FILED
Electronically
[redacted]

[redacted]

IN THE FAMILY DIVISION

FOR THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF [redacted]

[redacted],

Plaintiff,

vs.

[redacted],

Defendant.

Case No.: [redacted]

Dept. No.: 2

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF EMBRYO CUSTODY

The Defendant [redacted]"), pursuant to this Court's order, respectfully submits this memorandum of law in support of her petition for exclusive custody of the two cryogenically preserved embryos stored with [redacted].

PRELIMINARY STATEMENT

This court has finalized Mr. [redacted] divorce and resolved distribution of all marital property. The one issue remaining, however, and severed by this Court's order from the resolution of the divorce, is a dispute about who would take custody over two cryogenically preserved embryos in [redacted], near Ms. [redacted]'s home. These embryos were the result of an IVF contract Mr. [redacted].

[redacted] executed in 2013 in [redacted]. That agreement led to the successful creation of a number of embryos, resulting in the eventual birth of *three* children. Two remaining embryos, created as a result of that IVF contract, are the subject of this dispute. In that agreement, both Mr. [redacted] expressly agreed that in the event of divorce, Ms. [redacted] would take sole custody of the embryos. But now that the divorce is final, Mr. [redacted] asks—in direct contravention of that agreement—that the court *order* the destruction of those two embryos. Ms. [redacted] for her part, opposes their destruction and seeks their custody.

Recognizing the gravity of what's at stake, this Court has ordered additional briefing on who should take custody of the embryos. *Four* independent reasons foreclose any pathway to their destruction and require that Ms. [redacted] take sole custody.

First, unlike many divorce-related embryo disputes, the parties here have *already* agreed how the embryos would be divided in their pre-divorce agreements. And those agreements are clear: Upon divorce, Ms. [redacted] should take sole custody. *Second*, Mr. [redacted] abandoned any interest in the embryos when he did not pay the storage and maintenance fees called for in the storage agreements. *Third*, Nevada law provides expressly that Mr. [redacted] is, as a matter of law, not the father of these embryos. *Fourth,* if the court decides that pre-divorce IVF agreements are powerless to resolve allocation of the embryos, there are fundamental constitutional liberties at stake which prohibit any notion that destruction or indefinite suspension of these embryos is a permissible path forward.

FACTUAL BACKGROUND

Mr. [redacted] were married in Nevada in [redacted] During their marriage, the couple struggled with fertility issues and decided to pursue in vitro fertilization ("IVF") as a means to have children together.

[redacted] the parties executed an agreement with [redacted] the "[redacted] Agreement") to undergo IVF treatment. At the time of signing the [redacted] Agreement, the marriage was intact, and both parties desired to have children together. The [redacted] Agreement expressly required the parties to designate their intentions regarding disposition of any embryos created through IVF. When completing the section entitled "Disposition of embryos in case of Divorce," the parties

were presented with three options: "Donate," "Discard," or "Custody." The parties specifically selected "Custody" and wrote Ms. [redacted] full name, "[redacted]," in the corresponding blank space to indicate the parties' informed agreement that Ms. [redacted] would take sole custody of any embryos in the event of divorce. Through this IVF procedure at [redacted] using Ms. [redacted]'s eggs, several embryos were created. *Id.* Three children were born from embryos created at [redacted] Two embryos from this IVF procedure at Emory remain cryogenically preserved, which are the subject of this dispute. [1] The other embryos were implanted unsuccessfully.

In 2014, the parties moved to Massachusetts and underwent another round of IVF treatment in 2015 at [redacted] in [redacted]. The parties executed an agreement with [redacted] (the "[redacted] Creation Agreement") for this second round of treatment. In the [redacted] Creation Agreement, when presented with options for disposition of embryos in the event of divorce, the parties chose: "A court decree and/or settlement agreement will be presented to the Clinic directing use to achieve a pregnancy for one of us or donation to another couple for that purpose." The parties deliberately did *not* select the options "Destroy the embryos" or "Award for research," further indicating their mutual intention that any embryos created would be preserved. One child was born because of the [redacted] IVF procedure. No embryos from this second IVF procedure remain, as the other embryos were implanted unsuccessfully.

It is also in 2015 that the marriage began to deteriorate, eventually leading to their decision to live separately. At the beginning of 2019, Mr. [redacted] moved to Georgia but Ms. [redacted] stayed in Massachusetts. Later that same year, though separated by then, the parties executed a "Consent Form for Storage of Cryopreserved Embryos" with [redacted] IVF (the "[redacted] Storage Agreement") to store the remaining embryos created under the [redacted] Agreement. The [redacted] Storage Agreement explicitly states that "[t]he purpose of continued storage of cryopreserved embryos" is "to save the embryos for a future attempt to establish a pregnancy." At no point in any of these agreements did either party ever choose or contemplate embryo destruction.

[1] The discovery in this case has documented that only the [redacted] embryos remain. For example, [redacted] medical records include a discussion of the fact that all embryos created because of the [redacted] Creation Agreement were depleted. See page two of the attached [redacted] IVF medical records.

Ms. [redacted] has been solely responsible for *all* financial obligations related to the storage and maintenance of the embryos. Mr. [redacted] has not contributed to the payment of any storage fees for the embryos at any point. Ms. [redacted] has personally paid the entire amount of storage fees to [redacted] IVF for the maintenance of these embryos. Mr. [redacted] has never expressed any interest in the embryos or their disposition until seeking their destruction.

Ms. [redacted] considers these embryos to be her children—not *potential* children or mere genetic material, but her living children who are in the earliest stages of development. Ms. [redacted] has maintained consistent beliefs about the value of these embryos throughout the marriage, during separation, and now during divorce proceedings. If granted custody of the embryos, Ms. [redacted] intends to bring them to term through pregnancy to be raised as part of her family. Ms. [redacted] notes that, to the extent this becomes a concern, under Nevada law (NRS 126.700), Mr. [redacted] would not be considered the legal parent of any children resulting from these embryos without his post-divorce consent. And to assuage any further concerns, she is expressly willing to waive any claim for child support from Mr. [redacted] for any children born from these embryos. Ms. [redacted] believes it would be in the best interests of these embryos to be brought to term rather than destroyed, as they represent human life and are the genetic siblings of her existing children.

ARGUMENT

I. The IVF agreements Ms. [redacted] and Mr. [redacted] executed already resolve allocation of the embryos upon divorce.

In some embryo-divorce disputes, courts—when left unaided by the existence of pre-divorce distribution agreements—may be faced with the complex task of resolving competing claims to the custody of embryos. This is *not* one of those cases. Here the parties already codified their intentions of what is to come of the embryos upon dissolution of their marriage. Where such valid, pre-divorce agreements exist, the analysis stops and the language of the agreements control. *See, e.g.*, *Szafranski v. Dunston*, 34 N.E.3d 1132, 1136 (Ill App. 2015) (enforcing a pre-separation oral agreement granting the custody and use of embryos); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (enforcing a contractual agreement regarding the disposition of frozen embryos and emphasizing that "neither party disputes

that [the consents] are an expression of their own intent regarding disposition of their pre-zygotes" and that neither "contest[ed] the legality of those agreements, or that they were freely and knowingly made"); *In re Marriage of Dahl*, 194 P.3d 834 (Or. Ct. App. 2008) (enforcing a contractual agreement regarding the disposition of frozen embryos); *Roman v. Roman*, 193 S.W.3d 40, 48 (Tex. App. 2006) (likewise enforcing an agreement between parties as to how embryos would be addressed and noting that case law evinces "emerging majority view that written embryo agreements between embryo donors and fertility clinics . . . are valid and enforceable").[2] Courts, therefore, have repeatedly enforced the terms of embryo agreements as written. The seminal case on embryo custody stressed that if—like here—a prior agreement among the parties exists, "*then their prior agreement concerning disposition should be carried out*." *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) (emphasis added).

Though the Nevada courts have not yet had occasion to resolve embryo custody disputes in divorce proceedings, Nevada case law reveals that analogous pre-divorce and pre-birth custody agreements are enforceable.[3] *See Bluestein v. Bluestein*, 131 Nev. 106, 111 (2015) ("Public policy encourages parents to enter into private custody agreements for co-parenting. As such, parties in family law matters are free to contract regarding child custody, and such agreements are generally enforceable." (cleaned up)). Pre-divorce property agreements are likewise enforceable. *Cf.* NRS 123.220(1) (underscoring that pre-divorce agreements exempting certain property as communal property are to be given effect). Courts have emphasized that "[p]arties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy" *Rivero v. Rivero*, 125 Nev. 410, 429 (2009), *overruled in part on other grounds by Romano v. Romano*, 138 Nev. 1, 6 (2022). *See also St. Mary v. Damon*, 129 Nev. 647, 660 (2013) (holding that a pre-divorce IVF "co-parenting agreement aligns with Nevada's policy of

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[2] *See also In re Marriage of Litowitz*, 48 P.3d 261 (Wash. 2002) (same); *Terrell v. Torres*, 456 P.3d 13, 17-18 (Ariz. 2020) (same); *Bilbao v. Goodwin*, 217 A.3d 977, 989 (Conn. 2019) (same); *Karmasu v. Karmasu*, No. 2008 CA 00231, 2009 Ohio 5252, 2009 WL 3155062 (Ohio Ct. App. 2009) (same); *Smith v. Smith*, 892 S.E.2d 832, 841 (Ga. App. 2023) ("[G]iven that the parties executed an enforceable agreement, there was no reason for the trial court to resort to the blended approach and/or Georgia's equitable division of property doctrine.").

[3] It is important to clarify agreements discussed herein are *not* "Gestational agreements," which the Nevada legislature has defined as "a contract between an intended parent or parents and a *gestational carrier* intended to result in a live birth," NEV. REV. STAT. § 126.570 (emphasis added), because a "gestational carrier" is defined as "an adult woman *who is not an intended parent* and who enters into a gestational agreement to bear a child conceived using the gametes *of other persons and not her own*," *id.* § 126.580 (emphases added). Ms. [redacted] is *not* a gestational carrier. She's always been and remains the intended parent of children conceived through IVF and the gametes used here are hers and not those of another person. *See* [redacted] Decl. ¶ 13.

encouraging parents to enter into parenting agreements that resolve matters pertaining to their child's best interests"); *see also id.* at 658–59 ("[P]ublic policy favors fit parents entering agreements to resolve issues pertaining to their minor child's 'custody, care, and visitation.'" (quoting *Rennels v. Rennels*, 127 Nev. 564, 569 (2011))).

In fact, the court in *Kass* emphasized that a "prior written agreement between the parties [ ] should be presumed valid, and implemented." *Kass*, 696 N.E.2d at 179. The existence of such an agreement here, therefore, resolves the issue fully and completely. Under Nevada law, "the initial focus is on whether the language of the contract is clear and unambiguous; if it is, the contract will be enforced as written." *Davis v. Beling*, 278 P.3d 501, 515 (Nev. 2012). Additionally, "[e]very word [in a contract] must be given effect if at all possible." *Royal Indem. Co. v. Special Serv.*, 413 P.2d 500, 502 (Nev. 1966); *see also Ellison v. C.S.A.A.*, 797 P.2d 975, 977 (Nev. 1990) ("[A]bsent some countervailing reason, contracts will be construed from the written language and enforced as written."). When a contract's language is clear, that ends the matter.

While the parties executed *three* IVF-related agreements, including the repeated renewal of storage agreements long after their marriage deteriorated, the relevant embryos here are the specific subject of *two* of those agreements: the [redacted] Agreement and the [redacted] Storage Agreement. All of the agreements, however, speak with a singular voice (whether taken individually or collectively): calling for the *preservation* of the embryos and never their destruction. Those codified intentions must be honored. *Three* reasons, in particular, require that Ms. [redacted] be given custody and control over these embryos here.

a. First, the embryos were created under the [redacted] Agreement which is unequivocal that, upon divorce, Ms. [redacted] takes sole custody.

On May 16, 2013, long before Ms. [redacted] and Mr. [redacted] ever contemplated separation, they "elected to undergo in vitro fertilization and embryo transfer (IVF) therapy at the [redacted] Agreement at 1. The fruit of that labor was the successful creation of a finite set of embryos. Only *two* embryos remain—*i.e.*, the two embryos that are the subject of this custody dispute. *See* [redacted] The parties' intentions could not have been clearer: Ms. [redacted] is to take exclusive custody of the embryos upon divorce. And the manifestation of that intent is easy to follow.

When asked for their decision on the "[d]isposition of embryos in case of Divorce," the parties selected "Custody" and wrote a single name in the corresponding blank space: "[redacted] [redacted] Agreement at 1 (emphasis added). Despite being presented with *two* other options—"Donate" or "Discard"—the parties chose *preservation*. But not a preservation of any kind; they each gave a clear indication that Ms. [redacted] should take custody of the embryos. Even so, Mr. [redacted] now insists the embryos should be destroyed. But that's not what the parties *ever* agreed to. And Mr. [redacted] can point to *zero* contractual provisions allowing him to demand that these embryos be destroyed in contravention of a clear, mutual manifestation of his assent that Ms. [redacted] take sole custody. As the *Kass* court noted, while "[t]he subject of this dispute may be novel[,] . . . the common-law principles governing contract interpretation are not." 696 N.E.2d at 180. More to it, "it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice." *Id*.[4]

One case that bears a striking resemblance to this one is *Marriage of Dahl*, 194 P.3d at 836. There (like here) the parties' embryo-related storage agreement allowed the parties to affirmatively designate their dispositional intent. Their agreement provided that, if the parties could not agree on a disposition, then they would "designate the following [spouse] or other representative to have the sole and exclusive right to authorize and direct [the clinic] to transfer or dispose of the Embryos." *Id*. (cleaned up). And just beneath that the parties further clarified—by writing "in a space designated 'Name'" the wife's name and each initialing it to signal their assent—that it would be the *wife* who would take custody. *Id.* The trial court thus held those agreed-upon terms over disposition must control. *Id.* at 837.

The appellate court later affirmed, though offered additional guidance that speaks precisely to the posture here. As the Court of Appeals of Oregon observed, the storage agreement "evinced the parties' intent" that the wife would decide the disposition of the pre-embryos in the event the parties could not agree on a disposition. *Id.* at 841. Indeed, the fact that "the parties [had been] given choices when they entered the agreement on possible disposition of the embryos." *Id.* The same is true here: Mr. [redacted] was given several choices

[4] In *Kass*, the Court of Appeals of New York noted: "[P]arties 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." *Kass*, 696 NE2d at 180.

when he consented to IVF Services over what would happen to those embryos upon a divorce; yet *he* freely chose to award them to Ms. [redacted]

With the divorce now finalized, the [redacted] Agreement requires that Ms. [redacted] take custody of these embryos and the temporary restraining order be lifted. *See Roman*, 193 S.W.3d at 54–55 ("By awarding the frozen embryos to Augusta, the trial court improperly rewrote the parties' agreement instead of enforcing what the parties had voluntarily decided in the event of divorce."). The cases discussed above all "involve married couples who signed forms allowing *them* to determine the disposition of their pre-embryos. Each of those cases are similar in that they all involved explicit language regarding the intended disposition . . . in the event of a specific event." *Szafranski*, 34 N.E.3d at 1161. That is precisely the situation here. The parties long ago reached a mutual agreement regarding the disposition of these embryos; their agreement should now be enforced. *See* [redacted] Agreement at 1 ("Custody: [redacted]

b. Second, far from undermining the [redacted] Agreement, the [redacted] Storage Agreement further bolsters Ms. [redacted]'s entitlement to the embryos.

Resisting this conclusion, Mr. [redacted] may contend that it is not the [redacted] Agreement (under which the Embryos were created) that should control but, instead, a subsequent storage agreement he may attempt to present as if it somehow undermines the intentions codified in the first agreement: the [redacted] Storage Agreement. Yet in reality, the opposite is true. Consistent with the [redacted] Agreement, the [redacted] Storage Agreement, executed in 2019, states upfront that it shares "[t]he *purpose* of continued storage of cryopreserved embryos" in order "*to save the embryos for a future attempt to establish a pregnancy*." [redacted] Storage Agreement at 1 (emphasis added). At the time of this agreement, Mr. [redacted] and Ms. [redacted]'s marriage had already deteriorated and they were living in two different states [redacted] Decl. ¶ 30. And so, the point of the agreement was to continue preserving the embryos. Stated plainly, it would make little sense for Mr. [redacted] to help Ms. [redacted] transport the embryos from Georgia and store them in Massachusetts—*after he's already separated from her*—if not to ensure that Ms. [redacted] would be able to eventually use them.

The [redacted] Storage Agreement, it's true, *does* have something to say about divorce: "[i]n the event of divorce or dissolution of the relationship between patient and partner, embryos cannot be used, donated or discarded without the expressed, written consent of both parties or as directed by a court order, even if donor eggs/sperm were used." [redacted] Storage Agreement at 2. Yet that language further *bolsters* Ms. [redacted]'s entitlement to sole custody for at least *two* reasons.

i. Though related, the two agreements are complementary—one for creation and the other for storage—and work together to further the parties stated goal to "save the embryos for a future pregnancy."

One, the [redacted] Storage Agreement's divorce provision neither supersedes nor modifies the [redacted] Agreement. It neither: i) contradicts anything in the [redacted] Agreement; ii) indicates any intention of modifying or superseding the [redacted] Agreement; and iii) is fundamentally about supporting the [redacted] Agreement (*i.e.*, storing the embryos created under the [redacted] Agreement versus creating new ones). *See generally* [redacted] Storage Agreement. As separate agreements, therefore, they should be read to give *each* of their terms effect. *See Phillips v. Mercer*, 94 Nev. 279, 282 (1978) ("A court should not interpret a contract so as to make meaningless its provisions.").

Taking them as distinct but related agreements yields the most sensible outcome—and the one most logically and intuitively aligned with the parties' intentions: one agreement governed the creation of the embryos in Georgia, while the other addressed their storage in Massachusetts. Both, however, were in service to "a future attempt to establish a pregnancy." [redacted] Storage Agreement at 1. So rather than being in tension, these agreements should be read to collectively effectuate the parties' purposes. *Cf.* A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."); *see also J.E. Faltin Motor Transp., Inc. v. Eazor Express, Inc.*, 273 F.2d 444, 445 (3rd Cir. 1959) ("[I]f possible, all the provisions of the contract should be given effect.").

There's another reason these agreements are complementary: The [redacted] Agreement itself is the "written consent of both parties" contemplated in the [redacted] Storage Agreement for the disposition of the embryos. In other words, the "written consent" the [redacted] Storage

Agreement calls for *had already* been satisfied by [redacted] Agreement's written, mutual expression that Ms. [redacted] take custody upon divorce. This reasoning featured heavily in the nearly identical case, *Szafranski*, 34 N.E.3d at 1132. "Nearly identical" only because in the first agreement at issue there, the parties only had an *oral* agreement. The second agreement was in writing. This case is easier in that *both* agreements are in writing and easily discernable.

In *Szafranski*, like in this case, the male partner, Jacob—who sought to destroy the embryos—argued that a post-embryo-creation informed-consent form stating that "[n]o use can be made of these embryos without the consent of both partners," *id.* at 1153, worked to contradict or modify an earlier oral agreement he had with the female partner, Karla, regarding the embryos. The trial court, however, disagreed, reasoning that the later agreement—*i.e.*, the informed consent form—"neither modified nor contradicted" the earlier agreement and, therefore, "under the terms of the Informed Consent, any use of the pre-embryos would be governed by the [earlier, oral] contract." *Id.* at 1154.

On review, the appellate court affirmed. It agreed with the trial court that the two agreements were not in tension, and then further explained that even if additional consent was technically called for by the *later* (*i.e.*, second) agreement, it had already been given through the first:

> "The form, however, specifically contemplates that another agreement between the parties may govern the future disposition of the embryos. . . . *In this case, Karla and Jacob have a* ***previous*** *oral agreement which is not contradicted or modified by any language in the Informed Consent, or by anything else that happened between the parties*." Accordingly, this Court finds that the consent language in the [Informed Consent] does not apply to Karla and Jacob under the facts in this case, and the March 24, 2010 oral agreement stands uncontradicted.

Id. at 1153 (quoting *Szafranski v. Dunston,* 2015 IL App (1st) 122975, P89 (Ill. App. 2015) (emphasis added)).

> As it went on to explain, it was critical to interpret both agreements consistently: The Informed Consent in this case contemplated the parties reaching a separate agreement as to disposition and *did not contain any language that would override the parties' prior agreement*. The Informed Consent simply provided that Northwestern would refrain from taking any action with the

> pre-embryos unless the parties both consented to such action. *Significantly, the provision requiring both parties to consent to use of the pre-embryos does not bar a situation in which the parties have reached an advance agreement—oral or written—concerning disposition*.

Id. at 1155 (emphases added).

The agreements here are nearly identical in this regard. Like in *Szafranski*, the later agreement (the [redacted] Storage Agreement) does not contain any language expressly modifying or contradicting the terms in the earlier one (the [redacted] Agreement). Beyond that, the court *must* interpret the agreements in a manner that allows both to cohere—which can only be true if the agreed-upon commitments to awarding Ms. [redacted] custody remain honored.

That said, even if the Court were to find that there is a conflict among these two agreements, the [redacted] Agreement must *still* prevail over the [redacted] Storage Agreement. Indeed, the [redacted] Agreement contains a *specific* directive of what is to come of the embryos, *see* [redacted] Agreement at 1 ("Custody: [redacted]"), whereas the [redacted] Storage Agreement contains only an indefinite invitation for further discussion, *see* [redacted] Storage Agreement at 2 (calling for either "written consent of both parties" or "a court order"). When interpreting contracts, "a specific provision will qualify the meaning of a general provision." *Shelton v. Shelton*, 78 P.3d 507, 510 (Nev. 2003). This principle ensures for contracts and statutes that "when read together, the two provisions are not in conflict, but can exist in harmony." *Matter of N.J.*, 420 P.3d 1029, 1032 (Nev. 2018). Here, the specific agreement available (which constitutes the written consent of the parties) defines precisely and specifically what should happen upon divorce and accordingly controls—even assuming the presence of a conflict.

The [redacted] Agreement stands as a clear and express statement of intent, granting full custody of the embryos to Ms. [redacted] And no evidence suggests that this intent was altered—let alone superseded or revoked—by the second agreement, which lacks any specific reference to the prior agreement. The specificity and clarity of the [redacted] Agreement renders its agreed-upon provisions the ones that should control here—whether read individually or in conjunction with the [redacted] Storage Agreement. That is to say, the parties here plainly agreed that Ms. [redacted] would take sole custody upon a divorce.

Destroying the embryos—an irreversible act—would not only contravene the plain wording behind the [redacted] Agreement but, still worse, disregard *both* parties' intent to preserve them.

ii. Because Mr. [redacted] and Ms. [redacted] were separated when they signed the [redacted] Storage Agreement, only the [redacted] Agreement's divorce provision applies.

Two, the court can determine that only [redacted] Agreement's divorce provision applies because the parties were already separated when they executed the [redacted] Storage Agreement and living over one thousand miles apart. By late 2019, Ms. [redacted] and Mr. [redacted] marriage had already deteriorated to the point of separation. At that time, Ms. [redacted] was living in Massachusetts and Mr. [redacted] in Georgia. [redacted] Decl. So, consistent with the intention that Ms. [redacted] take sole custody, the parties signed the [redacted] Storage Agreement for the embryos to remain in Massachusetts where only Ms. [redacted] lived.[5]

All of this to say that the language in the [redacted] Storage Agreement calling for "expressed, written consent of both parties" upon the "dissolution of the relationship" is, necessarily, inoperative because the relationship had been dissolved by the time they signed that 2019 agreement.[6] And it matters not that Mr. [redacted] signed this agreement—the [redacted] Storage Agreement only required a countersignature "if applicable." [redacted] Storage Agreement at 3 (calling only for the patient's partner's signature "if applicable"). But this does nothing to restore their relationship. In other words, the [redacted] Storage Agreement contemplated a *future* divorce or dissolution. Since the dissolution of the relationship and legal separation had *already* occurred by the time the parties executed it, the divorce provision in the [redacted] Storage Agreement alters nothing.

Accordingly, because the [redacted] Agreement explicitly designates Ms. [redacted] as the custodian of these embryos in the event of divorce, and because the [redacted] Storage Agreement facilitates and reinforces that designation, the contractual framework here requires that Ms. [redacted] take custody of the embryos upon divorce.

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[5] The [redacted] Agreement specifically authorized the transfer and transport of embryos to other facilities. *See* [redacted] Agreement at 2 ("We have the [redacted] of transferring our embryos outside of [redacted] Embryos may be lost or destroyed during transport. . . It is our responsibility to make the arrangements for any transfer.").

[6] It matters not that the parties were not yet formally divorced. The language in the [redacted] Storage Agreement is written in the disjunctive: "In the event of divorce or dissolution of the relationship between patient and partner . . . .[.]" [redacted] Storage Agreement at 2 (emphasis added). Since the parties' relationship had already been deteriorated at that point, this provision cannot take effect.

c. Third, the intention to preserve the embryos is made even more clear within the context of all *three* IVF agreements.

As stated earlier, while it's the [redacted] Agreement and the [redacted] Storage Agreement that directly govern these embryos, the parties really executed *three* agreements. And together they sing the same song: preserve the embryos.

Taking them in order: In the [redacted] Agreement, signed in 2013 for the creation of new embryos, the parties marked *neither* "Donate" nor "Discard." Instead, they marked "Custody[.]" *Id.* And then they wrote Ms. [redacted] name next to the "Custody:" line. *Id.* But there's more.

For *none* of the other scenarios presented to the parties calling for a decision about the disposition of the embryos did they *ever* contemplate destruction as a permissible outcome. They marked "Donate" for "Disposition of embryos in case of Death of both partners" and "Transfer" for each of "Disposition of embryos in case of Death of Female Partner" and "Disposition of embryos in case of Death of Male Partner." *Id.* So despite being prompted with a "Discard" option for each scenario, *not once* was that option selected as an acceptable choice. The intentions in the [redacted] Agreement are clear therefore: never destroy the embryos, even upon the death of both parents.

Next, in 2015, Ms. [redacted] underwent another round of IVF treatment. At this point, the parties had not yet separated and were living in Massachusetts together. So they executed the [redacted] Creation Agreement (not to be confused with the [redacted] Storage Agreement *post-separation*). Here, Mr. [redacted] and Ms. [redacted] designations as to what is to come of the new embryos mirrored nearly exactly their designations for the embryos created under the [redacted] Agreement. *First*, they indicate that they "consent to have extra embryos frozen" even though they could have easily marked "[w]e do <u>not</u> want to freeze extra embryos and we give consent to discard these embryos." [redacted] Creation Agreement at 2. Notably, this agreement expressed what was also made clear in the [redacted] Storage Agreement: "[t]he purpose of embryo freezing is to save embryos for a future attempt to establish a pregnancy." *Id.* at 1. Next, they twice indicate that in the event of the death of the other, the embryos should be "[o]wned and controlled by the" surviving partner. *Id.* at 2.

As to the divorce option in the [redacted] Creation Agreement, here again the parties chose preservation over destruction (and even research). The parties chose neither "[d]estroy

the embryos" nor "[a]ward for research," but instead the only remaining choice: "[a] court decree and/or settlement agreement will be presented to the Clinic directing use *to achieve a pregnancy* for one of us or donation to another couple *for that purpose*." *Id.* at 3 (emphases added). Again, the parties demonstrated their clear intentions that their embryos are to be preserved.[7] While the [redacted] Creation Agreement is not itself the contract at issue here, it is further evidence of the parties' intent.

Finally, the parties entered the [redacted] Storage Agreement. This, of course, has been discussed more fully above. Though particularly salient here is that—even *after* their separation—the parties once again acknowledged that the storage of their embryos was being done "to save the embryos for a future attempt to establish a pregnancy." [redacted] Storage Agreement at 1. Consistent with this sentiment, and all the other indications, the Boston Storage Agreement thus mirrors the [redacted] and [redacted] Creation Agreements: preserve the embryos, whether upon death or divorce, and never destroy them.

In sum, *each* of the IVF agreements here reveal an unbroken, mutual intention that the embryos be preserved for a future pregnancy and—just as critically—protected against destruction. What's more, Mr. [redacted] and Ms. [redacted] shared and memorialized intentions persist not only across state lines but survive even if the marriage does not. That Mr. [redacted] has changed his mind is no basis for what is otherwise made plain in every one of these agreements: that their embryos be protected from destruction and, more to it, awarded to Ms. [redacted] if they were to ever divorce.

II. Mr. [redacted] *waived* if not *abandoned* any claim to the embryos by foregoing payment of the storage fees for over ten years.

Moreover, Mr. [redacted] has legally waived or abandoned whatever underlying property interest or contractual right he might have otherwise had. This Court's October 10, 2023, order entitled "Ex Parte Clarifying October 9, 2023, Ex Parte Temporary Restraining Order; Temporary Mutual Restraining Order Regarding Parties' Frozen Embryos," speaks to why. As this Court stressed:

[7] The one instance where they mark "thaw[ ] and discard [ ]" is where the agreement provides *zero* alternative and that parties are forced to accept a form disclosure that says that if the embryos "are still in storage at the end of five years, and we have not contacted Boston IVF to make alternative, appropriate arrangements for them that are acceptable to Boston IVF our embryos will be considered abandoned and will be thawed and discarded." Boston Creation Agreement at 3 (emphasis in original).

> Mr. [redacted] does not assert he ever notified [redacted] IVF of the parties' separation or revocation of consent (although it appears the consent's finite period of validity has since expired). Indeed, Mr. [redacted] fails to identify *any* steps taken by him to effectuate his rights to prohibit use of the frozen embryos other than seeking an ex parte emergency order.

Id. at 3 (emphasis added). As Ms. [redacted] Declaration further confirms, Mr. [redacted] has never paid any support or storage fees for these embryos. [redacted] Decl. Thus since the parties' separation, he has clearly signaled his intent to abandon whatever purported interest he might have otherwise had to the embryos in question.

"Whether a person has abandoned his property is a question of intent, which we infer from words, acts, and other objective facts." *State v. Taylor*, 968 P.2d 315, 320 (Nev. 1998). The "court may infer intent to abandon 'by conduct clearly inconsistent with any intention to retain and continue the use or ownership of the property.'" *Maldonado v. Robles*, 2015 Nev. Unpub. LEXIS 1414, *2–3 (Nev. 2015) (quoting 1 Am. Jur. 2d Abandoned, Lost and Unclaimed Property § 58 (2005)). *Maldonado*, though unpublished, presents a similar posture to the one here. There the court found that, because "Maldonado did not attempt to contact Robles about his possessions at any time, did not ask her or anyone else to preserve his belongings, and made no other provision for them" before their "divorce," he abandoned his property altogether. *Id.* at *2. The exact same thing can be said here. Indeed, after signing the [redacted] Storage Agreement in 2019, Mr. [redacted] took no action or interest in these embryos until this divorce beyond signing the consent forms. He thus abandoned whatever interest he had to them long ago (wholly apart from the terms he already agreed to in the contracts, which—as covered above—require custody be awarded to Ms. [redacted]

III. Nevada law obviates any concern that Mr. [redacted] is to be made a parent over his objections.

Still resisting, Mr. [redacted] may contend that he should not be made a father over his objections. But Nevada law remedies those concerns. Mr. [redacted] is *not* the legal parent of these embryos under Nevada law. NRS 126.700 is unequivocal: If a marriage ends before embryo transfer, the former spouse is not a parent *unless* they consent post-divorce. The law specifies:

> If a marriage or domestic partnership is dissolved or terminated before the transfer of eggs, sperm or embryos, the former spouse or former domestic

> partner is not a parent of the resulting child unless the former spouse or former domestic partner consented in a record that if assisted reproduction were to occur after a dissolution or termination, the former spouse or former domestic partner would be a parent of the child.

Id.[8] This law seems to have been created precisely for this situation. Mr. [redacted] has offered no such consent. He is thus not a parent.

Should Ms. [redacted] bring these embryos to term, Mr. [redacted] would have no legal rights or duties—a fact that strips him of any legal basis for objecting to their birth. So any notion that Mr. [redacted] should not be forced into becoming a "parent" of these to-be-born children rests on a misplaced premise: that he *would* be the parent. Nevada law is controlling on this point, and it says no. He thus has no legal footing for asserting parenthood-based objections to their birth. Moreover, while Nevada law is clear, Ms. [redacted] is willing to specify an agreement to this effect, waiving any rights to child support regarding these embryos. [redacted] Decl. ¶ 55.

Any objection or concern about Mr. [redacted] being forced into parenting these embryos is, therefore, legally misplaced, as he cannot (agreement with Ms. [redacted] or not) actually be considered by law to be the embryos' parent. With this crucial legal standard acknowledged, the facts show that, should the Court set aside the contract for whatever reason, Ms. [redacted] "interest in preserving and potentially using the embryos to procreate outweigh [Mr. [redacted]'s stated interest[.]" *See In re Marriage of Katsap*, 214 N.E.3d 945, 969 (Ill. App. 2022). The Court in *Katsap* emphasized that the father's concerns in an embryo case about a duty of support were misplaced when that duty was avoidable. How much more here when—as a matter of black-letter Nevada law—Mr. [redacted] is *not* a parent to begin with. This demonstrates the lack of justification for Mr. [redacted] core argument.

IV. The embryos cannot be "destroyed" for an even more fundamental reason: They are rights-bearing *persons* with a constitutional right to live.

Although the Court need not reach this question to resolve this dispute (consistent with principles of constitutional avoidance), Ms. [redacted] would like to make one thing

[8] Although the act generally deals with "gestational agreements" (*i.e.*, surrogacy contracts), Section 126.700 deals, specifically, with scenarios like this one, where couples have excess cryogenically preserved in vitro embryos prior to divorce; it makes *no* reference to "gestational agreements."

clear: her embryo-children are, indeed, *children*. They are thus entitled to constitutional protection under the Thirteenth and Fourteenth Amendments and are not mere possessions.[9]

That is, an assumption underlying the parties' dispute over the embryos is that they are, legally speaking, marital *property* of their parent-progenitors—allowing this Court to adjudicate their respective rights to them as part of the marital estate, with the anchoring premise being that human embryos are something that can be *owned* and governed by contract. For that reason, a first-principles question any court dealing with an embryo-related dispute must grapple with is whether the embryos are legal persons or property—because, if persons, then any claim of ownership to them would run afoul of "the Thirteenth Amendment [which] removes all human beings from the category of property." *McQueen v. Gadberry*, 507 S.W.3d 127, 158 (Mo. Ct. App. 2016) (Dowd, J., dissenting).[10] It would require the Court to treat the embryos as *children*, ensuring their right to life as persons and deciding custody based on their best interests as children. *C.f., Roe v. Wade,* 410 U.S. 113, 156–57 (1973) ("If this suggestion of personhood is established, . . . the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment. The appellant conceded as much on reargument.").

The seminal embryo-custody case—*Davis v. Davis*—corroborates this point. As the Tennessee Supreme Court stressed upfront, the "fundamental" question lurking behind any embryo-related dispute is whether they "should be considered 'persons' or 'property' in the contemplation of the law." *Davis*, 842 S.W.2d at 594. That's because if the embryos are rights-bearing "persons,"[11] then they *cannot* be destroyed—demanding instead that their "best interests," as children, be kept foremost. *Id.* at 597. But if not rights-bearing persons, then agreed-upon terms "regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as

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[9] Ms. [redacted] recognizes Nevada law generally reflects the view that embryos are property, not legal persons, thus, subject to ownership. *See, e.g.*, NRS 127.710–750 (allowing courts to enforce embryo-related agreements). Even these statutes, reflecting the state legislature's view of embryos as property, must yield to *federal* principles of constitutional personhood. Ms. [redacted] raises this point not just to make clear her stance on why her children cannot be ordered destroyed, but—if she was not awarded custody—to preserve it for appeal.

[10] Historically speaking, it is true that at one time, human beings could lawfully be treated as property of another. But the Thirteen and Fourteenth Amendments did away with "property in man," making it unconstitutional for one man to claim ownership—let alone insist on the destruction—of another. *See* Anthony Sirven, *No Property In Man: A Fading Principle*, Texas Review of Law & Politics, Spring 2025 (forthcoming), Available at SSRN: https://ssrn.com/abstract=5211564 (explaining how the Reconstruction-Era Amendments prohibit owning human beings, including embryos).

[11] The *Davis* Court, ultimately, concluded it could not recognize the embryos "as 'persons' under federal law: given the then-existing constraint imposed by "*Roe v. Wade*, . . . [which] refused to hold that the fetus possesses independent rights under law[.]" *Id*. at 596. But those constraints no longer exist, placing embryo personhood back on the table. *See* Sirven, *supra* note 10 at pg. 4, n. 23.

between the progenitors," *id.*—which, for the reasons above make clear that Ms. [redacted] be given custody of the embryos and, just as critically, prohibit any party from destroying them.

Blackstone's Commentaries, the leading authority on the common law, expressly grouped the rights of unborn children with the "Rights of Persons," consistently described unborn children as "infant[s]" or "child[ren]," and spoke of such children as sharing in the same right to life that is "inherent by nature in every individual." 1 William Blackstone, Commentaries on the Laws of England 125–26. More generally, the Supreme Court recently observed that, even as far back as the 18th century, the unborn were widely recognized as living persons with rights and interests. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 246-48 (2022).

Again, this Court need not reach the constitutional questions to resolve this dispute. Enforcing the terms of the agreement, as detailed above, provides this Court narrower grounds on which it can rule. But what Ms. [redacted] must make clear—especially if Mr. [redacted] raises arguments for destroying the embryos that veer outside the governing agreements—is that these two healthy, five-and-six-day-gestated embryos have a fundamental right at stake here: the right to live.

CONCLUSION

Ms. [redacted] respectfully requests that this Court apply the plain terms of the parties' agreement and award her custody of the embryos at issue and any other relief this Court deems appropriate.

LANCE WHITE LAW PLLC

Lance C. White, Esq.
Attorney for [redacted]

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

CERTIFICATE OF SERVICE

I certify that I am an employee working for LANCE WHITE LAW PLLC, and am a citizen of the United States, over twenty-one years of age, not a party to the within action. My business address is 429 W. Plumb Ln, Reno, Nevada 89509.

On the 9th day of May 2025, I electronically filed the foregoing with the Clerk of the Court system which will send notice of electronic filing to the following:

Raymond E. Oster, Esq.

Christina J. Cullen, Esq.

Katie Duran

Katie Duran - Paralegal
LANCE WHITE LAW PLLC

EXHIBIT INDEX

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