uterus right after the procedure to try to get pregnant. Based on his review of the notation and his discussions with Lee, Dr. Rosen interpreted this to mean that Lee was not going to need to undergo chemotherapy to treat her breast cancer.

On September 29, 2010, in advance of the IVF procedure, Findley and Lee met with Katz and signed two consent forms. The first, entitled the Informed Consent for In Vitro Fertilization ("Informed Consent"), consisted of eight pages. The Informed Consent explained the IVF process, its risks, costs and the various associated procedures, including egg retrieval, fertilization and transfer, cryopreservation and transfer, the embryo transfer process, the embryo freezing process, and the five IVF options. Of the five options, Findley and Lee only initialed the Intracytoplasmic Sperm Injection ("ICSI"), meaning that Lee's sperm would be injected into any retrieved eggs with the hope that embryos would result. The Informed Consent also indicated that Findley and Lee had decided to freeze all resulting embryos instead of transferring some and freezing others, as suggested in Katz's note from September 27, 2010. Findley and Lee signed the last page of the document with Katz as the witness.

The second document, the Consent & Agreement (Trial Ex. PX-3), consisted of ten pages. The Consent & Agreement is a very different document from the Informed Consent. The first paragraph stated:

> "We, Mimi LEE (female participant) and Stephen FINDLEY(partner/husband), as participants in the in vitro fertilization program (IVF Program) of the UCSF Center for Reproductive Health at the University of San Francisco Medical Center (hereinafter "UCSF") understand that as a result of our participation in the IVF Program, more embryos (an embryo is normally a fertilized egg) may form than our physicians recommend be transferred in a single IVF cycle. We understand that the purpose of cryopreserving (freezing) embryos is to allow the possibility of a pregnancy at a future time. We understand that only embryos deemed viable by our IVF laboratory will be considered eligible for freezing. The purpose of this Consent and Agreement is to give our permission to cryopreserve excess

> embryos, to state our jointly agreed upon choices as to the future disposition of these embryos, and to outline our understanding of, and agreement as to, the terms under which our cryopreserved embryos will be maintained by UCSF. *We understand that the embryos are subject to our joint disposition and, therefore, all future decisions about their disposal must be joint decisions, except where indicated otherwise herein, or where such disposal may be affected by applicable laws in the future or by any court having jurisdiction over these embryos.* We understand we can jointly change any of the choices made herein by contracting the IVF Program Director and signing a new agreement incorporating any new choices and decisions which are available to us and on which we both agree."

(Consent & Agreement 1, italics added.) The document explains the freezing process, the risks and benefits of that process, as well as the costs and expenses associated with storage and the treatment alternatives. Under the section entitled "Legal Considerations" the document stated, in part:

> "*We have made the choices indicated below in order to define and govern, to the extent possible, disposition of our unused cryopreserved embryos in case any of the stated contingencies or other unexpected events occur*. We reserve the right to *jointly alter our instructions if the stated conditions (for example, unavailability, death, divorce) have not yet occurred* by delivering another duly signed and executed Agreement to the IVF Program, with different allowable instructions indicated therein . . . .
> . . . .
> *We understand that we may wish to consult an attorney on our behalf concerning these matters before completing this form* and acknowledge that the IVF Program has not provided us with legal advice regarding these matters."

(Consent & Agreement 4–5, italics added.)

Following this preamble, the Consent & Agreement continues to a separate section entitled "INSTRUCTIONS AS TO THE DISPOSITION OF UNUSED EMBRYOS" which tracks the provisions in Health and Safety Code section 125315 subdivision (b). The Consent & Agreement defines the four options Findley and Lee had with respect to each directive. Option 1. "Thaw and Discard"; Option 2. "Donation"; Option 3. "Transfer to Spouse/Partner"; and Option 4. "Thaw for Observation/Research." (Consent & Agreement 6.)

After defining the options, Findley and Lee were directed:

> "THE FOLLOWING DESCRIBES OUR CURRENT DIRECTIVES OF WHAT WILL BE DONE WITH OUR UNUSED CRYOPRESERVED EMBRYOS. **PLEASE SELECT ONLY ONE OPTION PER DIRECTIVE** (Each selected directive must be initialed by BOTH partners):"

(Consent & Agreement 6, emphasis in the original.) In the succeeding pages, the Consent & Agreement sets forth seven directives. "DIRECTIVE 1: In the event of the DEATH of both of us, the initial terms of disposal will apply:" Findley and Lee both initialed "Thaw and Discard." "DIRECTIVE 2: In the event of the DEATH of FEMALE PATIENT, the initial terms of disposal will apply:" Findley and Lee both initialed "Thaw and Discard." "DIRECTIVE 3: In the event of the DEATH of PARTNER, the initial terms of disposal will apply:" Findley and Lee both initialed "Transfer to Spouse/Partner." "DIRECTIVE 4: In the event of the DIVORCE, DISSOLUTION or LEGAL SEPARATION (as evidenced by a judicial order or decree), the initial terms of disposal will apply:" Findley and Lee both initialed "Thaw and Discard." Findley and Lee also gave UCSF permission to "Thaw and Discard" the Embryos if they failed to pay storage fees for 12 months or if any unused Embryos remained after five years.[13] (Consent & Agreement 6–9.)

In addition to placing their initials after each directive as required, Findley and Lee also initialed the bottom of each page. At the end of the Consent & Agreement, Findley and Lee signed the document with Katz as the witness. Just before their signatures, appeared the following:

> "**OUR SIGNATURES** below evidence our agreement that: 1) we have read, understood, and agreed to all terms of the agreement described above, 2) all such terms, medical procedures, risks, and benefits have been satisfactorily explained to us, that we have had sufficient time to seek additional information and make our decision, and that we have all the information we desire, 3) we hereby give

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[13] Findley and Lee chose not to donate any of the Embryos and therefore were not required to complete Directive 7. The fact that they did not complete Directive 7 is additional evidence that each carefully read the instructions and directives before initialing and signing.

> our authorization and consent and agreement to cryopreservation of embryos according to the terms described above."

(Id. at p. 9.)

Findley and Lee both testified about reviewing, initialing, and signing the Consent & Agreement. According to Findley, he vividly remembered the Consent & Agreement because it was part of an important event in their lives in creating the Embryos, and it involved important choices. Findley testified that he carefully reviewed both the Informed Consent and Consent & Agreement before he signed the forms. He estimated that the total time to review, initial and sign was between 10 and 20 minutes. Lee, on the other hand, testified that the entire process took 10 minutes or less. Both Findley and Lee agreed that neither requested more time before signing the forms and neither requested to have the forms reviewed by an attorney, which was an option specifically given to them.

No evidence was presented at trial indicating that either Findley or Lee expressed concern about the Consent & Agreement; asked any questions; indicated to Katz or anyone else that they were rushed or needed more time; or indicated that they did not understand what they were signing. Consistent with the testimony at trial, the medical record in evidence indicates on September 29, 2010 that "Pt. verbalized good understanding." (Trial Ex. PX-6.) Dr. Rosen testified that note is used when the patient and partner have no questions and understand the Consent & Agreement. He also testified that if either party had indicated that he or she had a question or was confused, that note would not be used, and instead Findley and Lee would have been referred back to him.

According to Findley, it was Lee who made the choice on each directive. After she made the choice, Lee placed her initials on the line marked (Female Patient Initials) followed by Findley on the line marked (Partner Initials). Findley specifically recalled that Lee checked the box directing that any embryos be "thaw[ed] and discard[ed]" upon a judgment of dissolution.

Findley testified that while he did not recall any specific discussions he had with Lee about the directives in the Consent & Agreement—and if they had any such discussions on that day they would have been brief—his review of the options Lee checked on each directive were entirely consistent with prior discussions Findley and Lee had about only wanting to have children if they were married to each other. Findley further testified that if Lee had selected the option transferring the Embryos to her in the event of divorce, and she provided no other alternative, he would not have agreed with her selection.

> "Q. What would you have done if she had checked the box that she gets the embryos in the event of divorce?
> A. I would have -- I think I would have asked her first why she checked that, because it wasn't what our intentions were, which were to have children together as a married couple. And if she said that was her choice and there was no alternative, then I would have said I can't agree to that."

(RT 100:14–20.)

In contrast to Findley's testimony, Lee could not recall who selected the options. At trial Lee stated that she could not say whether the check marks in each box were her handwriting. Thereafter, Lee was confronted by prior deposition testimony in which she stated that the check marks looked like the manner in which she checks other medical forms. Lee further testified that even if she checked the boxes in the Consent & Agreement, it was her belief at the time she and Findley signed the Consent & Agreement that it was not enforceable. Lee based this belief on her experiences as a physician. Lee testified that advance medical directives are routinely disregarded in the operating room where she provided anesthesia services and in other hospital settings.

It is undisputed that Lee never informed Findley or UCSF that she believed she could unilaterally change the directives. Moreover, when she signed the Consent & Agreement which expressly stated that any modifications must be jointly made, she never told either Findley or UCSF that her belief was inconsistent with this clear language.

Lee was asked whether, after signing the Consent & Agreement on September 29, 2010, she was given a copy. She responded that she was "99.9 percent sure" she and Findley did *not* receive a signed copy. Her trial testimony, however, was impeached with her prior deposition testimony wherein she testified that she could not recall if they received a signed copy.

Dr. Rosen testified that obtaining consents "is a critical procedure to our operation" and without the consents, UCSF will not provide IVF services to a patient. He testified at length about the process UCSF uses to obtain the consent forms from patients; the operating procedures in place to insure the forms are obtained prior to any IVF procedure; how the consents are scanned in an electronic database so that UCSF always has the progenitors' directives on file regarding embryo disposition; and how patients, if they request, are able to modify the form. Even if a patient modifies the Consent & Agreement, it must contain the minimum requirements of what is actually in the form: the directives regarding disposition pursuant to Health and Safety Code section 125315.

Findley's and Lee's actual egg retrieval and ICSI did not take place until October 16, 2010—over two weeks after the Consent & Agreement was signed. On that day, Dr. Rosen was able to retrieve 18 eggs. According to both Dr. Rosen and Lee's expert witness, Dr. Kelly Jane Baek ("Dr. Baek"), the range of the number of eggs expected to be retrieved from a 41 year old woman is between 4 and 18. Lee was on the very high end of the range. Of the 18 eggs, only 12 eggs were inseminated through the ICSI process and after three days, the five Embryos resulted. Dr. Rosen further testified that given the number of eggs produced, if Lee had transferred the Embryos in October 2010, she would have had a 25 percent chance of a single live birth.

Findley and Lee both testified that because of her cancer treatment, they agreed as a couple to wait a year before discussing further use of the Embryos. According to Findley, in or about October or November 2011, he and Lee discussed using a surrogate to carry a child or children for them. Findley testified that he expressed his reluctance to consider surrogacy at that

time because he was actually concerned about the marriage. Nonetheless, Findley agreed to explore the option with Lee.

Lee selected a surrogacy agency but no agreements were ever signed and at best, Lee was provided with a boilerplate agreement she and Findley could review in case they decided to proceed. Lee did not dispute this testimony but stated that, exhausted from her cancer treatment, she had "no bandwidth" to think about surrogacy in 2011. She also admitted that during this time she formed a musical group that required her to attend daily rehearsals.

Both Findley and Lee admitted that their marriage was experiencing difficulties after about a year and a half, and that neither pursued the use of a surrogate except for the one time briefly in Fall 2011.

Findley and Lee separated on August 5, 2013, and he filed for divorce on December 6, 2013. During this time, Findley and Lee discussed the Embryos only four times. The first discussion took place a few weeks after August 5, 2013, when Findley and Lee were talking about the division of joint assets. Findley testified that he was sharing account information with Lee and she became upset.

> "But then some weeks later we started to have conversations about the actual process of divorcing. And the first conversation that we had where I started -- I offered to share with her just some account information about what the joint assets were, she told me that she found that offensive in terms of the amount that I was -- was a -- was characterizing as joint. And she said, What about the embryos?
> And I was kind of caught off guard because we weren't -- first of all, I was caught off guard because I frankly didn't think, naively, in retrospect, that the embryos were an issue in the divorce because I remembered the agreement we signed. But I was caught off guard because it wasn't the subject of the conversation. And so I said, What do you mean, the embryos?
> And she said, Well, how much are those worth?
> And I said, What you do mean?
> And she said, you know, Do I get $1 million for those? $2 million for those? For each one?
> And I think I told her I'm not going to have that discussion, and I was -- I, frankly, was kind of sick to my stomach."

(RT 272–273:28–21.)

The next conversation took place one to two months later in Findley's office. During this in-person conversation, Lee informed Findley that she had been speaking with her lawyers and that she was thinking that she wanted the Embryos. According to Findley, this was a civil conversation.

The third conversation took place in July 2014. Findley testified that he called Lee after hearing that she might actually be taking legal action to obtain the Embryos. Findley again described this conversation as civil. Lee explained to Findley that after recently spending time alone with her nephew, it taught her something about how much she wanted to be a parent, and that she was going to pursue legal action for the Embryos. Findley explained to Lee how difficult it would be for him to be forced to be parent of a child outside of the marriage and suggested using a mediator to try and resolve the issue. Lee declined.

The last conversation regarding the Embryos took place over the telephone on September 30, 2014. Findley described how the dissolution proceeding, both with respect to Lee fighting for control of the Embryos and the financial issues, had become heated. After running into Lee by coincidence earlier in the day, Findley received a call from her that night. Findley testified that Lee told him she was worried about her finances and where she would live in the event their jointly owned condominium was sold. At that time Lee was residing in the condominium.

> "And she said to me, you know, You have more money than I do and isn't there a way that you can just give me the condo so I can live there? And I -- and she said that, you know, at first in a nice way.
> And then I said, you know, I'm not going to talk about -- I'm not, you know, having a settlement discussion with you or something. I'm not going to talk about that, that's for the lawyers.
> And then she said something to the effect of, You know, at some point if we have kids from these embryos, you should be worried about what I'll say to them if you're not generous to me in my request."

(RT 277:14–25.) Findley testified that he fears interacting with Lee over the next 18 years if a child or children were to result from the Embryos. Nonetheless, he also confirmed that he would

want to be an involved parent in the life of any child or children born.

During the course of the dissolution proceedings, Lee made several claims involving financial issues which Findley highlighted during his testimony as to why he fears Lee would manipulate the child or children to extract money from him for other purposes. One involved her claim during the dissolution that she was incapable of working full time as an anesthesiologist due to mental health issues. Yet, as Findley claims, she failed to produce records from her mental health provider until the night before he was deposed despite an earlier deposition subpoena. Lee also claimed that but for Findley, she would be receiving monthly disability benefits of between $10,000 and $15,000 because of her cancer diagnosis. Specifically, Lee claimed that Findley had insisted that she cancel her disability policy. Lee also denied under oath that she ever applied for disability benefits as a result of her cancer. Later, after the disability records were subpoenaed by Findley's attorney, she changed her testimony and produced the letter which evidenced that she had in fact made a claim for disability benefits which had been denied. Lee testified that she found the rejection letter in her closet after she received the subpoena.

Findley also testified that during the proceeding, after both parties agreed to sell their community condominium, Lee threatened to block the closing on the sale because she did not like the fact that her half share of the sale proceeds were going into escrow and not directly to her. The escrow documents, again signed by both Findley and Lee, specifically stated that the proceeds were to go into escrow to be divided at a later time.

B. Testimony Regarding Lee's Fertility

Dr. Baek, Lee's fertility expert, provided her opinion at trial regarding the current state of Lee's fertility. Dr. Baek testified that she believes Lee has "age-related infertility." Dr. Baek did *not* opine that Lee became infertile as a result of her cancer treatment. Dr. Baek's opinion that Lee suffers from age-related infertility is based on two studies that were admitted into evidence.

The first, Monthly Vital Statistics Report, was published in 1998 by the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention.[14] (Trial Ex. RX-4.) The second report, referred to at trial as the Spandorfer study, was a retrospective study of IVF treatments from 1991–2005.[15] The Spandorfer study consisted of 161 women, only 29 of them who were age 46. Dr. Baek did not examine or conduct any fertility tests on Lee and testified that she did not need to conduct any such examinations because of Lee's age. Dr. Baek also testified that the IVF center where she is a partner has a policy not to perform IVF on women who are 46 years of age. Dr. Baek opined that Lee has a .03 percent chance of fertility at this time.

In contrast to Dr. Baek, Dr. Rosen testified that UCSF does performs IVF on women who are over the age of 46 and that UCSF was able to retrieve eggs from a woman who was 46 or 47 that resulted in a live birth. Dr. Rosen testified that the fertility of a patient is dependent on the individual patient. In Lee's case, based on her prior egg retrieval, Dr. Rosen testified that he would give her between a 0 to 5 percent chance of fertility at age 46. Dr. Rosen also testified that he told Lee that UCSF would conduct egg harvesting on women who were taking Tamoxifen. He further testified that he told Lee that Tamoxifen did not have a direct impact on ovarian function; that there was no statistically significant increased risk of having a recurrence of breast cancer if she subsequently got pregnant; and that there was no increased risk of progression of a hormone-receptive breast cancer if she underwent ovarian stimulation. Lee denies that Dr. Rosen ever made such statements.

Dr. Rosen also testified that UCSF does not have a policy that requires women who are

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[14] Stephanie J. Ventura et al., Report of Final Natality Statistics, 1996 (June 30, 1998) p. 1–100.

[15] Steven D. Spandorfer et al., *Outcome of in vitro fertilization in women 45 years and older who use autologous oocytes*, 87 FERTILITY AND STERILITY 74 (2007).

on Tamoxifen to stop taking the drug prior to or during egg harvesting procedures. Finally, Dr. Rosen testified that UCSF has been cryopreserving eggs for women who might become infertile because of medically related issues for 10 to 15 years, and that the clinic was employing the vitrification process[16] to freeze a woman's eggs since 2007.

IV. LEGAL ANALYSIS

A. Health and Safety Code Section 125315

On September 22, 2002, California passed Senate Bill 253, which created Health and Safety Code section 125116[17] authorizing for the first time research involving the derivation and use of human embryonic stem cells. (Stats. 2002, ch. 789, § 1, pp. 5031–5033, added by Sen. Bill No. 253 (2001–2002 Reg. Sess.).) In so doing, the Legislature declared "that the policy of the State of California shall be . . . [t]hat research involving . . . stem cells . . . shall be permitted . . . ." (*Id.* at pp. 5032–5033.) The bill sought to "balance ethical and medical considerations" related to stem cell research and donation. (*Id.* at p. 5032.) To address concerns about the ethical dilemma associated with the sale of embryos for stem cell research, the legislation requires, among other things, that embryos may only be donated, but not sold, to another person(s) or for research. (*Id.* at p. 5033.) The bill also required written informed consent from embryo donors and required fertility treatment providers to inform individuals receiving fertility treatments about embryo disposition in general. Medical considerations for stem cell research included the facts that biomedicine pays $12.8 billion in California wages and "open scientific

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[16] Vitrification is a process which flash freezes the eggs. (HUMAN ASSISTED REPRODUCTIVE TECHNOLOGY 313 (David K. Gardener et al. eds., 2011).)

[17] In 2003, former Health and Safety Code section 125116 was repealed and reenacted as section 125315 of the Health and Safety Code. (Stats. 2003, ch. 507, § 1, p. 3904 [repealing Health and Safety Code section 125116]; Stats 2003, ch. 507, § 3, pp. 3905–3906 [enacting Health and Safety Code section 125315].)

inquiry . . . will be essential to maintaining California's worldwide leadership in . . . biotechnology." (*Id.* at p. 5032.)

In 2003, California passed Senate Bill 771, which repealed former Health and Safety Code section 125116 and enacted section 125315 of the Health and Safety Code.[18] (Stats. 2003, ch. 507, § 1, pp. 3904–3907, added by Sen. Bill No. 771 (2002–2003 Reg. Sess.).) The bill requires that "[a] physician or surgeon or other health care provider delivering fertility treatment *shall* provide his or her patient . . . information to allow the patient to make an informed and voluntary choice regarding the disposition of *any* human embryos remaining following the fertility treatment." (*Id.* at p. 3905, italics added.) The failure to provide to a patient this information constitutes unprofessional conduct within the meaning of Chapter 5 (commencing with section 2000) of Division 2 of the Business and Professions Code. (*Id.* at p. 3905.)

More specifically, the statute requires:

> "Any individual to whom information is provided pursuant to this subdivision (a) shall be presented with the option of storing any unused embryos, donating them to another individual, discarding the embryos, or donating the remaining embryos to research. When providing fertility treatment, a physician and surgeon or other health care provider *shall provide a form* to the male and female partner, or the individual without a partner, as applicable, *that sets forth advanced written directives regarding the disposition of embryos*. This form shall indicate the time limit on the storage of the embryos at the clinic or storage facility and shall provide, at a minimum, the following *choices* for the disposition of the embryos based on the following circumstances:
> . . . .
> . . . .
> (3) In the event of separation or divorce of the partners, the embryos shall be disposed on by one of the following actions:
> (A) Made available to the female partner.
> (B) Made available to the male partner.
> (C) Donation for research purposes.
> (D) Thawed with no further action taken.
> (E) Donation to another couple or individual.
> (F) Other disposition that is clearly stated."

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[18] See Stats. 2003, ch. 507, § 1, p. 3904 [repealing Health and Safety Code section 125116]; Stats 2003, ch. 507, § 3, p. 3905 [enacting Health and Safety Code section 125315]

(*Id.* at pp. 506–507, italics added.)

There have been no amendments to Health and Safety Code section 125315 since the Legislature enacted Senate Bill 771 in 2003. No court has declared the statute unconstitutional.

B. Relevant California Case Law

No court in California has squarely addressed a dispute over the disposition of frozen embryos. However, two cases in the context of probate proceedings discuss the disposition of frozen sperm and are instructive. The first appellate court case to analyze the issue, *Hecht v. Superior Court* (1993) 16 Cal.App.4th 836, involved a written directive made by the sperm donor, William Kane, at the time he deposited 15 vials of sperm with the California Cryobank. The authorization directed that all of Kane's frozen sperm should be released to his girlfriend, Debra Hecht, in the event of his death. (*Id.* at p. 840.) In his will, Kane expressed his desire that Hecht be impregnated with this sperm. (*Ibid.*) Kane's grown children from a prior marriage opposed Hecht's use of Kane's vials of sperm. (*Id.* at p. 844.)

The Court of Appeals held that at the time of his death, Kane had an ownership interest in his vials of sperm, to the extent that he had decision-making authority as to the sperm within the scope of policy set by law. (*Id.* at p. 846.) Following Kane's expressed intent at the time of the sperm donation, the sperm was awarded to Hecht over the estate's objection. (*Id.* at p. 861.)

That same approach was adopted 15 years later in *In re Estate of Kievernagel* (2008) 166 Cal.App.4th 1024. In *Kievernagel*, the husband, Joseph, and his wife, Iris, were married for 10 years prior to Joseph's death. (*Id.* at p. 1026.) The couple contracted with a fertility clinic to perform IVF. (*Ibid.*) As part of this process, Joseph provided sperm to the clinic, which was frozen and stored for use by Iris. (*Ibid.*) The sperm storage agreement, which the parties signed, provided that the sperm was Joseph's sole property and was to be discarded if Joseph died or became incapacitated. (*Ibid.*) After Joseph unexpectedly died in a helicopter crash, Iris

petitioned the court for release of Joseph's sperm to her, but Joseph's parents objected to the petition, stating that Joseph did not want to father a child posthumously. (*Ibid.*)

The Court of Appeals upheld the probate court's ruling enforcing the terms of the sperm storage agreement and concluded that because the material at issue in the case was Joseph's sperm, and not an embryo, Joseph was the only person with an ownership interest in the genetic material. (*In re Estate of Kievernagel*, *supra*,166 Cal.App.4th at p. 1032–1033.) As such, his intent governed disposition of the sperm, and all documents indicated that his intent was to have the sperm destroyed upon his death; therefore, the sperm should be discarded. (*Id.* at p. 1033.)

California appellate courts resolving parentage disputes in the surrogacy[19] context have also focused on the intent of the parties at the time the embryo was created and not on the changed intent of the parties thereafter. In *Johnson v. Calvert* (1993) 5 Cal.4th 84, the Calverts, a married couple, created an embryo which was implanted in Johnson, the surrogate. The surrogacy agreement clearly stated that the Calverts would be the parents of the child and the surrogate relinquished any parental claims. (*Id.* at p. 87.) During the pregnancy, Johnson changed her mind and claimed to be the mother of the child. (*Ibid.*) In determining the competing claims of maternity under the Uniform Parentage Act, the court upheld the intentions of the parties as manifested in the surrogacy agreement made before the embryo was implanted. (*Id.* at p. 93.) "Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions as manifested in the surrogacy agreement." (*Id.* at p. 93.)

The same analysis was used in *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410. In *Buzzanca*, the husband and wife agreed to have an embryo which was created using both

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[19] "Surrogacy" occurs when "a woman who becomes pregnant (by artificial insemination or embryo insertion) following an arrangement made with another party (usually a couple unable themselves to have children) . . . agrees to give the child she carries to that party when it is born.

donor sperm and egg implanted in a surrogate. (*Id.* at p. 1412.) A week prior to the child's birth, the husband filed for divorce claiming that he had no children. (*Ibid.*) Wife responded alleging she and husband were expecting a child. (*Ibid.*) The appellate court held that the husband was the father because he gave "his express consent to a medical procedure that was *intended* to result in the procreation of a child." (*Id.* at p. 1428.)

These California cases stand for the general proposition that courts should look to the intent of the parties at the time of the procedure to resolve any later arising disputes. As set forth below, this general framework is in line with several sister state court decisions resolving embryo disputes in divorce proceedings.

C. Statutory Framework Regarding Embryos in Other States

California is one of several states that has enacted legislation addressing state policy regarding human embryos, and the approaches of these states vary. Louisiana and New Mexico are the only states to provide any protections for embryos. Louisiana defines an embryo as a "biological human being" and New Mexico requires that the IVF procedure "shall include provisions to ensure that each living fertilized ovum, zygote and embryo is implanted in a human female recipient" without the option for disposition. (See LA. REV. STAT. ANN. §§ 9:121–133 (2011); N.M. STAT. ANN. § 24-9A-1(D) (West 2007).)

Florida requires the treating physician and couple to "enter into a written agreement that provides for the disposition of the commissioning couple's eggs, sperm, and pre-embryos in the event of a divorce, the death of a spouse, or any unforeseen circumstance." (FLA. STAT. ANN. § 742.17 (West 2005).) Unlike California, Florida's statute does not indicate required dispositional choices and the failure of a treating physician to secure a written agreement has no statutory consequence. Moreover, in the absence of a written agreement, the statute provides

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(Oxford Concise Medical Dict. (8th ed. 2010) p. 732.)

that the commissioning couple retains the joint authority to decide on the disposition of the pre-embryos. (*Ibid.*)

In New Jersey and Massachusetts, much like California, IVF providers must obtain informed and voluntary choices from the gamete progenitors regarding disposition. (MASS. GEN. LAWS ANN. ch 111L, § 4 (West 2005) [giving progenitors the option of storing, donating or destroying unused embryos]; N.J. STAT. ANN. § 26:2Z-2 (West 2004).) North Dakota's statutory framework appears to allow either progenitor to implant an embryo regardless of the objection of the other. Specifically, North Dakota's statute provides that "[i]f a marriage is dissolved before placement of the eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after divorce, the former spouse would be a parent of the child." (N.D. CENT. CODE ANN. § 14-20-64 (West 2005).) The statute also allows either gamete progenitor to withdraw consent at any time prior to implantation. (*Id.* at subd. (2).) Similar legislation exists in Colorado, Texas and Washington, where the male gamete progenitor is deemed not to be the legal parent of a child and cannot have any duty of support even if the female gamete progenitor is unable to provide support. (See COLO. REV. STAT. ANN. § 19-4-106 (West 2009); TEX. FAM. CODE ANN. § 160.706 (West 2007); WASH. REV. CODE ANN. § 26.26.725 (West 2011).)

D. Case Law Resolving Disputes over Embryos from Sister State Jurisdictions

Several state supreme and appellate courts have determined the disposition of embryos in the event of a divorce between the gamete progenitors, and one court has made that determination where the progenitors were not married. These sister jurisdictions have used three analytical frameworks: (1) the contractual approach; (2) the balancing approach; and (3) the contemporaneous mutual consent approach. Although the reasoning of these cases has varied substantially, particularly on the question of contractual enforcement, as a general rule, courts have been reluctant to allow one party to use embryos to initiate a pregnancy over the objection

of the other gamete progenitor.[20] Moreover, where the intent of the parties is evidenced in writing, courts have uniformly upheld the agreement regarding the use or disposition of embryos.

The seminal case involving the framework to be adopted when considering the disposition of frozen embryos between a married couple is *Davis v. Davis* (Tenn. 1992) 842 S.W.2d 588, cert. denied sub nom. *Stowe v. Davis* (1993) 507 U.S. 911. In *Davis,* Mary Sue and Junior Davis had no prior written agreement regarding disposition of their seven cryopreserved embryos. After their divorce, Mary Sue wanted to donate the embryos to an infertile couple, and Junior wanted them destroyed. (*Id.* at p. 590.) With no prior agreement to reference, the Tennessee Supreme Court balanced the parties' conflicting constitutional interests in procreation—Mary Sue's right to procreate and Junior's right not to procreate. (*Id.* at pp. 603–604.) The court classified the parties as "entirely equivalent gamete-providers" although it recognized Mary Sue's greater physical contribution to creating the embryos. (*Id.* at p. 601.) Considering the parties' competing interests, the Tennessee Supreme Court ultimately weighed Junior's right not to procreate more heavily, in part relying on the possibility that Mary Sue might achieve parenthood through another cycle of IVF or by adoption. (*Id.* at p. 604.) The Court urged that if a prior agreement exists between two progenitors, courts should resolve embryo disposition disputes based on the preferences expressed in that agreement. (*Ibid.*) Under

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[20] Only one appellate court has ruled in favor of a progenitor who wanted to use the embryos in the face of opposition by her husband. (*Reber v. Reiss* (Pa. Super. Ct. 2012) 42 A.3d 1131.) In an earlier case, *In re Marriage of Nash* (Wash. Ct. App. 2009) 150 Wash.App. 1029 the court awarded the embryos to the ex-husband, who planned to transfer them to a surrogate, based on a mediation agreement. However, the embryos were created with donor eggs, not eggs from the ex-wife. (But cf. *Karmasu v. Karmasu* (Ohio Ct. App. 2009) No. 2008 CA 00231, 2009 WL 3155062 [upholding disposition choice made in contract with clinic granting embryos to clinic "to preserve, dispose of or donate" over objection of husband-progenitor].) One recent trial court awarded embryos to a woman planning to use them over her ex-husband's objection, pursuant to a contract signed by the couple at the fertility clinic prior to the procedure. (Bailey Henneberg, *Maryland Woman Wins Custody of Frozen Embryos,* UPPER MARLBORO PATCH (Jan. 7, 2013), http://patch.com/maryland/uppermarlboro/judge-awards-maryland-woman-custody-of-frozen-embryos.)

the *Davis* analysis, the balancing test is only relevant in a dispute lacking a prior agreement between the parties, or where the agreement is ambiguous, in which case the party seeking to avoid procreation would *ordinarily* prevail. (*Ibid.*)

The majority of cases following *Davis* have adopted the contract approach to determine if the writing, usually an IVF consent form, establishes the clear intent of the parties regarding the disposition of the embryos. The first court to use the contract approach was the Court of Appeals of New York in *Kass v. Kass* (N.Y. 1998) 696 N.E.2d 174. There the husband and wife signed an agreement prior to the IVF procedure which stated that the embryos would ". . . not be released from storage for any purpose without the written consent of *both* of us . . ." and in the event the parties were ". . . unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, . . ." the embryos could be disposed of by the IVF program for research. (*Id.* at p. 176.) Neither party disputed that the agreement reflected their mutual intent at the time it was signed. The Court of Appeals of New York held that the terms of the agreement signed by a husband and wife controlled the disposition of the embryos because it expressed their mutual intent and was clear and unambiguous. "Agreements between progenitors, or gamete donors, regarding the disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them." (*Id.* at p. 180.)

Other courts adopting the contract approach have reached differing results based on the particular facts surrounding the writing and state public policy. (See *A.Z. v. B.Z.* (Mass. 2000) 752 N.E.2d 1051, 1056–1057 [choosing not to enforce IVF consent form giving wife embryos to implant if the parties "separated" because: (1) the primary purpose of the consent was to explain risks and benefits and to obtain the donors' desires for disposition and it was not intended to be an agreement between the husband and wife should they later disagree as to disposition; (2) the consent did not contain a duration provision; (3) it was unclear that the consent governed a dispute in the context of a divorce where it only used the term "separated" which has a different

legal meaning; and (4) the agreement violated state public policy because it compelled procreation over the subsequent objection of the other party.]; *J.B. v. M.B.* (N.J. 2001) 783 A.2d 707, 713 [deciding consent form signed by a married couple which relinquished control of the embryos to the fertility clinic upon "[a] dissolution of [the] marriage by court order, unless the court specifies who takes control and direction of the tissues" permitted the parties to obtain a court order regarding disposition and, accordingly; the court adopted the balancing approach to resolve the dispute]; *Litowitz v. Litowitz* (Wash. 2002) 48 P.3d 261, 271 [Washington Supreme Court adopting the contract approach and upholding the terms of the cryopreservation agreement which directed that any embryos created from the husband's sperm and donor eggs be "thawed out but not allowed to undergo further development" after five years]; *Roman v. Roman* (2006) 193 S.W.3d 40 [using the contract approach to enforce provision in the "Informed Consent for Cryopreservation of Embryos" agreement directing the facility to discard the embryos in case of divorce]; *Dahl v. Angle* (2008) 194 P.3d 834, 836 [following the general framework of *Davis* and *Kass* to enforce advance directives of gamete progenitors in a dissolution proceeding and interpreted the consent form which gave wife the right to possess or dispose of the embryos as "personal property" under Oregon divorce statute subject to equitable division by the court].).

The only case to award the embryos to the wife over the husband's objection in a dissolution proceeding was *Reber v. Reiss* (Pa. Super. Ct. 2012) 42 A.3d 1131. In *Reber* the Superior Court affirmed the trial court's use of the balancing test because, in part, the consent agreement signed by the parties *did not address* the disposition of the embryos in the event of a divorce.

The decisional law from sister states demonstrates the overwhelming consensus that in dissolution proceedings, where the gamete progenitors express a clear intent as to the disposition of the embryos, that intent controls whether it is set out in a written agreement or supported by the evidence. The most recent case addressing a dispute between unmarried gamete progenitors

is in accord. In *Szafranski v. Dunston* (Ill. App. Ct. 2015) 34 N.E.3d 1132 the Appellate Court of Illinois awarded the frozen embryos to the female partner over the objection of the male sperm donor. Karla Dunston, a physician, was in a relationship with Szafranski, a firefighter, when she was diagnosed with non-Hodgkin's lymphoma. (*Id.* at p. 1137.) Her treatment plan included both chemotherapy and radiation. (*Ibid.*) Szafranski agreed to donate the sperm used by Karla in her IVF treatment initiated by her prior to undergoing chemo and radiation. (*Id.* at p. 1138) No agreement between Karla and Szafranski was signed regarding Szafranski's role as a co-parent or Karla's use of the embryos. After Karla and Szafranski ended their relationship, Szafranski rekindled a relationship with his prior long term girlfriend and thereafter changed his mind about the embryos and sued to enjoin Karla from implanting them. (*Id.* at pp. 1141–1142.) Karla filed a counterclaim seeking sole custody and control of the embryos. (*Id.* at p. 1136.)

Ultimately, the Appellate Court of Illinois upheld the trial court order in awarding Karla the embryos and finding that: (1) the parties had an oral contract by which Szafranski had agreed to allow Karla to use the embryos without securing his consent; and (2) alternatively, the balance-of-interest test favored awarding the embryos to Karla because, among other things, her chemotherapy treatments had rendered her infertile. (*Szafranski v. Dunston, supra*, 34 N.E.3d at p. 1163 ["Under the unique circumstances of this case, however, Karla's interest in using the pre-embryos to have a biologically related child—given her ovarian failure and inability to create any more pre-embryos with her own eggs, prevail over Jacob's interest in not using them"].)

The only court to expressly adopt the third analytical framework—the contemporaneous mutual consent approach—was the Iowa Supreme Court in *Marriage of Witten* (Iowa 2003) 672 N.W.2d 768. *Marriage of Witten* involved a husband and wife who, prior to the IVF procedure, signed an IVF consent agreement that did not provide for disposition in the event of divorce, but did require that the embryos would not be released absent the written authorization of *both* the husband and wife. (*Id.* at p. 772.) Husband asked that the contractual provision requiring mutual

consent be enforced and wife asserted that the agreement was against the public policy of Iowa because it allowed husband to back out of his prior agreement to become a parent. (*Id.* at p. 779.)

The Iowa Supreme Court held that prior agreements regarding the future disposition of embryos are against public policy. (*Marriage of Witten*, *supra*, 672 N.W.2d at p. 781.) In so holding, the court expressly rejected the argument that embryo disposition agreements were similar to antenuptial agreements or divorce stipulations. (*Ibid.*) "Whether embryos are viewed as having life or simply as having the potential for life, this characteristic or potential renders embryos fundamentally distinct from chattels, real estate, and money that are the subject of antenuptial agreements." (*Ibid.*) The court, citing *J.B. v. M.B.*, *supra*, 783 A.2d at p. 719, ultimately held that while agreements entered into prior to the time the IVF procedure is commenced were enforceable and binding on the parties, they are "subject to the right of either party to change his or her mind about the disposition up to the point of use or destruction of any such embryo." (*Marriage of Witten*, *supra*, 672 N.W.2d at p. 782.) Under this approach, the embryos must remain in storage until there is a mutual agreement between the parties regarding disposition, and the party or parties who oppose destruction shall be responsible for any storage fees. (*Ibid.*)

V. FINDINGS

A. Burden and Standard of Proof for the Contract and Balancing Test Approaches

The Court finds that the contract approach is required by the statutory scheme created by the Legislature, followed by California public policy favoring judicial deference to the intent of the contracting parties, and supported by the weight of authority from courts in other states that have considered similar cases. The first step, therefore, is to determine whether the parties entered into a binding agreement. No court has squarely addressed the issue of which party in a contested divorce proceeding has the burden of proof or what standard of proof applies in this

context. Findley is seeking to enforce what he alleges is the written agreement between himself and Lee regarding the disposition of the Embryos upon dissolution. He asserts that the standard of proving the existence of a contract is a preponderance of the evidence, and that the initial burden of proof rests with him and the Regents to the extent they seek to have the Court find the Consent & Agreement is valid. (Pet'r's Resp. to Questions from the Ct. 7:4–23.)

The Regents take the position that, under the contract approach, it is Lee who has the burden of proving that the Consent & Agreement is "void or voidable, i.e. that is it not valid, binding and enforceable." (Claimant's Resp. to Questions Posed by the Ct. 3:20–26.) The Regents rely on California Evidence Code section 622 and assert that the Consent & Agreement is conclusively presumed to be valid and it is Lee, therefore, who must demonstrate by clear and convincing evidence that she has rebutted the presumption of validity and enforceability.

Lee, on the other hand, asserts that neither the Consent & Agreement nor the advanced directives regarding the Embryo dispositions contained within the form are a legally binding agreement or contract between the parties. (Resp't's Resp. to Questions from the Ct. 15:8–10.) Lee suggests that if the Court applies the contract approach, it should conclude that Findley has the burden to prove the existence of a contract and that he must establish by clear and convincing evidence that the agreement is binding on Lee because of the constitutional implications involved to her procreative rights. (*Id.* at lines 12–13.)

Under California law, "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Cal. Evid. Code § 500.) "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Cal. Evid. Code § 115.) The term "otherwise provided by law" includes considerations of "constitutional, statutory and decisional law." (See Cal. Evid. Code § 160.) Both statutes and decisional law may provide for a higher standard of proof in a civil proceeding. (See *In re Estate of Ford* (2004) 32 Cal.4th 160, 173; *Lillian F. v. Superior*

Court (1984) 160 Cal.App.3d 314, 320 [explaining that a clear and convincing evidence standard may be required in civil cases where personal freedoms are at stake].) For example, the waiver of a known right must be shown by clear and convincing evidence. (*DRG/Beverly Hills, Ltd. v. Chop-Stix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61. See *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 489 [stating that the presumption that the owner of a legal title to property is also presumed to be the owner of the full beneficial title may be rebutted only by clear and convincing proof].)

In family law and dependency cases, the clear and convincing standard is used in several contexts. Once established, the presumption of paternity affecting the burden of proof pursuant to Family Code section 7611 may be rebutted but only by clear and convincing evidence. (Fam. Code § 7612, subd. (a).) Findings under Family Code section 7820, for the termination of parental rights, must be supported by clear and convincing evidence. (See *In re Angelia P.* (1981) 28 Cal.3d 908, 919.) A clear and convincing standard may also be applied to a trial court's order permitting grandparent visitation over the objection of a parent. (*Ian J. v. Peter M.* (2013) 213 Cal.App.4th 189, 207–208.)

The clear and convincing standard of proof requires that the evidence be sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Angelia P.*, *supra*, 28 Cal.3d 908, 919. See CACI No. 201 ["Highly Probable—Clear and Convincing Proof—Certain facts must be proved by clear and convincing evidence, . . . [t]his means the party must persuade you that it is highly probable that the fact is true."].)

As set forth below, the Court finds that Findley has the initial burden of proof demonstrating the existence of a contract between him and Lee by a preponderance of the evidence. Because the Court finds that the Consent & Agreement is a written contract between them, the burden then shifts to Lee to rebut the conclusive presumption that the Consent & Agreement is valid, binding and enforceable between the parties by clear and convincing

evidence, not merely a preponderance of the evidence. The Court's conclusion that the higher standard of proof applies is based on several factors. First, California, unlike other states, sanctions a physician by statutorily finding that it is malpractice *per se* if the advance written directives required in the statute are not secured by the physician *before* the IVF procedure is performed. (See Health & Saf. Code § 125315, subds. (a) and (b).) Second, California Penal Code section 367g makes it a felony to use embryos for any purpose other than that indicated on a written consent form, or to implant embryos into a recipient without the signed written consent of the sperm, egg or embryo donor.[21] Finally, the clear legislative intent of these statutes directly governing the creation and use of frozen embryos is to require *written* instructions/consents which, under California Evidence Code section 622, would be rendered meaningless unless a clear and convincing standard were used to overcome the presumption.

Lee's assertion, on the other hand, that if the Court determines that a contract exists, Findley must establish by clear and convincing evidence that the agreement is binding on Lee because of the constitutional implications involved to her procreative rights, is not supported by any statute or decisional law. The only basis for this assertion is that the Consent & Agreement constitutes a waiver of her constitutional right to procreate. (See *Church v. Pub. Utilities Comm'n of State* (1958) 51 Cal.2d 399, 401 [party claiming waiver of a right must prove it by clear and convincing evidence].) But the Consent & Agreement did not require Lee to waive any right to procreate: it merely directed what Lee and Findley jointly decided UCSF should do with their Embryos in the event of divorce.

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[21] Findely contends that this Court would be authorizing a violation of Penal Code section 367g if it allowed the Embryos to be implanted into Lee or a surrogate. Because the Court is upholding the terms of the Contract & Agreement, and further finds that even if a balancing test were applied Findley's rights and interests outweigh those of Lee, this argument is not ripe.

The Court further finds that if the contract was not valid and a balancing test was used to resolve a dispute over the right of one gamete progenitor to implant the embryos over the objection of the other gamete progenitor, the party seeking to implant the embryo over the objection of the other has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim and must establish each such fact by clear and convincing evidence. The higher standard of clear and convincing evidence is warranted where, as here, there was a prior agreement specifically addressing the eventuality of divorce, and the parties are now in fact divorced.

B. The Consent & Agreement is a Contract between Findley and Lee

Health and Safety Code section 125315 requires fertility treatment providers to "provide a form to the male and female partner, or the individual without a partner . . . that sets forth advanced written directives regarding the disposition of embryos." (Health & Saf. Code § 125315, subd. (b).) The form must include choices for embryo disposition upon death, divorce and failure to pay embryo storage fees. The Legislature enacted Senate Bill 771 in 2002, acknowledging at the time a growing nationwide debate over embryo disposition upon divorce.

> "This bill also seeks to address in more detail the need for clear and specific informed consent procedures related to the donation of both embryos and egg cells. A review of case law reveals that legal conflicts have arisen from disagreements between partners regarding the disposition of embryos and egg cells, in various circumstances such as divorce. In most of the cases, couples have gone through the IVF process and have frozen embryos remaining when they divorce. In most of the cases, the woman wanted to use the embryos to either impregnate herself or donate them to another infertile couple. When confronted with this situation, where one partner wants to procreate while the other does not, the courts have sided most often with the partner that does not want to procreate. The argument is that individuals have a right to privacy and therefore should not be forced to have his or her genetic material passed on. *The courts have encouraged couples to contract for such contingencies.* In New York, the court upheld an IVF clinic's informed consent document in which the couple agreed to donate the frozen embryos to research if they were unable to agree on what do with them.

(Sen. Comm. on Health and Human Srvcs., Analysis of Sen. Bill. 771 (2002–2003 Reg. Sess.) April 21, 2003, italics added.)

The Legislature required couples to "clearly specify" in a written document a procedure for embryo disposition. (Health & Saf. Code § 125315, subd. (b).) This statutory language supports the conclusion that the Legislature intended to support the enforceability of such a document. Health and Safety Code section 125315 was intended to require individuals involved in fertility treatments where cryopreserved embryos may result to make a clear choice, and to allow them to contract with each other to make a choice—a contract—that can only be altered by joint agreement.[22]

1. The Consent & Agreement and Directive 4 are binding contracts.

Based on the record evidence, the Court finds that the Consent & Agreement is a contract between and among UCSF, Findley and Lee. The term of the agreement in Directive 4, which provides for the disposition of the Embryos in the event of divorce is binding between Findley and Lee. None of the sister state embryo cases require that the prior agreement meet the threshold of being a contract. Instead both California decisional law and the embryo decisions in other states, focus on whether the parties' intent is clear and discernible. Nonetheless, in this case the Consent & Agreement meets both the elements of a contract as well as a written agreement between Findley and Lee expressing their intent *before* the Embryos were created.

The intent and purpose of the Consent & Agreement, as ascertainable within the four corners of the document, is (1) to provide the consent of Findley and Lee for UCSF to cryopreserve their embryos; (2) to settle the disposition and use of the Embryos under certain

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[22] IVF treatment is not limited to couples. A woman may elect to use donor sperm through a sperm bank to create embryos for later use. Under Family Code section 7613, subdivision (b) there is no other legal parent, and thus the woman would be contracting with herself if the statute used the term "contract" or binding agreement. By using the word "form" instead of "contract" Health and Safety Code section 125315 accommodates the single parent

contingencies; and (3) to provide for storage by UCSF of the Embryos. This purpose is stated in the first paragraph of the Consent & Agreement: "The purpose of this Consent and Agreement is to give our permission to cryopreserve excessive embryos, to state our jointly agreed upon choices as to future disposition of these embryos, and to outline our understanding of, and agreement as to, the terms under which our cryopreserved embryos will be maintained by UCSF." The Consent & Agreement itself uses the terms "agree," "agreed," or "agreement" at least 27 times and conspicuously includes the use of the word "AGREEMENT" in the title of the document, which is in all capital and bold letters at the top of the first page, in a larger font than the rest of the type found in the body of the document. Moreover, in the paragraph immediately above the parties' signatures, on page 9 of 10, the word "agreement" is used three times and "agreed" is used once.

Lee, relying on *Jason P. v. Danielle S.* (2014) 226 Cal.App.4th 167, contends that "[t]he Court of Appeal recently held that consent forms are not legally binding contracts between IVF patients." (Resp't's Trial Br. 34:13–14.) *Jason P.* involved Family Code section 7613, subdivision (b) which provides, in part, that "[t]he donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in assisted reproduction of a woman other than the donor's spouse is treated in the law as if he were not the natural parent of a child thereby conceived *unless otherwise agreed to in a writing signed by the donor and the woman prior to the conception of the child.*" (Italics added.) The appellate court determined that the statute did not prohibit a semen donor from becoming a presumed father under Family Code section 7611, subdivision (d). (*Jason P. v. Danielle S.*, *supra*, 226 Cal.App.4th at p. 179.) However, at the time the child, Gus, was conceived, Family Code section 7613, subdivision (b) did not allow a written agreement. (*Id.* at pp. 179–180.) The biological father contended that the amended section 7613, subdivision (b) should be applied retroactively. (*Id.* at p. 180.)

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scenario.

The Court of Appeals did not decide the retroactivity issue of Family Code section 7613, subdivision (b) but upheld the trial court finding that the IVF consent form was insufficient to satisfy the writing requirement in the statute. In so doing the Court of Appeals stated:

> "Jason contends that the writing required for the exception to apply 'need not amount to a formal, enforceable contract, and may, along with evidence of the surrounding circumstances, show an agreement or confirm an understanding that the sperm donor will have the status of a parent recognized by the law.' *That may be so, but the informed consent forms at issue here do not in any way address any understanding or agreement between Jason and Danielle of Jason's legal status regarding parentage.* Instead, the documents– titled 'Informed Consent for Micromanipulation,' 'Informed Consent for Oocyte Collection,' 'Informed Consent [for]Human Embryo Cryopreservation,' and 'Informed Consent for Embryo Transfer (In Vitro Fertilization)' –address only the medical procedures that were performed on Danielle. The fact that Jason is listed in the spaces for 'Intended Parent' says nothing about the parties' understanding regarding his *legal* status as a parent."

(*Jason P. v. Danielle S.*, *supra*, 226 Cal.App.4th at p. 180, first italics added.) The Court finds that Lee's interpretation of *Jason P.* is misplaced.[23]

Based on the facts in this case, the plain language of the Consent & Agreement establishes the intent of the parties. Nonetheless, and even assuming the Court found it necessary to look outside of the document to determine the intent of the parties, Findley and Lee both testified at trial that the purpose of undergoing the IVF process was to preserve the *option* of having children *together*: not as single people. The Court finds credible Findley's testimony that he was led to believe that Lee's intent at the time was only to have children *with him* and only if they were together because Lee has previously confided in him that one of the reasons she never previously had children was because she did not have the right partner, and to that end she had terminated four prior pregnancies. This evidence also supports a finding that Lee's decision

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[23] Lee also cites *K.M. v. E.G.*(2005) 37 Cal.4th 130 and *Quintanilla v. Dunkelman* (2005) 133 Cal.App.4th 95 as supporting her position that a medical consent form is not a legally binding contract. (Resp't's Trial Br.34–36.) Certain consent forms standing alone as a patient consenting to specified medical treatment may not be contracts. The Consent & Agreement in

to move forward with the IVF procedure with Findley in 2010 was because she believed that he was the right partner for her.

In addition, Lee testified at trial that it was her intention when she checked, initialed, and signed Directive 4 in the Consent & Agreement to thaw and discard the Embryos in the event of divorce. No additional or unanticipated circumstances have arisen since Findley and Lee signed the Consent & Agreement on September 29, 2010, except for the divorce and passage of time. The Court further finds that Lee's possible infertility after the passage of time would not have been unanticipated, as she entered into the agreement when she was already 41 years old and had previously expressed to Findley that she may not be able to have children because of her age.

The Court has also considered and is relying upon Civil Code section 1636, which provides, "[a] contract must be so interpreted as to give effect to the mutual intention of the parties *as it existed at the time of contracting*, so far as the same is ascertainable and lawful." (Cal. Civ. Code § 1636, emphasis added.) There is no conflicting evidence as to the intent of the parties at the time they signed the Consent & Agreement: Their intent on September 29, 2010, was to preserve the option of having children together in the future, and to thaw and discard the Embryos in the event of divorce. In accordance with Civil Code section 1636, this Court must interpret the Consent & Agreement in such a way to give effect to Findley and Lee's mutual intent to have the Embryos thawed and discarded in the event of divorce.

The vast majority of reported cases ruling on disputes regarding the disposition of embryos indicate a strong preference to allow parties to enter into binding agreements regarding the effect of contingencies such as the divorce of the gamete progenitors. Binding agreements have many benefits. The agreements allow the gamete progenitors to discuss and make joint decisions governing the embryos before they are created. If parties cannot agree on important issues, they may ultimately decide to forgo the IVF process altogether, or not undergo IVF until

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this case is factually different.