

THE DAILY RECORD MARYLAND Family Law UPDATE

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**'IT HAS TO BE ON
THE RADAR'**

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SOGAND ZAMANI
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This “has to be on the radar of family law and estate planning attorneys,” says Jennifer Fairfax, of Jennifer Fairfax LLC in Silver Spring, of cases involving the disposition of frozen embryos.

Attorneys: Don’t wait to address the issue of frozen embryos

BY HOPE KELLER

Special to The Daily Record

A year after the Maryland Court of Special Appeals set guidelines for judges to follow regarding the disposition of frozen embryos in a divorce, family law practitioners say they are encountering the issue more and more frequently – and they implore prospective parents to establish directions for the disposition of embryos before any are created.

In a matter of first impression, the Court of Special Appeals ruled in *Jocelyn P. v. Joshua P.* in April 2021 that a frozen embryo, or pre-embryo, “can-

not be classified simply as an interest in property because it concerns interests of far broader dimension.” The case, between divorcing parents who disagreed over what to do with a frozen embryo, was sent back for a trial in which the competing interests of the two would be weighed, or balanced.

“I think it’s just going to keep increasing,” Jennifer Fairfax, of Jennifer Fairfax LLC in Silver Spring, said of cases involving the disposition of frozen embryos. “It has to be on the radar of family law and estate planning attorneys.”

Fairfax, who says she mediates but

does not litigate cases involving embryos, said she used to see such a case “now and then” but more recently has seen five or six a year.

In *Jocelyn P.*, the Court of Special Appeals cautioned judges not to rely on fertility clinics’ “third party” contracts with couples as evidence of the parties’ intent if their relationship should end.

“Given the pervasiveness of third-party informed consent agreements, we emphasize that the progenitors – not fertility centers – must expressly and affirmatively designate their own intent,” Judge Andrea M. Leahy wrote

for the court.

Fairfax, who has handled cases involving assisted reproductive technology for more than 20 years, emphasized the importance of embryo disposition contracts between prospective parents.

“If I had just one wish in the world to come true, (it would be) that when these parties went to the (fertility) clinic that the clinic told them that they must consult with counsel before they created embryos,” she said. “The clinic forms are not helpful; they’re not clear enough. They’re not necessarily a negotiated agreement between the parties.”

Without specific instructions on what to do with frozen embryos, courts must decide between the right to procreate versus the right not to procreate, Fairfax noted – adding that, based on cases in other states, courts generally lean toward the right not to procreate.

Sogand Zamani, of Zamani & Associates in Washington, D.C., emphasized the importance of resolving disputes over embryos out of court, ideally before any embryos are created or any disputes arise.

But that is not what generally happens, she said.

“People usually come to me when they’re separating, asking what to do with embryos – do they have to destroy the embryos, use, donate?” Zamani said. “All those questions could have been answered in advance, when they weren’t in a dispute.”

In a related matter, Zamani said that after the U.S. Supreme Court’s Dobbs decision, which overturned the constitutional right to an abortion, she would be cautious if a client sought to preserve embryos in a state where there are no existing laws on the status



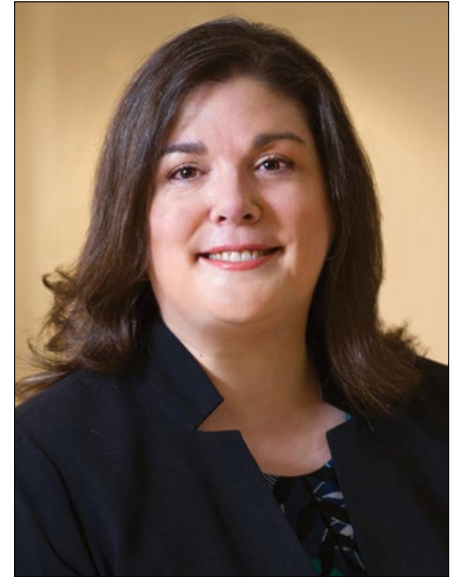
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“People usually come to me when they’re separating, asking what to do with embryos -- do they have to destroy the embryos, use, donate?” says Sogand Zamani, of Zamani & Associates in Washington, D.C. “All those questions could have been answered in advance, when they weren’t in a dispute.”

of embryos and where “personhood” statutes could be introduced. Dobbs, which came down in June, resulted in a ban on most abortions in at least 13 states.

One of Zamani’s clients even wondered if she should move her frozen embryos to a state that would criminalize their destruction to prevent her spouse from destroying them in the divorce process, Zamani said, adding that she advised the client not to do so.

Eva Juncker, a partner at Cipriani & Werner’s Washington-area office and co-chair of its DMV Family Law practice group, said that, post-Dobbs, she has had discussions with other family law practitioners about whether frozen embryos should be moved out of storage in red states.



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“Really think long and hard, spend the time and energy and money for a private party contract, not just boilerplate,” says Eva Juncker, a partner at Cipriani & Werner’s Washington-area office and co-chair of its DMV Family Law practice group.

“It’s absolutely discussions that we’re having,” Juncker said. “It’s been part of all the general discussions regarding what family law looks like in this climate.”

Like Fairfax and Zamani, Juncker said all couples planning to create embryos should find an attorney to create a binding contract that stipulates what should happen to the embryos in case of divorce or death.

“Really think long and hard, spend the time and energy and money for a private party contract, not just boilerplate,” said Juncker, who has litigated embryo disposition in divorce cases. “Get your agreement formulated in your mind and on paper with an attorney. It saves so much heartache on the other end.”

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