they are ready to have the embryos transferred immediately. Binding agreements bring a certain solemnity to the IVF process, and require parties undergoing IVF to be responsible for the life altering decision of starting a family. Lastly, clear, binding agreements minimize the need for court resolution of what many believe is one of the most personal decisions an individual makes: when and under what circumstances to bring a child into the world.

The Court is also aware of and recognizes the divergence of viewpoints on treating consent forms as contracts between the gamete-progenitors. (See John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos* (2001) 50 Emory L.J. 989, 992, fn. 12. See also Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms are Not the Answer* (2011) 24 J. Am. Acad. Matrimonial Law. 57, 66–68 and 100–101 [criticizing consent forms, courts interpreting them as binding contracts, and suggesting that "[s]tatutes like California's that currently require health care providers to provide disposition forms should likewise be modified, if necessary, to eliminate any apparent requirement that the parties select a disposition choice in the event of relationship breakdown or divorce."]; Alex M. Johnson, Jr., *The Legality of Contracts Governing the Disposition of Embryos: Unenforceable Intra-Family Agreements* (2013) 43 Sw. L.Rev. 191, 223–224 ["the so-called agreement or contract should not be enforced as a contract because they are more akin to informed consent forms that does [sic] not reflect deliberate and informed choice on the part of the 'patient' signing the same"]; Diane K. Yang, *What's Mine is Mine, But What's Yours Should Also Be Mine: An Analysis of State Statutes that Mandate the Implantation of Frozen Embryos* (2002) 10 J.L. & Pol'y 587, 627 [arguing for the contractual approach "[a]lthough the individual's circumstances and state of mind prior to and after IVF may drastically change, human indecisiveness and uncertainty are variables in any contract"]; ABA Model Act Governing Assisted Reprod. Tech. § 501.1(b) ("ABA Model Act") [recommending *binding agreements* be "executed prior to embryo creation" and that those agreements include use and disposition in the

event of divorce].) Notwithstanding the existence of other alternatives, the Legislature has not modified the provisions of Health and Safety Code section 125315 since 2003.

In addition, California has never adopted the ABA Model Act Governing Assisted Reproductive Technology since it was promulgated in 2008. That Act requires, among other things, that "[a]ll participants known to the ART provider must undergo a mental health consultation . . . [and] [t]he results of this consultation shall not be used to arbitrarily deny any intended parent the right to procreate." (ABA Model Act Governing Assisted Reprod. Tech. § 301.1.) The ABA Model Act also requires a binding agreement between the gamete progenitors regarding the disposition of embryos including in the event of a divorce, but it allows either progenitor to withdraw consent if there is a subsequent disagreement, and the prior agreement will not be enforced. (§§ 501.1 and 501.3(c).) If, however, there is a disagreement about whether the embryos will be used or not, and one party transfers the embryos "after receipt of the notice in a record of that individual's intent to avoid gestation as set forth in paragraph 3(c) of this Section, *that intended parent will not be the parent of a resulting child.*" (*Id.* § 501.3(e), italics added.)

The Court finds that the statutory scheme in California encourages courts to conclude that written directives fulfilling the requirements of Health and Safety Code section 125315 are binding contracts between the parties under the appropriate circumstances, such as those present in this case. This finding is consistent with the approaches of sister states. For example, in *Roman*, in support of her challenge to the embryo agreement, the wife contended the parties did not have a meeting of the minds on the disposition of the embryos upon divorce because the parties neither discussed nor considered that a possibility. (*Roman v. Roman*, *supra*, 193 S.W.3d at p. 53.) In rejecting her argument, the Court of Appeals of Texas stated:

> " 'Parties strike the deal *they* choose to strike and, thus, voluntarily bind themselves in the manner *they* choose. [Citation] Although Augusta's choice may not have been fully considered, the evidence shows that she was aware of and

understood the significance of her decision. The parties' embryo agreement clearly indicates their wishes in the event of divorce.' "

(*Ibid.*)

In upholding the agreement in *Kass*, the Court of Appeals of New York made similar findings:

> "The conclusion that emerges most strikingly from reviewing these consents as a whole is that appellant and respondent intended that disposition of the pre-zygotes was to be their joint decision. The consents manifest that what they above all did not want was a stranger taking that decision out of their hands. Even in unforeseen circumstances, even if they were unavailable, even if they were dead, the consents jointly specified the disposition that would be made. That sentiment explicitly appears again and again throughout the lengthy documents. Words of shared understanding—'we,' 'us,' and 'our'—permeate the pages. The overriding choice of these parties could not be plainer . . . "

(*Kass v. Kass*, *supra*, 696 N.E.2d at p. 181.)

The Consent & Agreement is replete with indicators of a mutual agreement to the disposition of the Embryos. In addition to 27 uses of some variation of "agreement," words of shared understanding, such as "we," "us," and "our" appear at least 160 times. It is apparent to this Court that Findley and Lee intended this document to be an agreement reflecting their joint intentions regarding the Embryos.

Specific provisions in the Consent & Agreement evidence the express intent of the parties to create an agreement between themselves as to the disposition of the embryos, subject only to a later *joint* written agreement modifying those terms.

> "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 future disposition of these embryos, and 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."

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(Consent & Agreement 1, emphasis added.) That first paragraph continues:

> "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 contacting 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***."

(*Ibid.*, emphasis added.)

> "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 an executed Agreement to the IVF Program***, with different allowable instructions indicated therein."

(*Id.* at p. 5, emphasis added).

> "***In the absence of contemporaneous instructions jointly provided by us in writing*** to the IVF Program, which are acceptable to it, we have been asked to state our instructions for disposition of our unused embryos. We understand that ***any jointly agreed upon contemporaneous instructions***, agreed to by the IVF Program, will override there instructions."

(*Id.* at pp. 5–6, emphasis added.)

The evidence in this case is uncontroverted on at least one point. The Consent & Agreement has never been amended by jointly agreed upon instructions since September 29, 2010.

Moreover, unlike the standard consent forms that have been criticized by some scholars, the UCSF form specifically allowed Lee and Findley to supply their own directives, subject to approval by UCSF. (See Consent & Agreement 5 ["In the absence of contemporaneous instructions jointly provided by us in writing to the IVF Program, which are acceptable to it, we have been asked to state our instructions for the disposition of our unused embryos."].) To that

end, Findley and Lee could have agreed, *before* they created the Embryos, that in the event of divorce, Lee would keep some of the Embryos and Findley could thaw and discard the remainder. This is particularly so given that Lee was older, knew she had breast cancer, and had previously gone through a divorce.

Lee contends that she did not intend to enter into a binding agreement regarding the Embryos because it was her belief at the time the parties signed the Consent & Agreement that it was a medical consent form that could be revoked unilaterally at any time. While Lee testified variously that she did not read the document, she sped read the document, or she did not recall reading various provisions of the document, her argument that the document was only a medical consent form or advance directive is not convincing. Given Lee's education, profession, and intelligence, the Court finds that her testimony that she did not intend to enter into a binding agreement was not credible.

2. The conclusive presumption in Evidence Code section 622 applies and Lee fails to demonstrate that the Consent & Agreement is invalid.

Because the Court concludes that the Consent & Agreement is a written instrument between the parties, the conclusive presumption found in Evidence Code section 622 is also applicable. "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successor in interest; but this rule does not apply to the recital of a consideration." (Cal. Evid. Code § 622.) On page nine of the Consent & Agreement, it states "Our signatures below evidence that: 1) we have read, understood, and agreed to all terms of the agreement described above . . . ." (Emphasis omitted.) Additionally, the bottom of each page states, in bold type, "Please initial at the bottom of every page prior to your consenting appointment to confirm that you have read the content of this page." (Consent & Agreement 1–10.) Findley and Lee testified that they both initialed each page at the location next to that statement. As a matter of law, the fact that Findley and Lee read and understood the document is

conclusively presumed.

Even assuming the Court did not apply this conclusive presumption, the common language used and the proximity of the language at issue to an action taken by the parties (signing or initialing the document), is persuasive that the document was read and understood. There was no credible evidence introduced at trial that Lee did not intend what the Consent & Agreement calls for at the time she signed the form.

Lee also fails to demonstrate either by a preponderance or clear and convincing standard that grounds exist to invalidate the Consent & Agreement under established contract law. A written agreement is subject to unilateral rescission by a party whose consent to the contract, or the consent of another party jointly contracting with the rescinding party, was given by mistake (or in circumstances of duress, fraud, or undue influence not relevant here). (Civ. Code § 1689, subd. (b)(1).) Civil Code section 1578 states that a mistake of law only exists when it arises from "[a] misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law;" or, "misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify."

Lee contends that she did not believe the Consent & Agreement was binding. As set forth above, the Court finds that Lee's testimony on this point was not credible. Even if it was, her position at most amounts to a mistake of law that Lee alone made. There is no evidence that all the parties misunderstood the law, or that Lee misunderstood the law and Findley knew about it. To the contrary, both Findley and Dr. Rosen, as the person most knowledgable on behalf of the Regents, testified that it was their belief that the Consent & Agreement was binding between parties. As such, there is no evidence justifying a mistake of law pursuant to Civil Code section 1578.

In addition, there is no evidence of a mistake of any fact justifying rescission. Civil Code section 1577 defines a mistake of fact as "a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake," and consisting in "[a]n unconscious ignorance or forgetfulness of a fact present, material to the contract;" or a "[b]elief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed." Lee testified, among other things, that she believed that signing the Consent & Agreement was purely ministerial to initiating the IVF process, and that she could rescind her agreement at any time. She also testified that she routinely signs contracts without reading them and that she either did not read, or only read certain portions or sped read through the Consent & Agreement. It is axiomatic that the failure to read a contract before signing is not a defense to the contract. The failure to read a contract precludes the right to claim unilateral mistake of fact in a challenge to the contract. (*Marriage of Hill & Dittmer* (2011) 202 Cal.App.4th 1046, 1054–55. See *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal. App.4th 1072, 1080 ["Reasonable diligence requires a party to read a contract before signing it."].)

The Court expressly finds immaterial Lee's claim she and Findley took approximately 10 minutes to read the document: a claim Findley disputes.[24] Despite this short time frame, Lee also testified that she was not rushed to sign the Consent & Agreement; she did not ask for more time; and she did not ask any questions about it. Dr. Rosen testified that UCSF's procedure is for the Consent & Agreement to be printed just prior to the meeting at which it is provided to the patient. The records show that the Consent & Agreement was printed by UCSF on September 21, 2010, and the medical note on that day suggests that the Consent & Agreement was going to be notarized by Findley because he was then in New York. The record further shows that on September 22, 2010, Lee was provided with a folder during her meeting with Katz. While Lee

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[24] Findley testified it took approximately 20 minutes to review the document.

testified she could not recall what was in the folder and Katz was not available to testify due to medical issues, this Court finds that it was more likely than not that Lee received the Consent & Agreement on September 22, 2015.

There is also no evidence that Lee misunderstood the terms of the Consent & Agreement, and the evidence in the record is to the contrary. Katz's note on September 29, 2010, states that "Pt verbalized good understanding." (Trial Ex. PX-5.) Dr. Rosen testified that such a note would not have been entered by Katz if Lee had shown a lack of understanding or if she asked a question that Katz could not answer. If such a question was asked, it would have been noted and directed to Dr. Rosen to answer. That did not happen. Simply put, there is no evidence in the record to suggest that the parties had insufficient time to review the Consent & Agreement before and on September 29, 2010, or that they were denied the opportunity to ask any questions regarding the document.

The Court also finds that the parties demonstrated an understanding of the different options when choosing among the various directives. In Directive 3, Lee chose that in the event Findley died, the Embryos would be given to her. All other directives show a choice that the Embryos were to be thawed and discarded. Choosing different options for the different directives evidences a degree of thought and consideration that is incompatible with Lee's suggestion of mindlessly filling out the form.

For all these reasons, the Court finds that the Consent & Agreement is valid and binding and that Lee fails to rebut the presumption set forth in Evidence Code section 622.

3. The Consent & Agreement is a contract under Civil Code section 1549.

The Court further finds that the Consent & Agreement meets the statutory requirements for a contract. Civil Code section 1549 defines a contract as "an agreement to do or not to do a certain thing." (Cal. Civ. Code § 1549.) The essential elements to a contract are as follows: (1)

"Parties capable of contracting;" (2) "Their consent;" (3) "A lawful object; and," (4) "A sufficient cause or consideration." (Cal. Civ. Code § 1550.)

Capacity to Contract Lee does not claim that she lacked the capacity to contract but suggests that the confluence of life events (cancer, marriage, fertility treatments) created a "whirlwind" at the time she signed the Consent & Agreement. Nowhere does Lee allege that these events created an incapacity to contract, and the Court does not so find. And even assuming Lee affirmatively claimed that she lacked capacity, the Court would still be unconvinced based on the record at trial. Nothing in Lee's testimony or the exhibits evidence anything other than clear thought and a determined purpose to handle these various life events. This includes Lee's testimony about obtaining immediate treatment for her cancer diagnosis, obtaining and evaluating multiple opinions for treatment, deciding to undergo treatment at MD Anderson in Texas, finalizing wedding plans, getting married, and receiving several separate opinions regarding fertility options. These are examples of clear, rational thought over a period of weeks, and Lee reported no lack of clarity or understanding of any part of these life events she successfully navigated during this time.

In addition, and while there was no dispute at trial over the difficulty of the cancer diagnosis, the parties learned early in the process that the type of cancer Lee had was slow growing and treatable. Lee testified that she was diagnosed with cancer on August 25, 2010, but did not decide on a final course of treatment until late October of that year. The Court has reviewed many admitted exhibits related to correspondence sent by Lee to doctors, colleagues, and friends. None of these exhibits show anything short of an individual operating at a high level: they are neat, lucid, organized, and serve a purpose.

Consent In the Consent & Agreement itself, Findley and Lee each acknowledge the essential element of consent, namely that the consent was freely entered into. (See Cal. Civ. Code § 1565 et seq.) Although UCSF did not sign the Consent & Agreement, its acceptance of

the terms was established by its performance in accordance with its terms, including conducting the IVF procedure and storing the Embryos. (See Cal. Civ. Code § 1584 ["Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal"].)

Lawful Object "The object of a contract is the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do." (Cal. Civ. Code § 1595.) The object of the contract between the parties is to establish the terms and conditions of each party's individual participation in the IVF treatments with UCSF.

Sufficient Cause or Consideration A contract also requires "sufficient cause or consideration." (Cal. Civ. Code §1550.)

> "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

(Cal. Civ. Code § 1605.) There are numerous terms in the agreement where one party confers rights to another, that the other would not have a right to receive but for the agreement. Of most importance is the fact that neither party was entitled to the use of the other's genetic material in an IVF procedure. Thus, Findley and Lee provided consideration to the contract by the conditional use of his or her gametes.

4. The Consent & Agreement does not authorize the Court to replace the disposition directives.

The Court has considered Lee's contention that the terms of the Consent & Agreement grants the Court the ability to replace the parties' directives with its own dispositional outcome. The Court does not agree. The first paragraph of the Consent & Agreement states:

> "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."

Additionally, page 5 of the Consent & Agreement states:

"We further understand and agree that in the event of any conflict over disposition of the embryos, the Program or UCSF has the right to refuse to execute the choices made in this consent pending a court order resolving such conflict and may follow such court order without incurring any liability as a result."

The Court has considered *Kass v. Kass*, where the same issue was raised before the Court of Appeals of New York. *Kass* held that the provision in the informed consent providing a court of competent jurisdiction would determine legal ownership in the event of divorce is not a "dispositional provision" but rather was designed to insulate the hospital and the IVF Program from liability in the event of a legal dispute over the pre-zygotes in the context of divorce. (*Kass v. Kass*, *supra*, 696 N.E.2d at p. 182.) The Court of Appeals continued: "To construe the sentence as appellant suggests—surrendering all control over the pre-zygotes to the courts—is directly at odds with the intent of the parties plainly manifested throughout the consents that the disposition be only by joint agreement." (*Ibid.*) This Court reaches the same conclusion as *Kass*: there is no evidence to suggest that the parties intended to cede their decision-making authority over the Embryos to the court system in the event of a dispute merely by acknowledging UCSF's admonishment that a court has jurisdiction to hear the dispute. To the contrary, the Consent & Agreement evidences a strong intention by the parties to jointly control the disposition of the Embryos.

The Court is aware of the statutory rules of interpretation as set forth in Civil Code sections 1635 to 1667. The language of the contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity. (Civ. Code § 1638.) A contract must be interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting. (Civ. Code § 1636.) Civil Code section 1641 requires that "[t]he whole of a

contract be taken together, so as to give effect to every part, if reasonably practical, each clause helping to interpret the other."

The parties' stated intent in the Consent & Agreement to stand by their directives unless jointly modified and the recognition of judicial authority to resolve disputes does not create any contradiction or ambiguity in the agreement. The Court notes that it is a function of the Superior Court to interpret and enforce contract disputes; that reality exists as a default under the law. However, the Court's jurisdiction over disputes involving a contract does not create judicial authority to substitute the intent of the contracting parties with that of the Court.

The parties have clearly and unambiguously set forth their choices regarding the disposition of the Embryos in the event of death or divorce or the passage of time. Modification of those provisions requires a joint writing of the parties. Any interpretation of the Consent & Agreement to the contrary would be inconsistent with the parties' express intent. The language of the agreement is clear that the parties intended their joint decision on contingencies set forth in the agreement to control to the extent possible.

The acknowledgements of the court's jurisdiction in the Consent & Agreement can also be read consistently with the existing dispositional directives. There are foreseeable circumstances that could lead to disputes that were not addressed by the Health and Safety Code or the Consent & Agreement. For example, the parties could have disputed the implantation of the Embryos during an intact marriage, the choice of surrogates, the decision whether to use a surrogate or take risks with using Lee as the gestational carrier, or the transfer of the Embryos to a fertility center in a different state. There could also be a situation of permanent incapacity of one or both parties where guardians or UCSF might seek a dispositional order. As mentioned in *Kass*, the disappearance of one party could be an unconsidered contingency. None of these dispositional issues were addressed or contemplated in the Consent & Agreement and a dispute arising therefrom, or from a subsequent change in California law, could have rightfully been

brought before a court for resolution. The Court finds there is no ambiguity in the Consent & Agreement regarding the dispositional elections and the Court's ongoing jurisdiction arising from the contractual relationship of the parties and the Embryos.

The Court has also reviewed and considered the following line on page five of the Consent & Agreement: "We further understand and agree that in the event of any conflict over disposition of the embryos, the Program or UCSF has the right to refuse to execute the choices made in this consent pending a court order resolving such conflict and may follow such court order without incurring any liability as a result." The Court finds that this provision is merely a waiver of liability in favor of the Regents in the event a dispute over the Embryos is litigated. The Court rejects the contention that this provision negates the specific directives made by the parties.

5. The Court must give meaning to the entirety of the Consent & Agreement.

The Court finds Lee's position that she can unilaterally revoke the directives in the Consent & Agreement unpersuasive as well.[25] In analyzing contracts, courts must assume that each provision has meaning. If Lee were allowed to unilaterally withdraw from the Consent & Agreement, the elections made by the parties on September 29, 2010 never had any meaning; they would always have been subject to a later decision by her. This conclusion would be inconsistent with the stated intent of the Consent & Agreement—that the parties could only *jointly* alter the directives by subsequent written agreement. The Court cannot conclude that the agreements entered into by the parties were intended to have no meaning. Thus, and to the extent Lee believed that Directive 4 was akin to an advanced medical directive which, based on

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[25] It is also noteworthy that while Lee broadly challenges the Consent & Agreement, in reality she only takes issue with Directive 4. When asked during closing argument whether Lee contends that Directive 3—which gives the Embryos to her in the event of Findley's death—is still effective, her counsel responded: "Well, her position is that the directive is there. It has not been revoked prior to the contingency coming to pass, so therefore, there's no reason under the

her experience, could be unilaterally revoked, the express words of the document she signed altered that position.

Lee does not cite any case in which embryos were awarded to one progenitor over the objection of another who was relying on an agreement as clear as the Consent & Agreement is in this case. Indeed, no case with an agreement as unambiguous as the one before the Court has awarded embryos over the objection of the party seeking to enforce the agreement.

The two cases upon which Lee relies are factually and legally distinguishable. In *Reber v. Reiss*, *supra*, 42 A.3d 1131, the reviewing court applied an abuse of discretion standard to the trial court's equitable distribution of the marital property in the final divorce decree which awarded the pre-embryos to the Wife. Moreover, the *Reber* court did not decide which approach (contract, balance, or mutual consent) would be applied but deferred to the trial court using the balancing test "because *neither party had signed the portion of the consent form related to the disposition of the pre-embyros in the event of divorce or death of one party*." (*Id.* at p. 1136, italics added.) Finally, the reviewing court upheld the Master's and trial court's finding that the wife was infertile because (1) she underwent both chemotherapy and radiation for her breast cancer; (2) she underwent medical testing *after* her cancer treatment and testified she was led to believe that she could not have children; and (3) she was 44 years of age at the time of the appeal. Here, there is a written agreement signed by both Findley and Lee expressly covering disposition in the event of a divorce; there is no evidence that Lee's infertility is the result of cancer treatments; and Lee did no testing or additional IVF treatments to preserve her fertility.

Similarly, in *Szafranski v. Dunston*, *supra*, 34 N.E.3d 1132, there was no written agreement between the parties; the female progenitor (Dunston) had been rendered infertile by her cancer treatment; and there was undisputed evidence that an oral contract was formed prior to the IVF treatment wherein the male progenitor/donor (Szafranski) and Dunston agreed to

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directive not to have the embryos awarded to her." (RT 1073:6–9.)

create embryos so that Dunston could use them to have a genetically related child. (*Ibid.*) Thus, Lee's reliance on both *Reber* and *Szafranski* is misplaced.

Public policy also supports a finding that the Contract & Agreement be enforced. Health and Safety Code section 125315 would be rendered meaningless if the advance written directives were subject to unilateral change by either party at any time. IVF clinics and individuals who participate in the IVF process must have some certainty about dispositional choices before embryos are created. Enforcing prior agreements also furthers the policy in this state of avoiding costly litigation in dissolution proceedings. The Court of Appeals in *Kass* recognized these important policy concerns:

> "Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them. Indeed, parties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing. Explicit agreements avoid costly litigation in business transactions. They are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable. Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision. Written agreements also provide the certainty needed for effective operation of IVF programs.
>
> "While the value of arriving at explicit agreements is apparent, we also recognize the extraordinary difficulty such an exercise presents. All agreements looking to the future to some extent deal with the unknown. Here, however, the uncertainties inherent in the IVF process itself are vastly complicated by the cryopreservation, which extends the viability of pre-zygotes indefinitely and allows time for minds, and circumstances to change . . . .
>
> "These factors make it particularly important that courts seek to honor the parties' expressions of choice, made before disputes erupt, with the parties' over-all direction always uppermost in the analysis. Knowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process. Advance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree. To the extent possible, it should be the progenitors – not the State and not the court – who by their prior directive make this deeply personal life choice."

(*Kass v. Kass*, *supra*, 696 N.E.2d at p. 180, citation omitted. See *Roman v. Roman* (2006) 193 S.W. 3d 40, 49-50 [explaining pubic policy of Texas set out in legislation governing gestational surrogacy permits a husband and wife to enter into an agreement for embryo disposition in the event of a contingency such as divorce, death or changed circumstances].)

For all these reasons, the Court finds that the Consent & Agreement, including Directive 4, was a binding agreement between Findley and Lee which could only be altered upon joint written instructions. The Consent & Agreement was not jointly altered at any time after it was signed. Accordingly, the Court will enforce the agreement.

C. The Consent & Agreement is not a Contract of Adhesion

Lee previously suggested that the Consent & Agreement is a contract of adhesion. While it is unclear if she subsequently abandoned that position,[26] for purposes of this Statement of Decision, the Court will address the claim.

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[26] Lee also appears to have abandoned her argument that promissory estoppel applies (Resp't's Trial Br. 44) because she presented no evidence to support her claim at trial. Not only does this Court expressly find that Lee has not established the elements of promissory estoppel, if anyone would be entitled to such relief, it should be Findley.

Promissory estoppel applies where the promisor (1) reasonably expects his or her promise to induce action or forbearance on the part of the promisee; (2) the promise does induce action or forbearance; and (3) the failure to enforce the promise made would result in an injustice. (*Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 227.) The elements of promissory estoppel are: "(1) a promise is clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Id.* at p. 225, internal quotation marks and alteration omitted.)

Lee alleges that Findley "agreed without hesitation and without pre-conditions to participate in IVF and to provide his sperm to fertilize [her] eggs to create and cryopreserve embryos for later implantation." (Resp't's Trial Br. 44:21–23.) The evidence is to the contrary. There was one precondition: if they were no longer married, he initialed and signed the "thaw and discard" provision in Directive 4. Findley, on the other hand, relied on this same promise from Lee but now is faced with the prospect of becoming a single father simply because Lee changed her mind after he told her the marriage was over. Findley reasonably and justifiably relied on Lee's promises and statements at the time, and the damage to him has not only been a protracted litigation but the emotional damage attendant with learning, after the fact, that his

A contract of adhesion is "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Neal v. States Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694.) None of the characteristics required for this Court to determine that the Consent & Agreement is a contract of adhesion are present. First, UCSF is not the only clinic in the Bay Area to provide IVF treatments. At trial, Lee testified that she had called another fertility clinic prior to deciding on UCSF and she had worked at yet another such clinic performing anesthesia services in 2008. Thus, UCSF does not possess the superior bargaining power of, for example, the only fertility clinic in the state to perform IVF procedures. Even assuming UCSF had some superior power, Findley and Lee were given the ability to modify the Consent & Agreement by any dispositional terms acceptable to UCSF. (Consent & Agreement 5.) According to the testimony at trial, neither party requested to have an attorney review the document, and neither party requested to add language governing their choices. Second, UCSF was required to comply with Health and Safety Code section 125315 to secure the advance written directives regarding disposition of embryos before it performed the IVF procedure for Findley and Lee.

Finally, and even assuming the Consent & Agreement could be construed as a contract of adhesion, there are no judicially imposed limitations presented here on enforcing the agreement between Findley and Lee. (See *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 820 [explaining that two judicially imposed limitations are that the contract or a provision does not "fall within the reasonable expectations" of the weaker party and will not be enforced against him and the contract provision will be denied if enforcement, considered in its context, is unduly oppressive or "unconscionable"].) The Consent & Agreement is between UCSF and Findley and Lee—not just an agreement with UCSF and Lee. Findley was in the exact position as Lee and it

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sperm was provided under false pretenses and that Lee was willing to put a price tag on the Embryos they jointly created.

is now Findley, not UCSF, who asks to enforce the thaw and discard provision. Also, nothing about enforcing Directive 4—"Thaw and Discard"—would fall outside of the reasonable expectations of Lee or would be unduly oppressive. Lee knew at the time she signed the Consent & Agreement that she had breast cancer; that she was going to take Tamoxifen; and that she was 41 years of age. Finally, almost half of all marriages in America end in divorce, and Lee, having experienced a prior marriage that ended in divorce, should have anticipated this possibility.

For all these reasons, Lee's argument that the Consent & Agreement is a contract of adhesion—or Directive 4 if enforced falls within the two judicial exceptions—is rejected.

D. The Consent & Agreement is not an Advanced Health Care Medical Directive under Probate Code Section 4605

Lee argues that Directive 4 of the Consent & Agreement is an advance health care directive covered under Probate Code section 4605, and as such, it may be revoked unilaterally by her at any time. Lee contends that because Health and Safety Code section 125315 uses the term "advanced written directives" which is similar to "advance health care directive" or "advance directive" in Probate Code section 4605, the Legislature clearly intended that the Health and Safety Code would incorporate the definitions found in the Probate Code. She also contends that even though the Consent & Agreement was signed jointly, it is an "individual health care instruction" because the mutual agreement she made with Findley to "thaw and discard" the Embryos is analogous to an individual instruction about withdrawing health care to permit the natural process of dying. Lee's argument is not supported by the plain reading of these statutes or their legislative history.

"It is a settled principle of statutory interpretation that if a statute contains a provision regarding one subject, that provision's omission in the same or another statute regarding a related subject is evidence of a different legislative intent. [Citations.]" (*People v. Arriaga* (2014) 58 Cal.4th 950, 960.) "Our fundamental task in construing a statute is to ascertain the intent of the

lawmakers so as to effectuate the purpose of the statute. (See *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) "We begin as always with the statute's actual words, the 'most reliable indicator' of legislative intent, 'assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs. On the other hand, if the language allows more than one reasonable construction, we may look to such aids as the legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy.' " (*Even Zohar Const. & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 837–38 [citing *Wells v. One2One Learning Found.* (2006) 39 Cal.4th 1164, 1190].) The court must " 'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*People v. Coronado* (1995) 12 Cal.4th 145, 151 [quoting *People v. Jenkins* (1995) 10 Cal.4th 234, 246].)

It is a cardinal principle of statutory construction that we must " 'give effect, if possible, to every clause and word of a statute.' " (*United States v. Menasche* (1955) 348 U.S. 528, 538–539 [quoting *Inhabitants of Montclair Tp. v. Ramsdell* (1883) 107 U.S. 147, 152].) The term "advanced written directives" in Health and Safety Code section 125315 does not share the same statutory definition as "advance health care directive" or "advance directive" in Probate Code section 4605 for several reasons. First, the Legislature used different words and did not cross reference them. Second, Probate Code section 4605 defines these terms with respect to an "*individual health care instruction.*" Health and Safety Code section 125315, subdivision (b) differs in two significant respects. Most obviously, it contemplates choices made by two people (the two gamete progenitors unless noted otherwise) not an "individual." In addition, Health and Safety Code section 125315 focuses on the "disposition of embryos" not ongoing "health care."

The difference between "advanced health care directive" in the Probate Code and "advanced written directive" in the Health and Safety Code is made obvious by the legislative history. In 1999, the Legislature enacted Assembly Bill 891 to create Probate Code section 4605. Section 4605 defines an "advance health care directive" or "advance directive" as "an *individual* health care instruction or a power of attorney for health care." (Italics added.) The Legislature drew this definition verbatim from the Uniform Health Care Decisions Act, drafted in 1993 by the National Conference of Commissioners on Uniform State Laws. (Unif.Health-Care Decisions Act § 1, subd. (1) comment (1993) [29 Cal. L.Rev. Comm. Reports 1 (1999)].) Assembly Bill 891 comported with the United States statutory definition of advance directive as a "written instruction, such as a living will or durable power of attorney for health care, recognized under State law (whether statutory or as recognized by the courts of the State) and relating to the provision of such care when the individual is incapacitated." (42 U.S.C. § 1395cc, subd. (f)(3).)

Assembly Bill 891 is expressly "not intended to permit any affirmative or deliberate act or omission to end life other than withholding or withdrawing health care pursuant to an advance health care directive, by a surrogate, or as otherwise provided, so as to permit the natural process of dying." (Prob. Code § 4653.) The Legislative intent of Assembly Bill 891, therefore, is expressly restricted to "an *individual* health care instruction" that relates to the "natural process of dying." (Prob. Code §§ 4605, 4653, italics added.)

Findley and Lee made a *joint* agreement to "Thaw and Discard" the Embryos upon a judgment of divorce. Neither Lee nor Findley contend that the Embryos are human life, and Lee's counsel expressly stated that this is not her position. As such, the thaw and discard provision is not legally equivalent to the natural process of dying as contemplated under the Probate Code.

Lee also contends that Directive 4 of the Consent & Agreement is revocable under both Probate Code section 4605 and Health and Safety Code section 125315. Probate Code section

4605, as established, is inapposite. Moreover, the Legislature did not establish whether advanced written directives under Health and Safety Code section125315 are categorically revocable as it did with advance health care directives under Probate Code section 4605. "[T]he requirement that courts harmonize potentially inconsistent statutes when possible is not a license to redraft the statutes to strike a compromise that the Legislature did not reach." (*State Dept. of Pub. Health v. Superior Court* (2015) 60 Cal.4th 940, 956.) Notably, the Legislature did not discuss whether the statutory definition of a revocable advanced health care directive under Probate Code section 4605 applies to an advanced written directive under Health and Safety Code section 125315. Lee's contention that advanced written directives are revocable, therefore, is unpersuasive due to the lack of express Legislative intent or legislative history.

In addition, the plain letter meaning of an advanced written directive regarding disposition of embryos is that it is a directive that must be written in advance, not that it is categorically revocable. It is not within the jurisdiction of the Court to "insert what has been omitted, or to omit what has been inserted" into a statute. (Code Civ. Proc. § 1858.)

In conclusion, this Court finds that when comparing the plain reading of Health and Safety Code section 125315 with the definition of "advanced health care directive" in Probate Code section 4605, it is evident that the Legislature did not intend the terms to be similar. In addition, a review of the Legislative history supports this Court's finding that advanced written directives regarding the disposition of embryos are not categorically revocable.

E. Balancing Test

If there was not an enforceable agreement, the Court would turn to a balancing test to determine the disposition of the Embryos. This is the approach suggested by Lee. The balancing approach, first articulated by the Tennessee Supreme Court in *Davis v. Davis, supra*, 842 S.W. 2d 588, weighs the relative interests of the parties in using or not using the embryos. Lee argues

that under that test, because of her aged-related infertility, her federal and state constitutional right to procreate outweighs any interest Findley has not to become a parent with Lee.

Findley, on the other hand, suggests that Lee's motivation behind seeking the Embryos is not that she wants a child or children but because she wants *his* child or children so that she can use them to blackmail and extort money from him in the future. The following are the Court's findings regarding the balancing test. As set forth above, under this test the Court believes that Lee has the burden of proving that she is infertile by clear and convincing evidence since this fact alone is the reason Lee seeks the Embryos.

1. Lee failed to preserve her fertility between ages 43 and 45.

Lee asserts that she now suffers from age-related infertility. It is important, therefore, to consider in the balancing test the fact that Lee did nothing to preserve her own fertility when she knew: (1) her marriage was in trouble in mid 2012 (at which time she was 43 years of age); (2) when she and Findley separated in August 2013; or (3) when Findley filed for divorce in 2013 (at which times she was 44 years of age).

Dr. Rosen testified that prior to undergoing the IVF process in 2010, Lee underwent hormone testing and an ultrasound to evaluate her follicles and ovarian reserve. The purpose of this diagnostic testing was to determine if she was a good candidate to undergo IVF. Lee's results in 2010 were positive and Dr. Rosen was able to retrieve 18 eggs from her, which he characterized as a high amount. According to the Spandorfer study which was relied on by Lee's expert, Dr. Baek, Lee's prognosis for successful IVF treatments in 2012 and 2013 was actually good, particularly because she had produced 18 eggs after hyper stimulation in September 2010. "In conclusion, we have shown that IVF success in the woman over 44 years of age is limited to the group of women aged 45 years with normal ovarian reserve and a response of at least five oocytes during ovarian hyperstimulation." (Spandorfer et al., *supra* note 14 at p. 76.) Dr. Baek

also testified that for women age 40–44, the fertility rate is 6.6 percent to 6.8 percent live births per 1,000.

There is also no evidence that ovarian stimulation during this time would have increased Lee's cancer risks. The undisputed testimony was that becoming pregnant and carrying a child while on Tamoxifen is contraindicated, but not ovarian stimulation. Moreover, Dr. Rosen specifically informed Lee that women taking the Tamoxifen can undergo IVF treatments and further that the drug will not harm ovarian reserve. Dr. Rosen also testified that UCSF conducts IVF treatments on women taking Tamoxifen and there is no increased risk of recurrence of cancer arising from ovarian stimulation for IVF treatment.

Based on this evidence it is striking that Lee never once attempted to harvest additional eggs after it was clear her marriage was either in serious trouble or had ended. Lee is a Harvard educated physician *who worked in fertility clinics*, knew her age was a factor affecting her fertility, and had discussed with Dr. Rosen the ability of UCSF to retrieve eggs even if she was taking Tamoxifen. While Lee denies Dr. Rosen ever provided her this information, the Court does not find her testimony on this point credible. And even assuming Dr. Rosen did not inform Lee in 2010 about the relationship between Tamoxifen and IVF treatments, Lee is a skilled physician who by all accounts is capable of ascertaining and understanding medical information when necessary.

Lee's failure to take any steps to preserve her fertility during this crucial time period when she was well aware of the fact that her marriage was failing and that she had signed the Consent & Agreement directing UCSF to thaw and discard the Embryos in the event of divorce is a factor that militates against her in the balancing test.

2. Lee has not established that she is infertile per se at age 46.

Dr. Baek testified that Lee was not infertile because of cancer treatments, but was infertile based on her age alone. Dr. Baek did not physically examine Lee and, in fact, had never

met her. She did not evaluate Lee's hormone levels or conduct an ultrasound to determine if Lee was presently a good candidate to participate in IVF treatments. Dr. Baek testified that she had reviewed a recent test of Lee's hormone levels, but could not point to where in her materials that information was. In fact, Lee later testified that she has not undergone any testing of her reproductive health since prior to the IVF treatments in 2010.

Dr. Baek testified that it was her opinion, based on a published report which was received into evidence, that Lee, age 46, had a .03 percent chance of having a child, which translates to a pregnancy rate of zero. The Court has reviewed the reports cited by Dr. Baek.

On cross examination, Dr. Baek acknowledged that the Monthly Statistics Report was a study of birth rates for every woman in this country. (Trial Ex. RX-4.) The data showed there were .3 live births per 1,000 women in this country age 45 to 49. Dr. Baek further acknowledged that the 1,000 women in the sample would include women that were not trying to have children, that had their ovaries removed, had hysterectomies, were on birth control, were not sexually active, or had entered menopause. Dr. Baek could not quantify how many of these various categories of women exist in order to reduce the 1,000 figure to a more relevant sample. Dr. Baek also testified that women who are trying to have a child are more likely to conceive. This includes women engaging in timed intercourse and undergoing IVF treatments. If that category of women is more likely to reproduce, the .3 figure would be lower than an appropriate sampling of the population. Although Dr. Baek was unable to clarify the figures, the .03 percent derived from the data would be higher if you eliminated from the sample population women who cannot have children or are trying not to, and if you increased the probability of conception by trying to conceive.

The Court concludes that in that range of 45 to 49 year olds, the younger women in that age range would be more likely to reproduce than the older women in that age range. Dr. Baek

testified that her fertility clinic does not treat women who are age 46 or older, and would refer a patient that age somewhere else for treatment.

Dr. Rosen testified that UCSF has no upper age limit on conducting IVF treatments. He further testified that he has had success creating embryos from a 46 year old woman leading to a live birth. Dr. Rosen stated that a 46 year old woman has between a 0 to 5 percent chance of having a child, but where a woman falls within that range is based on the individual patient. He said that Lee's chances are low.

The Court finds that the testimonies of Dr. Baek and Dr. Rosen, as it relates to Lee's fertility, are not inconsistent. Although Dr. Baek's opinion that Lee is infertile was offered as a firm statement, it is not a zero percent chance and it is some unknown degree higher than .03 percent based on the sampling concerns found in the relied upon study. This comports with Dr. Rosen's testimony that Lee's chances of having a child are low, in the 0 to 5 percent range. By either account, a 46 year old woman has a low but non-zero probability of conceiving a child and having it result in a live birth.

Based on the record evidence, this Court finds that Lee is unable to establish that she is now infertile per se by either preponderance or clear and convincing evidence. However, the evidence did establish that at best she has between a 0 to 5 percent chance of a live birth.

3. The right to procreate balanced against the right not to procreate.

Findley and Lee both take the position that the right to procreate and not procreate are constitutionally protected rights that weigh in the balancing test. As a first point, this Court declines to find that either right is a constitutionally protected right in this case. And to the extent each had a constitutional right, Lee and Findley waived those rights when they initialed and signed the Consent & Agreement *unless they jointly agreed* to change the disposition instructions. Findley waived his right not to procreate with Lee if he pre-deceased her, and Lee waived her right to procreate with Findley in the event of divorce. (See Directives 3 and 4 in the

Consent & Agreement.)

Moreover, Findley and Lee were given the option to have the Consent & Agreement reviewed by an attorney and to make jointly executed contemporaneous instructions, acceptable to UCSF, to govern disposition. Those instructions could have included: (1) Findley agreeing that in the event of divorce, Lee could retain a certain number of the Embryos, and he could thaw and discard the rest; (2) Lee could implant one Embryo at a time until a child was born, and any remaining Embryos would revert to Findley's control; or (3) Lee could implant one Embryo at a time until a child was born and Findley would agree not to take any action with the remaining Embryos until a certain time thereby giving him time to decide if, after experiencing parenting with Lee and the true wonder of a new life in the world, he might then want additional children. All of these options, and more, were available to the parties in 2010, but they voluntarily decided to limit their options to those presented in the Consent & Agreement.

To the extent the Court needs to find that Lee waived her right to procreate with Findley by clear and convincing evidence, it does so herein. There are simply no facts in the record to support any other conclusion. And to the extent she was wrong or mistaken in her belief that the agreement was a medical consent or directive, she had the opportunity to review it with an attorney before she signed it.

With respect to Findley's assertion that he has a constitutional right not procreate, he provides no legal authority for the Court to reach that conclusion. There is no state action at issue and neither the United States nor California Supreme Courts have directly held that a man has a right not to procreate. In the context of his constitutional claim, Findley stands on the same footing as Lee: nothing in the Consent & Agreement forced Findley to procreate, and to the extent he procreated with Lee by creating the Embryos, the only limitation he placed on that right was set out in the directives.

4. Findley has legitimate concerns about parenting with Lee.

Findley testified that he is afraid of parenting with Lee because he is concerned about what she would say to any child born from the Embryos regarding the financial issues that transpired during the divorce. He also fears that Lee will use a child to extort additional money from him beyond normal child support payments. Conversely, Lee claims that she would co-parent with Findley and offers to enter into an agreement not to seek support should the Embryos result in a child or children.

Lee's offer to waive child support is not an enforceable agreement. The right to support belongs to the child, not the parent. (See *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 947 [explaining statutory obligation of child support "is unaffected by any agreement between the parents [citation]"].). Assuming Lee made this agreement and later changed her mind, Findley could not secure a court order enforcing the terms of the waiver. (See *In re Marriage of Lusby* (1998) 64 Cal.App.4th 459, 469 [" 'Agreements and stipulations compromising the parents' statutory child support obligation or purporting to divest the family court of jurisdiction over child support orders are *void* as against public policy. [Citations.]' [Citation.]"].) In reality, Lee's offer to waive support amounts to no offer at all because it has no legally binding effect.

Findley's concern that Lee will use a child to extort more money from him, while not impossible, is also highly unlikely under the current child support system. California provides a statewide uniform guideline formula to determine child support. The guideline formula is applied to every parent. (See Fam. Code § 4055.) The two main components of the formula are the income of each parent and time share with the child(ren). (See *Ibid.*) There is also a bonus calculation that is within a range dictated by statute and while one parent may argue for child support above the guideline range, there are certain factors courts must consider and make on the record before an award above the guideline formula will be made. (Fam. Code § 4057.)

Finally, Findley expresses a valid, albeit, normal concern about co-parenting with Lee

based on the statements she made during the break-up of their marriage. This concern is not unlike that shared by family law judges who frequently hear complaints that one parent is making disparaging statements about the other parent in front of the child(ren). In addition, Lee repeatedly made statements during the trial that she wants "*her* babies" and in her trial brief suggests that she is willing to terminate Findley's parental rights to any child born from the Embryos. These statements heighten the concern that Lee would in fact include Findley in a co-parenting relationship. But these anticipated problems are not of such extraordinary magnitude that either singularly or collectively they would, in and of themselves, weigh in the balance. Family law judges throughout the state routinely resolve bitter disputes between parents about custody, visitation and support issues within the framework crafted by the Legislature. Any such disputes between Findley and Lee would be resolved within the same context with the recognition that any resulting child(ren) has two parents, not one.

Findley holds valid concerns regarding a future parenting relationship with Lee both from a financial and practical perspective. However, this Court finds that in and of themselves, these concerns are not enough to dramatically weigh in his favor.

5. The credibility findings of the Court.

As the fact finder, this Court must make credibility determinations regarding testimony of the parties and other witnesses who testified at trial. As is often the case in dissolution proceedings, there are two sides to a story peppered with emotionally charged accusations, some of which are true, some where there is a kernel of truth embellished with many half-truths and conjecture, and some which are patently false. Fact finders, whether they are jurors or judges are armed with the observations of the witness' demeanor; the witnesses' ability to directly answer questions; whether the witness made any prior inconsistent statements; and other documents or evidence to impeach a witness' credibility.

After observing both Findley and Lee and carefully reviewing all of the evidence at trial,

this Court has serious concerns about Lee's credibility, her failure to seek additional IVF treatments when she knew her marriage had ended, and her motive for seeking the Embryos in this case.

During her testimony, Lee was evasive, contradictory and admitted to providing prior testimony under penalty of perjury that was untrue. Lee testified at trial that she and Findley had occasionally used condoms prior to marriage and prior to her cancer diagnosis. When confronted with her declaration which said the opposite, she testified:

> "Q. So page 2 of this declaration in paragraph 7 on line 3 states: "At no time during our relationship did we ever use any form of contraception." Do you see that?
> A. Yes.
> Q. Okay. Does that refresh your recollection that you actually told the court that?
> A. I believe this was a declaration that my counsel prepared.
> Q. And that wasn't a true statement, correct?
> A. No. At the time that was a true statement.
> Q. It was a true statement at the time you wrote this in August of 2014 that "At no time in our relationship did we ever use any form of contraception"; is that your testimony today?
> A. That was my best recollection in August of 2014 when this document was prepared."

(RT 881:9–25.)

Lee was impeached regarding her conflicting testimony about applying for disability benefits. During discovery on the financial issues in this proceeding, Lee denied that she ever applied for benefits under her disability policy. Further, she claimed that she would be receiving monthly disability benefits of $10,000 to $15,000 but Findley told her to cancel the policy. During subsequent deposition testimony, and only after Findley pressed the issue, did Lee produce a letter from her disability carrier that evidenced not only had she applied for benefits but that her claim was *denied.*

Lee also testified that prior to her marriage to Findley, it had never occurred to her that she might want to freeze her eggs because of her advancing maternal age. Lee further testified that she never seriously looked into or researched egg freezing prior to her marriage to Findley.

In a January 30, 2009, e-mail she sent to her sister, however, she stated that she was "[t]hinking of freezing some eggs w fertility guy next time I see him…just in case…Never know, you know?" (Trial Ex. PX-30.) After she was confronted with this e-mail during the trial, Lee testified that she didn't freeze her eggs at the time because of her age, the cost and down time from work.

In addition to the impeachment evidence, the Court finds Lee's responses to questions surrounding the Consent & Agreement to be evasive and at certain points, unbelievable. On one hand, Lee testified that the Embryos are priceless to her because they represent her last chance to have a genetically related child. In the same breathe, she claims that she never reviewed the Consent & Agreement before signing it; that this agreement was like so many she as a physician signs on a routine basis; and that it has the same importance to her as an iPhone update.

> "Q. All right. You testified earlier this morning, and you agreed that, at that time, on September 29, 2010, your intent was for you and Steve to preserve your embryos to have children together; correct?
> A. Correct.
> Q. And PX-3, which is the consent and agreement form that we have been discussing in this case is consistent with that intent at that time; correct?
> A. I don't know what the form is consistent with. The form--
> Q. Well, the form--
> A. I didn't write the form.
> Q. You filled it out, didn't you?
> A. Yes, we did.
> Q. And you read it; correct?
> A. We looked at that time, for sure.
> Q. I don't want to know what you did together. I want to know what you did.
> A. Oh, I'm sorry. I looked at it, yes, I did.
> Q. When you look at it, you're looking at words on a sheet; correct?
> A. Yes.
> Q. And you're reading those words; correct.
> A. I often speed read, and I don't read every single word, especially on forms like that.
> Q. Why? Why especially forms like this? Why do you say that?
> A. *There are lots of forms like this that I'm required to put my signature or my initials on, and I just don't read every single word. They're too frequent and often in my professional life and my personal life, too. Every time I get an iOS update, I have to sign an agreement, and I have never read one of those.*
> Q. What's an iOS update?

A. On my iPhone or computer. I'm a MAC user, and periodically there's updates to the software, and you're supposed to consent and agree that you abide by all the things in the thing, and it's very long, and the words are small, and it's super boring.
Q. *So you routinely sign things without reading them?*
A. *Sometimes, yes.*
Q. And in this case, is it your testimony that you signed this without reading it? . .
.
Q. Is that your testimony?
A. Yes."

(RT 664–665:4–27, italics added.)

To the extent the Court credits Lee's trial testimony that she failed to read the Consent & Agreement, the burden of her inattention should not fall on Findley. To the contrary, Findley testified that he very carefully read the Consent & Agreement because creating the Embryos was an important life event. Finally, any agreement which covers instructions about how the Embryos—which Lee now claims are her last chance to have a child—would be stored and disposed of in the event of certain unexpected life changing events is worthy of more attention than an iPhone update.

Lee was also unable to recall if she received the consent forms prior to or on September 29, 2010. However, Dr. Rosen testified that the Consent & Agreement was most likely printed on September 21, 2010 because that is the date on the last page of the document. The nursing note on that day indicates that the document would need to be "notarized" because Findley was out-of-town. Based on all of the evidence presented, the Court finds that it is more likely than not that Lee was given the Consent & Agreement on September 22, 2010 when she met with Katz. The Court further finds that because Lee received a copy of the Consent & Agreement on September 22, 2010, she had a week to review the form before signing it on the 29th.

Lee's explanation about why she made the statement to Findley suggesting that she was placing a price on the Embryos also lacks credibility. Findley testified that the first discussion he had with Lee about the Embryos was in August 2013. In that discussion, Lee admitted that she

asked Findley how much he was willing to pay for the Embryos, suggesting $1 to $2 million for all or per embryo. At trial, Lee testified that she made the statement because she had been trying to get Findley to talk about the Embryos for a long time and was frustrated because they meant so much to her. Later in her testimony, however, Lee claimed that it was not until several months later—after her nephew came to stay with her—that she decided she really wanted to have a child of her own. Lee's ambivalence about wanting a child is further supported by the fact that Findley and Lee only explored using a surrogate once during their marriage. No contract was signed and that option was never pursued again.

Based on all of this evidence, it is reasonable to conclude that Lee was ambivalent about having a child both during and after her break-up with Findley; that she did place a price on the Embryos as a means of securing additional monies during the divorce proceedings; and that Findley's belief that she would use any child born of the Embryos to secure additional monies from him is well founded.

Findley, on the other hand, was a witness this Court found credible. His answers were direct and without exaggeration. It is clear that Findley wanted children but only if he was married. His marriage to Lee has now ended. The Court also finds credible his testimony that he would not have agreed to the IVF procedure or signed the Consent & Agreement if Lee had indicated, as she does now, that she wanted the Embryos for herself.

6. Applying the balancing test to the evidence in this case, the Court concludes that the balance tips in favor of Findley, not Lee.

The Court, having reviewed all of the evidence, finds that if it were to apply a balancing test, Findley's right not to be compelled to be a parent with Lee outweighs Lee's right to have a biologically related child. It is undisputed that Findley was led to believe that Lee only wanted children with him if they were married. She never said otherwise until after they separated. If the Court credits Lee's testimony that she knew at the time she signed the Consent & Agreement

that she could withdraw her consent at any time and yet she failed to tell Findley, it is Lee who should bear the burden of her silence, not Findley. This is particularly true where, as here, she led Findley to believe that any future changes to the agreement would only be jointly made. In addition, Lee did little to further her dream of a having a biologically related child while she was still married to Findley, and failed to take any affirmative action to prevent age-related infertility when her marriage was troubled and after she and Findley separated. Based on all of expert testimony and exhibits admitted into evidence, Lee's chance of having a child during this time was much greater than it is now.

This Court acknowledges that Lee underwent more invasive and more repetitive procedures during the IVF process than Findley did but it gives little weight to this factor. Indeed, if family courts were required to consider the physical efforts and weigh the toll gestation and child birth takes on a woman in every family law proceeding, a man would never be considered an equal parent. California law is to the contrary.

Lastly, this Court expressly rejects the suggestion that Lee has any constitutionally protected right to procreate with one specific individual which overrides all other factors presented in this dispute. In the balance, however, Findley should be free from court compelled fatherhood and the attendant uncertainties it would bring. To mitigate these concerns, Lee suggests that the Court craft an order limiting her use of the Embryos. She also suggests that she would be receptive to terminating Findley's parental rights if he decides not to be an involved with any offspring. Lee's suggestions appear to violate public policy and invite the Court to impose limitations on how many children she and Findley could have: an invitation this Court will decline. Moreover, an order awarding Lee the Embryos necessarily requires that Lee, not Findley, have exclusive control over (1) when the Embryos are implanted; (2) how many are implanted; and (3) in whom they will be implanted. Findley is now in his mid-40's. Any order awarding Lee the Embryos imposes on Findley the prospect of becoming a parent not at a time

when he makes that joint decision with Lee but when she unilaterally makes that decision for him.

Finally, the California Legislature established a no-fault divorce system specifically structured to allow once married individuals to move forward in their *separate* lives disentangled from each other after a final judgment of dissolution. That noble goal is not achieved by creating unenforceable orders that are subject to unforeseen future contingencies, and protracted litigation.

For all these reasons, the balancing approach favors Findley.

F. Contemporaneous Mutual Consent Model

Findley suggests that if the Consent & Agreement is not determined to be binding on the parties, the contemporaneous mutual consent model should be used to resolve the disposition of the Embryos in this case. The Court declines to adopt this model, and would suggest that the model undermines several important public policies entrenched in California law.

Under the contemporaneous mutual consent model, embryo contracts are presumed enforceable but courts will not enforce the agreements where one party changes his or her mind regarding a directive in the event of divorce. (See *In re Marriage of Witten*, *supra*, 672 N.W.2d 768 [holding agreement did not address what the parties would do in the event of divorce but required joint consent to release embryos; the provision for joint release would not be enforced; and either party may unilaterally rescind that provision up to the point of implanting the embryo]. See also *J.B. v. M.B.*, *supra*, 783 A.2d 707, 719 [contracts regarding disposition of embryos would be enforced subject to the other progenitor's right to change his or her mind up to the point the embryos are either destroyed or implanted].) If the gamete progenitors cannot agree on a new disposition, the embryos remain cryopreserved until such time as an agreement can be reached, with the party who opposes discarding the embryos required to pay the cost of storage. (*In re Marriage of Witten*, *supra*, 672 N.W.2d at p. 783.)

The ABA Model Act also endorses what appears to be the consent by mutual agreement approach. (ABA Model Act Governing Assisted Reprod. Tech. § 501.3(c).) Under the ABA Act, however, if an embryo is implanted over the objection of the other intended parent, the objecting parent will not be considered the parent of any offspring. Both *Witten* and the ABA model are at odds with well established law governing parentage and divorce in California.

Courts should be cautious to adopt an analysis which may have broad policy implications for other statutory schemes. As noted by the Court of Appeal in *In re Marriage of Buzzanca*, *supra,* 61 Cal.App.4th at p. 1429:

> "Again, we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction . . . . Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme, looking to the imperfectly designed Uniform Parentage Act and a growing body of case law for guidance in the light of applicable family law principles. Or the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques. As jurists, we recognize the traditional role of the common (i.e., judge-formulated) law applying old legal principles to new technology. [Citation] However, we still believe it is the Legislature, with its ability to formulate general rules based on input from all it constituencies, which is the more desirable forum for lawmaking."

Prior to 1969, California operated under a fault-based divorce system where the party seeking to end the marriage was required to prove that the other spouse was at fault or responsible for the divorce, and the other party was essentially blameless. In that year, then Governor Ronald Reagan signed into law the first no-fault divorce bill which allowed couples to divorce without demonstrating responsibility. Since that time, it has long been the policy of this state to allow parties, once married, to disentangle their lives and move forward as single people without allocating fault to one or the other spouse. (See Family Code § 2310.) The mutual consent model allows one party seeking to change the prior directive, in this case Lee, to hold up a final judgment of all issues and subject the other party to years of uncertainty as to whether or not they may become a parent.

The mutual consent model is incompatible with a no-fault divorce system for other reasons. For example, the model may encourage, as Findley alleges here, one party to extract additional money in a divorce proceeding otherwise unwarranted in the Family Code. (See, e.g., *Szafranski v. Dunston* (Ill. App. Ct. 2013) 993 N.E.2d 502, 515 [" 'what is even worse . . . is to give a possibly antagonized ex-spouse the power to either block parentage or to name the price that potential parentage will cost.' [Citation.] "].) It would encourage litigation over the motivation for one spouse's conduct in changing their original directive and make what are already incendiary family law cases more toxic. Finally, giving one party what might be viewed as the ultimate leverage in a relationship raises concerns surrounding issues of domestic violence and could result in one spouse/partner staying in an abusive relationship simply because he or she is worried the other spouse/partner will change the original directive in retaliation.

For all these reasons, this Court will not apply the contemporaneous mutual consent approach here. Assuming that a reviewing court adopts this approach, however, the Embryos in this case would remain cryopreserved until: (1) Findley and Lee jointly agree regarding their disposition; (2) Lee dies; (3) Findley dies[27]; or (4) they both die.

G. Constitutional Framework of the Right to Procreate and the Right Not to Procreate

For reasons set forth herein, this Court does not find that any constitutional rights of Lee are at issue if this Court adopts a contract approach. To the extent a balancing test were adopted, Lee's wish to procreate and Findley's expressed right not to have a genetically related child with Lee would be considered, along with other factors. However, at the end this case does not implicate Lee's right to procreate, it implicates only her right to procreate with Findley which is not protected by either the California of United States Constitutions. In *Skinner v. Oklahoma ex rel. Williamson* (1942) 316 U.S. 535, 541, the United States Supreme Court first recognized the

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[27] As noted previously, Lee's position is that if Findley dies, Directive 3 gives her control of the Embryos subject to a challenge from Findley's estate.

right to procreate as a fundamental right protected by the United States Constitution.[28] *Skinner* involved a challenge to Oklahoma's then mandatory sterilization law for habitual criminals which had the express goal of eliminating undesirable traits from the gene pool. (*Id.* at p. 543 (conc. opn. of Stone, J.).) The majority opinion held that the statute was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment in that it mandated sterilization for certain crimes but not for others. (*Id.* at p. 541.)

Following *Skinner* the Supreme Court has addressed procreation under a right to privacy analysis, but all of the cases involved state action. For example, in *Griswold v. Connecticut* (1965) 381 U.S. 479 the Court struck down a Connecticut statute that made it a crime for any person to use a contraceptive device or drug, holding that there is a recognized "zone of privacy" in the marital relationship and married couples should be free from governmental intrusion into one of the most intimate zones of privacy, the marital bedroom. (*Id.* at pp. 487–486.) The privacy rights afforded married couples were expanded several years later in *Eisenstadt v. Baird* (1972) 405 U.S. 438 when the Supreme Court struck down a Massachusetts law that prohibited physicians from prescribing contraceptives to unmarried individuals. The *Eisenstadt* decision held that all individuals have the right to be free from "governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (*Id.* at p. 453.)

Findley contends that the right to procreate announced in *Skinner* and other federal and state cases also encompasses the corollary right *not* to procreate. While the fundamental concept rings true to any reasoned mind, there has been no case expressly holding that a man enjoys the same privacy right as a woman does under *Roe v. Wade* (1973) 410 U.S. 113 to prevent procreation under either the California or federal constitution. (See Glen Cohen, *The*

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[28] The Supreme Court explained that the right to procreate is "one of the basic civil rights of man." (*Ibid.*)

Constitution and the Rights Not to Procreate (2008) 60 Stan. L.Rev. 1135 [giving extensive analysis as to why the Supreme Court's ruling protecting a women's right to privacy as a gestational carrier does not compel a finding that an individual has a constitutional right *not* to be a genetic parent].)

The Consent & Agreement does not contain any language that either denies Lee the right to procreate or requires Findley to become a parent. The current dispute involves a private agreement between two parties with one, Findley, seeking to enforce Directive 4 to "Thaw and Discard" the Embryos, and Lee objecting. (See e.g. *Kass v. Kass*, *supra*, 696 N.E.2d at p 179 ["we conclude that disposition of these pre-zygotes does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice . . ."]; *Davis v. Davis*, *supra*, 842 S.W.2d at p. 600 ["None of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions is applicable here."].) Moreover, neither Findley nor Lee challenge the constitutionality of Health and Safety Code section 125315, nor do they argue that the statute is unconstitutional as applied.[29] Similarly, neither Findley nor Lee argue that UCSF violated their federal or state constitutional rights when it complied with state law and required them to provide advanced written directives regarding the disposition of the Embryos. As such, there is no state action involved abridging any recognized constitutional rights of the parties.

To the extent Lee asserts that any interpretation of the evidence whether sounding in contract or in a balancing test must tip in her favor because her right to procreate trumps all other considerations, she is again mistaken. What is at issue here is not whether Lee has a right to procreate generally but whether she has the right to procreate *with Findley*. Lee presents no case

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[29] Lee suggests in her trial brief that this Court "would violate the principle of constitutional avoidance" if it interprets the Consent & Agreement as a binding contract. (Resp't's Trial Br. 34, fn. 12.) Her argument lacks merit because neither the statute nor the

or statutory authority to support her position, and indeed it may be argued that any court order which directs a former spouse to become a parent with the other spouse under threat of contempt violates public policy, particularly here where the gestational carrier is someone other than Lee. If it were Findley who had cancer and who had initialed the thaw and discard provision in Directive 4, no court could require Lee to be the gestational carrier of the Embryos or order the Embryos, consisting of half of her genetic material, to be carried by a gestational surrogate. (See e.g. *J.B. v. M.B.*, *supra*, 783 A.2d at p. 716 [clarifying that the right not to procreate is lost if embryos are donated or implanted because such actions could result in the birth of an individual's biological child, which "could have life-long emotional and psychological repercussions" for the biological parent].)

The United States Supreme Court has directed that caution must be exercised before any court expands due process rights as Lee suggests here:

> "Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial guide posts for responsible decision making that direct and restrain our exposition of the Due Process Clause."

(*Washington v. Glucksberg* (1997) 521 U.S. 702, 720–21, internal citations and quotation omitted.) In accordance with these principles, the Court finds that Lee has not established any right to procreate using the Embryos created jointly with Findley.

H. The Court Need Not Decide Whether the Embryos are Property

The Regents ask this Court to find that the Embryos are property for purposes of disposition. No case in California has determined that embryos, as opposed to sperm or ova, are

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Consent & Agreement requires her to waive any constitutional right.

property. Yet statutory law in California and Supreme Court precedent prevent any finding that Embryos are individual human beings. Embryos are unique.

> "Human embryo research has elicited diverse and conflicting perspectives since the early days of in vitro fertilization. The ASRM Ethics Committee acknowledges the diversity of opinion regarding these topics among ASRM membership, no different from that seen in the general community. Discussions about the human embryo frequently are framed in terms of the embryo's moral status. An important distinction arises between those who regard the embryo as a person with all the protections accorded to fellow human beings and those who regard the embryo as deserving respect as a potential human but not the same respect accorded to persons. Those who believe the embryo has the moral status of persons expect that the embryo should be accorded all the rights of these individuals. The embryo is vulnerable, under this perspective, and needs protection. Some believe that this status begins at fertilization, when the DNA from the female and male gamete unite to create a unique entity with a novel genetic composition. Others believe that the status begins later, when the primitive streak begins to develop at approximately 14 days after fertilization and when the embryo will, if it survives, be more likely to develop into a single individual."

(Ethics Committee of the American Society for Reproductive Medicine, *Donating embryos for human embryonic stem cell (hESC) research: a committee opinion*, 100 FERTILITY AND STERILITY 935, 936 (October 2013).)

This Court was previously asked to determine whether the Family Court had jurisdiction over the issue of the disposition of the Embryos. After reviewing the case law and relevant statutes, the Court held that the broad definition of "property" in the Family Code included the Embryos. This Court expressly determined that "the Embryos are not property because they are a 'thing,' but because Findley and Lee may lawfully exercise rights over the Embryos because they were created from each of their own biological material." (Order re: Jurisdictional Objections 5:1–13, June 9, 2015.) That determination, however, is limited to the jurisdictional question presented and does not answer the question the Regents ask this Court to now decide: that the Embryos are property for purposes of determining their disposition.

In *Davis* the Tennessee Supreme Court noted that the embryos were neither persons nor

property, but "occupy an interim category that entitles them to special respect because of their potential for human life." (*Davis v. Davis*, supra, 842 S.W. 2d at p. 597.)

> "It follows that any interest that Mary Sue Davis and Junior Davis have in the preembryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law."

(*Ibid.*)

The only other court to address this issue was *Dahl v. Angle, supra*, 194 P.3d 834. As discussed above, in *Dahl* the Court of Appeals of Oregon held that the frozen embryos of a couple in a dissolution proceeding were "personal property" as defined under Oregon Revised Statutes section 107.105. (*Id.* at p. 839.) The court reached its conclusion because the IVF agreement expressly stated that each party had a contractual right to dispose of embryos. (*Ibid.*)

California cases are inapposite because they have focused on determining whether sperm constitutes "property" as defined by the Probate Code. In that context, California Courts have broadly construed the term "property" to include such reproductive material. (See *Hecht v. Superior Court*, *supra*, 16 Cal.App.4th 836; see also *In re Estate of Kievernagel*, *supra*, 166 Cal.App.4th 1024.) The Court of Appeals in *Kievernagel* followed this interpretation and held that "gametic material, with its potential to produce life, is a unique type of property" and as such, the ownership interest in the sperm was entitled to special respect because of the potential for human life. (*In re Estate of Kievernagel*, *supra*, 166 Cal.App.4th at pp. 1028, 1030.)

This Court declines to find that the five Embryos in this case are property.[30] In the Consent & Agreement, which is at the very heart of this case, UCSF acknowledges that it will only freeze and transfer embryos it deems "viable." (Consent & Agreement 1 ["We [Findley and

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[30] Findley requests a specific finding that Lee violated her fiduciary duty to him pursuant to Family Code section 721. Based on the determination here, this Court does not need to find any violation because Family Code section 721 applies only to transactions between spouses

Lee] understand that *only embryos deemed viable* by our IVF laboratory will be considered eligible for freezing."]; Consent & Agreement 2 ["We [Findley and Lee] understand that *only embryos considered to be potentially viable* using reasonable medical judgment *will be transferred.*"] (Emphasis added.).) To suggest that this Court should find that these five "viable" Embryos are simply property undermines not only the express language in the Consent & Agreement, but ignores the very reason couples undergo the emotionally and financially draining process of IVF: To have a child.

It simply is not necessary in this case to categorize the Embryos as "life" or "property." The reality is that the Embryos and their creators, Lee and Findley, deserve something more nuanced. Accordingly, the Court finds that based on the evidence presented at trial and the clear language of the Consent & Agreement, the Embryos in this case represent the nascent stage of five human lives. They are not property nor are they a fully formed human being. They are, in the construct of the law, *sui generis* and will be deemed as such in this statement of decision.

VI. CONCLUSION

On September 29, 2010, Findley and Lee jointly agreed that in the event of a judgment of dissolution of their marriage, UCSF would thaw and discard the Embryos they created through the process of IVF. That dispositional directive has never been jointly changed, and this Court is not free to re-write the clear terms of the Consent & Agreement. As such, the law requires that Directive 4 and the Consent & Agreement be enforced.

The Court hereby orders:

1. The Consent & Agreement and Directive 4 are valid and enforceable.
2. UCSF complied with Health and Safety Code section 125315, subdivision (a) by requiring Findley and Lee to execute the Consent & Agreement.
3. Findley and Lee voluntarily and intelligently entered into the Consent &

"respecting property." (Fam. Code § 721 subd. (a).)

Agreement as a precondition to UCSF performing the IVF procedure.

4. Findley and Lee agreed between themselves and with UCSF to "thaw and discard" the Embryos if they divorced when the Embryos were still in UCSF's custody.

5. UCSF may thaw and discard the Embryos consistent with Directive 4.

6. The orders of this Court are stayed for the period of time which would allow any party to appeal, and no action shall be taken with respect to the Embryos during this time.

7. If any party appeals, the orders of this Court are stayed pending decision by the Court of Appeal or dismissal of the appeal.

Dated: November 18, 2015

Anne-Christine Massullo

HON. ANNE-CHRISTINE MASSULLO
JUDGE OF THE SUPERIOR COURT