

f. Advise Members of the risks involved if they are unable or unwilling to contact or gain the consent of the non custodial biological or adoptive parent if the family care plan would leave the child in the custody of a third party. Strongly encourage them to obtain legal advice as far in advance of the absence as is practicable about the implications of failing to include the noncustodial biological or adoptive parent in the family care plan process. Emphasize that the failure to involve, or at least inform, the non-custodial biological or adoptive parent of custody arrangements in anticipation of an absence can undermine, or even render useless, the family care plan ....

g. Encourage Members to seek the assistance of military and community support resources, to include family support centers; legal assistance offices; family program directors, coordinators, and ombudsmen; Service relief organizations; the CEW Readiness Cell; and online resources (e.g., Military OneSource), in the completion of the family care plan.

3 From Enclosure 3, "Procedures," to Department of Defense Instruction 1342.19 -- 4. LEGAL ASSISTANCE ATTORNEYS. Legal assistance attorneys or other qualified legal counsel shall, when appropriate, ensure their clients receive:

(1) A full explanation of the potential consequences of not including the non-

custodial biological or adoptive parent in the creation of a family care plan.

(2) A discussion of appropriate courses of action, to include the benefits of validating temporary custody arrangements and the return of the child to the Member upon the Member's return, with an appropriate court.

4. Note that some states, at least in contested matters, do not allow for contingent changes of custody. See *Dellinger v. Dellinger*, 278 Ga. 732, 609 S.E.2d 331 (2004). Be sure to read the case law, understand the contrary cases, and build in as many facts and factors as possible when writing up a consensual contingency for change of custody.

# Disposition of cryopreserved pre-embryos settled in *Szafranski v. Dunston*

BY HEATHER M. HURST

On February 29, 2016, the United States Supreme Court denied the Petition for a Writ of Certiorari in the *Szafranski v. Dunston* matter, thereby effectively exhausting Jacob Szafranski's bid to overturn the June 2015, ruling of the Illinois First District Appellate Court. The United States Supreme Court's denial ends the battle that began more than four years ago when Jacob brought suit against his ex-girlfriend, Karla Dunston, to prevent her from using cryopreserved embryos created jointly by the parties.

## Case Facts

Karla Dunston, a physician practicing emergency medicine, had been dating Jacob Szafranski, a firefighter, paramedic and registered nurse, for about five months when she learned she had non-Hodgkin's lymphoma. In March 2010, Karla was informed that her chemotherapy treatment would likely make her infertile. Karla decided to delay her chemotherapy to harvest and freeze her embryos for possible future use.

Karla asked Jacob if he would provide sperm to fertilize her eggs, and create embryos which would then be frozen to be used after her cancer treatments.

Jacob agreed, and the next day went to Northwestern Hospital to begin the process of donating his sperm for the purpose of creating embryos. The parties also signed Northwestern's "Informed Consent for Assisted Reproduction" form. On the same day, the parties met with an attorney to discuss various legal options associated with the embryos. Despite numerous exchanges with several attorneys, as well as a verbal agreement between the parties that Karla would use the frozen embryos to attempt to have a child, Jacob and Karla did not execute any written agreements.

Karla's eggs were harvested and fertilized, and the procedure resulted in three frozen embryos. Karla then immediately began her chemotherapy treatments. The three frozen embryos represented Karla's last and only source of having a biological child of her own.

In May 2010, Jacob ended the parties' relationship via text message. Karla immediately responded with an inquiry about the embryos, but Jacob did not respond. On June 14, 2010, Jacob emailed Karla expressing his concerns over their separation and about the embryos. Although Jacob's e-mail detailed his thoughts and fears about fathering a

child, including but not limited to, his fear that the decision would prevent him from finding love in the future, as well as expressed that he had no desire to have a child with her, he did write the following: "I know that I must make a choice in this and choose to leave it up to you ultimately to decide Karla." *Szafranski v. Dunston*, 2015 IL App (1st) 122975-B (2015), ¶ 23.

On September 6, 2010, Jacob emailed Karla to announce that he could not let her use the embryos, and that he wanted them to be donated to science or research. Karla immediately responded that "Those embryos mean everything to me and I will fight this to the bitter end." On September 10, 2010, Jacob responded to Karla that "if [she] could put together all the documents that [he] would need to sign over the embryos [he'll] do it." Karla immediately contacted the attorney whom she and Jacob had originally consulted and requested that a sperm donor agreement be drafted. The attorney stated that Jacob would need to sign a waiver and hire separate legal counsel. Jacob waited to hire an attorney and on April 29, 2011 sent a proposed "Sperm Donation and Confidentiality Agreement," to Karla's attorney. The proposed agreement granted Karla full

custody of the embryos and required that Jacob's identity remain confidential. Jacob subsequently fired his counsel and sent Karla his own "Proposed Anonymous Embryo Donation and Confidentiality Agreement" which provided that Karla would be granted full custody of the embryos. Karla testified that she would have executed Jacob's proposed agreement; however, Northwestern indicated that it would not abide by its terms.

On August 11, 2011, Jacob filed suit against Karla seeking to enjoin her from using the frozen embryos and Karla counter-sued seeking sole custody and control over the embryos. The matter eventually proceeded to a two day trial where the trial court heard evidence and testimony from both parties, a Northwestern doctor, the attorney who met with the parties prior to the harvesting and fertilization of Karla's eggs, and Jacob's former girlfriend.

The trial court awarded Karla sole custody and control of the embryos. It found that the parties entered into an enforceable oral contract in March 2010, because it contained an "offer and acceptance and meeting of the minds regarding the disposition of the embryos.... and represents the intent of the parties, at that time, that Karla need not obtain Jacob's consent to use the embryos to attempt to have a child." *Id. at ¶ 61*. The trial court further found that Northwestern's Informed Consent, which both parties executed, specifically contemplated that another agreement between the parties may govern the future disposition of the embryos because it stated that Northwestern would abide by any agreement reached by the parties. The court ruled that the parties' previous oral agreement was not contradicted or modified by any language in the Informed Consent, or by anything else that occurred between the parties.

Even though the trial court found that the oral agreement which allowed Karla to use the embryos without Jacob's consent, controlled, the court also conducted a "balancing-of-interests analysis." The trial court held that Karla's interest in using the embryos outweighed Jacob's interest in preventing their use. Specifically, the court found that "Karla's desire to

have a biological child in the face of the impossibility of having one without using the embryos, outweighs Jacob's privacy concerns, which are now moot, and his speculative concern that he might not find love with a woman because he unhesitatingly agreed to help give Karla her last opportunity to fulfill her wish to have a biological child." *Id. at ¶ 62*.

### Appellate court decision

Jacob appealed. The Appellate Court agreed that there was a valid oral contract between the parties, and that because "great weight should be given to the principle apparent purpose and intention of the parties at the time of contracting," the trial court correctly found that the parties intended to allow Karla to use the embryos without limitation when they formed the March 24th oral contract. The Appellate Court further found that the relief Jacob sought, incorporating a limitation into the oral contract, would change the fundamental essence of the parties' oral contract. The court indicated that under Illinois case law, "a court cannot alter, change or modify the existing terms of a contract or add new terms or conditions to which the parties do not appear to have assented, write into the contract something which the parties have omitted or take away something which the parties have included." *Id. at ¶ 81*. The Appellate Court rejected Jacob's argument that the Informed Consent modified the terms of the March 24th oral contract. The Informed Consent contemplated the parties reaching a separate agreement as to disposition, and did not contain any language that would override the parties' prior oral agreement. The Informed Consent identified only three events that would require a decision as to the disposition of the embryos: 1) divorce or dissolution of marriage; 2) death or legal incapacitation of one partner; or 3) death or legal incapacitation of both partners. With respect to those events, the Informed Consent provided what would happen to the embryos. The Informed Consent did not provide for the disposition of the embryos in the event of an unmarried couple separating. The court found that the absence of any agreement as to what would occur upon such a separation could

only mean that neither Northwestern nor the parties considered what would happen to the embryos in that event. The court went on to state that Northwestern was aware of the possibility that an unmarried couple might separate, and expressly stated in the Informed Consent that it was important for the couple to decide what would happen in the case of a separation. However, the Informed Consent was silent as to a potential separation, electing instead to address other specific situations. The court found therefore that this could only be interpreted as a purposeful omission. Concluding its analysis, the court held that there was nothing in the Informed Consent which contradicted or modified the parties' oral contract.

Despite the enforceable oral contract, the trial court was also asked on remand to consider a "balancing of the parties' interests" test. In reviewing the trial court's decision, the Appellate Court concurred that Karla's interest in the embryos was paramount given her inability to have a biological child by any other means. Conversely, Jacob's concerns of harm to his future relationships were speculative, and his privacy concerns were moot due to the public nature of the case.

Jacob appealed to both the Illinois Supreme Court and then United States Supreme Court, arguing that the decision violates his right to not procreate. He argued that he was being forced into parenthood, violating his constitutional liberty interest under the 14<sup>th</sup> Amendment. The Illinois Supreme Court denied Jacob's appeal in September 2015. The United States Supreme Court denied Certiorari on February 29, 2016.

### Impact on Illinois litigants

The Court's hybrid approach is now precedent for any future embryo cases. The court found that an oral contract existed in this matter. However, the court also balanced which party had a greater interest in the fate of the embryos. In a future case, therefore, if there is no contract between the parties regarding the disposition of the embryos, a trial court will likely apply a balancing of the parties' interests test to determine the embryo's disposition.

*Szafranski* does not settle the impact that