Order

Michigan Supreme Court
Lansing, Michigan

April 25, 2025

166782

SARAH MARIE MARKIEWICZ,
Plaintiff-Appellant,

v

SC: 166782
COA: 363720
Macomb CC: 2019-003236-DM

DAVID RANDAL MARKIEWICZ,
Defendant-Appellee.

_____/

On April 9, 2025, the Court heard oral argument on the application for leave to appeal the December 7, 2023 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

ZAHRA, J. (*concurring*).

The application for leave to appeal filed in this divorce action asks us to determine the disposition of a cryogenically preserved human embryo, conceived through in vitro fertilization. The facts in this matter are unique and do not present a good vehicle to address the weighty issues arising from in vitro fertilization and the human embryos created in the process. I therefore conclude that the Court should not intervene in this case as presented. I nonetheless write to highlight the significant policy questions implicated in this case that are properly and most appropriately resolved by our legislative branch of government. Broadly speaking, the primary issue is how the law should classify and treat human embryos, frozen or otherwise, which, at a minimum, have the potential to develop into autonomous human beings. This question implicates some of the most perplexing debates in society, invoking deep-seated and conflicting beliefs about morality, ethics, religion, human life, and personal autonomy.[1]

[1] One recent high-profile example of a dispute over the legal classification and treatment of human embryos, albeit in a different state and context, was the Supreme Court of Alabama's decision in *LePage v Ctr for Reproductive Med, PC*, ___ So 3d___ (Ala, 2024), holding that the state's Wrongful Death of a Minor Act applied to cryogenically preserved embryos that had been destroyed.

In the context of divorce, some courts have treated preserved embryos as a special category of marital property to be divided by contractual agreement or equitable division.[2] Yet not all jurisdictions have accepted the premise that a human embryo should be treated as a form of property, special or otherwise.[3] Ultimately, balancing the interests at stake in disputes like this one requires judgment calls that are beyond the judicial ken. Whether embryos should be treated as property or as persons with independent interests and whether control over embryos' fates should be granted in divorce on the basis of a preexisting contract, an equitable decision of a court, child custody law,[4] or some other method are matters best understood as legislative questions.[5] Our Legislature is the appropriate body to decide the weighty policy questions presented not just in this case but also by the science of in vitro fertilization more generally. I call on the Legislature to address these issues and not abdicate its policymaking function to this Court through inaction.

---

[2] See, e.g., *In re Marriage of Rooks*, 429 P3d 579, 591-594 (Colo, 2018); *Davis v Davis*, 842 SW2d 588, 597, 603-604 (Tenn, 1992).

[3] See, e.g., *EB v RN*, 242 NE3d 791, 794 (Ohio Ct App, 2024) (disagreeing with property-based approaches to the disposition of frozen embryos in divorce because those approaches "do not account for the fact that what is involved is not property, but life or the potential for life" and noting that the "inadequacies" in the law "must be rectified by action by the legislature").

[4] See *Karungi v Ejalu*, 501 Mich 1051, 1051 (2018) (MCCORMACK, J., concurring) (highlighting a party's argument that the child custody law controlled the disposition of frozen embryos in a divorce and emphasizing that the trial court should not avoid the argument on remand).

[5] See *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 589 (2005) ("[P]olicy decisions are properly left for the people's elected representatives in the Legislature, not the judiciary. The Legislature, unlike the judiciary, is institutionally equipped to assess the numerous trade-offs associated with a particular policy choice."); *Van v Zahorik*, 460 Mich 320, 330 (1999) ("In the context of a subject matter fraught with public policy implications and the Legislature's occupation of the field of child custody with the promulgation of the Child Custody Act, the judiciary is not the proper entity to create new rights or extend theories to reach new situations.").