[Cite as *Kotkowski-Paul v. Paul*, 2022-Ohio-4567.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY

MELISSA KOTKOWSKI-PAUL,	**CASE NO. 2021-P-0088**
Plaintiff-Appellant,	
- v -	Civil Appeal from the Court of Common Pleas, Domestic Relations Division
TIMOTHY PAUL,	
Defendant-Appellee.	Trial Court No. 2019 DR 00334

O P I N I O N

Decided: December 12, 2022
Judgment: Affirmed

Joel A. Holt, Ickes\Holt, 4301 Darrow Road, Suite 1100, Stow, OH 44224 (For Plaintiff-Appellant).

Thomas J. Sicuro, Sicuro & Simon, 213 South Chestnut Street, Ravenna, OH 44266; and *Antonios C. Scavdis, Jr.,* Scavdis & Scavdis, LLC, 261 West Spruce Avenue, P.O. Box 978, Ravenna, OH 44266 (For Defendant-Appellee).

Rita Louise Gitchell, Thomas More Society Special Counsel, 309 West Washington Street, Suite 1250, Chicago, IL 60606 (Amicus).

James E. Brightbill, 1799 Akron Peninsula Road, Suite 308, Akron, OH 44313 (Guardian ad litem).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Melissa Kotkowski-Paul, appeals from the judgment of the Portage County Court of Common Pleas, Domestic Relations Division, which concluded that the cryogenically frozen embryos, which were a result of the in vitro fertilization ("IVF") of her eggs and the sperm of appellee, Timothy Paul, are marital property. The court

allocated the subject embryos to appellant but ordered she either donate them or destroy them. Although this appeal raises legal, philosophical, and potentially ontological issues relating to the way in which frozen embryos should be treated in a divorce proceeding in this state, its resolution depends not on an esoteric analysis of such points. Rather, our focus is much narrower and hinges upon what, if any, evidentiary quality materials were submitted to assist the trial court in rendering its judgment. In light of the parties' representations throughout the proceedings and the lack of any competent evidence that would demonstrate the trial court erred in entering its judgment, we affirm.

{¶2} The parties were married in May 2012. During the marriage, the parties wanted to start a family and commenced infertility treatment, including IVF and embryo transfer. They started the treatment through University Hospitals ("UH") and, in so doing, signed various documents with UH, including an Informed Consent-Embryo Cryopreservation agreement. The parties ultimately terminated services through UH and, in July 2014, began infertility treatment through the Cleveland Clinic. The treatment at the Cleveland Clinic also involved the process of IVF and embryo transfer. The parties maintained they signed similar informed-consent documents with the Cleveland Clinic, but neither party could produce any record of the contract. Appellant eventually became pregnant and delivered twins in April 2015. The remaining frozen embryos were kept in storage.

{¶3} In August 2019, appellant filed a complaint for divorce. During the proceedings, the parties reached an agreement regarding all issues binding them during their marriage with the exception of the disposition of the frozen embryos. Appellant argued the court should award her the frozen embryos with the ability to dispose of them

as she sees fit, including the option to implant them in her body or in that of a surrogate. Appellee argued the embryos should be either donated or destroyed because he strenuously opposed becoming a father to another child or children, particularly with appellant. Appellee underscored his position by pointing out he had a vasectomy procedure.

{¶4} On July 21, 2021, the trial court filed its final order of divorce. At the time of the divorce, appellant was 42 years old and appellee was 70 years old. On the only issue in dispute, the trial court first ruled that "both parties argued that the frozen embryos are marital property subject to distribution by this court. Therefore, the Court shall not delve further into an analysis under the 'human life' or 'interim status' characterization of the frozen embryos." Next, the trial court determined, after balancing the parties' relative personal and constitutional interests, that appellant should be "awarded the frozen embryos subject to the restriction and prohibition that she may not use the frozen embryos to impregnate herself or a surrogate. She may only donate or destroy the embryos."

{¶5} Appellant now appeals and assigns five errors relating to the manner in which the trial court treated and allocated the subject embryos. In a divorce, "[t]he trial court's role in dividing the [marital] property is to evaluate all relevant facts and arrive at an equitable division." (Citation omitted.) *Forcier v. Forcier*, 11th Dist. Geauga No. 2019-G-0192, 2019-Ohio-5052, ¶27. A trial court's division of property in a divorce is reviewed under an abuse of discretion standard. *Id*.

{¶6} Appellant's first assignment of error provides:

{¶7} "The trial court committed reversible, prejudicial error when it incorrectly declined to consider whether the subject embryos were human life and instead

determined them to be property subject to distribution and destruction, in violation of the rights of mother under the Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution and Article I, [Sections] 1 and 20 of the Ohio Constitution."

{¶8} Although appellant assigns five discrete errors and amicus curiae, American Association of Pro Life Obstetricians & Gynecologists,[1] also assign five errors, the primary issues are twofold: (1) Did the trial court err in concluding the embryos were marital property, subject to statutory allocation, as opposed to human life, which cannot be so allocated; and (2) If not, did the court err in ordering appellant to either give the property away or destroy the property. Appellant's first assignment of error concerns the first issue.

{¶9} Initially, we point out that the trial court found that both parties *agreed* the frozen embryos are marital property. Although both parties did argue at great length the embryos are marital property (by virtue of the alleged provisions in the Cleveland Clinic contract), appellant also argued (in the alternative) and for the first time, in her post-trial brief, that the embryos are human life and therefore cannot be treated like ordinary property. Significantly, however, prior to filing her post-trial brief, this issue was not broached. And appellant did not provide the court with any evidentiary-quality materials to support her position or critically seek to re-open the trial to offer any evidence. Still, in

1. We note that amicus curiae is entitled to submit arguments in support of appellant's position. And this court has considered those arguments. To the extent, however, amicus has assigned error in addition to the arguments advanced by appellant, we shall not consider the same. Because amicus is not a party to the action, let alone a legally aggrieved party, it lacks standing to present an assignment of error to which this court must respond. *See State v. Gibson*, 8th Dist. Cuyahoga No. 82087, 2003-Ohio-5839, ¶12, fn 1. *See*, *also*, *Kenwood Lincoln-Mercury, Inc. v. Daimlerchrysler Corp*., 1st Dist. Hamilton No. C-000784, 2002 WL 10073 (Jan. 4, 2002), *2, fn 1.

the interest of a comprehensive analysis, we shall address appellant's argument in relation to the manner in which it was raised.

{¶10} In support of her position, appellant contends that "modern science" has established that frozen embryos are "human life," and as such, the embryos are entitled to the same dignity and rights as any other legal person. Because of their status as human life, appellant urges the embryos cannot be understood as mere property subject to allocation as a typical inanimate object or piece of personalty might.

{¶11} Only two other appellate districts have addressed the issue of embryo allocation in the context of a divorce proceeding. Each case, however, involved a fully executed, pre-IVF contract that provided for the disposition of frozen embryos. In *Karmasu v. Karmasu*, 5th Dist. Stark No. 2008 CA 00231, 2009-Ohio-5252, the Fifth District treated the embryos as property and divided the same pursuant to the contract. The court observed that the trial court had no authority to interfere with the valid contract entered between the parties to the divorce and the third-party clinic. Thus, the appellate court held the trial court did not err in finding the allocation of the embryos was controlled by the contract. *Id.* at ¶38.

{¶12} Similarly, in *Cwik v. Cwik*, 1st Dist. Hamilton No. C-090843, 2011-Ohio-463, the First District, following *Karmasu*, found the pre-IVF contract controlled the allocation of the embryos. The court in *Cwik* also rejected the husband's claim that the Thirteenth Amendment to the United States Constitution, which prohibits slavery and involuntary servitude, rendered the pre-IVF contract unconstitutional. The court noted that the husband failed to cite any authority to support his position that the Thirteenth Amendment applies to frozen embryos. And, the court underscored that, as of the date of its decision,

"[c]ourts have not afforded frozen embryos legally protected interests akin to persons, and such frozen embryos would not be considered persons under the Thirteenth Amendment." *Id.* at ¶57. Although the aftermath of the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), which committed the regulation of abortion to the legislature of each state, may change this statement of law, no Ohio statute has been codified to extend frozen embryos statutory personhood.

{¶13} Here, the parties signed a pre-IVF contract with UH. Once they terminated services with UH, however, that contract was terminated. Both parties recognized they entered into a pre-IVF contract with the Cleveland Clinic. Appellant claimed the contract was "similar" to the UH contract, but neither party was able to produce the executed Cleveland Clinic contract; only a copy of a blank Cleveland Clinic form. As no signed contract was presented and the trial court did not find that the evidence supported appellant's position that the UH contract was sufficiently similar to the executed Cleveland Clinic contract the parties failed to produce, we are compelled to conclude that neither *Karmasu* nor *Cwik* are precisely on point in this matter.

{¶14} An additional Ohio case has addressed the legal status of frozen embryos, although not in the context of a divorce proceeding. In *Penniman v. Univ. Hosps. Health Sys., Inc.*, 8th Dist. Cuyahoga No. 107406, 2019-Ohio-1673, plaintiffs, the Pennimans, brought actions against the hospital for declaratory judgment and wrongful death damages based upon the destruction of their frozen embryos which occurred when the hospital's freezer failed. The Pennimans sought a judgment declaring that the life of a person begins at the moment of conception and thus the legal status of an embryo is that

of a legal person. The hospital moved to dismiss the declaratory judgment action for failure to state a claim upon which relief could be granted. The trial court granted the motion, concluding that an embryo not implanted into the uterus does not constitute a "distinct human entity" and thus is not a legal person with corresponding rights. The Pennimans appealed.

{¶15} The Eighth Appellate District affirmed the dismissal. The court held that, as a matter of first impression, Ohio law conferred no rights on frozen embryos prior to implantation. ("The state legislature has not extended the rights of the fetus to an embryo." *Id.* at ¶14).

{¶16} In arriving at its decision, the Eighth District examined the interplay of various statutes which offered legal definitions of the terms "person," "unborn human individual" and "fetus," as set forth in R.C. 2901.01(B), former R.C. 2919.19(J), and former R.C. 2919.19(B), respectively. The court set forth the following statutory definitions:

{¶17} "R.C. 2901.01(B) defines a 'person' as 'i. An individual, corporation, business trust, estate, trust, partnership, and association; ii. An unborn human who is viable.' R.C. 2901.01(B)(1)(a). [Former] R.C. 2919.19(J) [, now R.C. 2929.19(A)(15),] defines an 'unborn human individual' as 'an individual organism of the species homo sapiens from fertilization until live birth.' [Former] R.C. 2919.19(B) [, now R.C. 2929.19(A)(5),] defines a 'fetus' as 'human offspring developing during pregnancy from the moment of conception and includes the embryonic stage of development.'" *Penniman*, *supra*, at ¶11.

{¶18} The court observed that a hallmark condition for a status of a "person" under Ohio law is "viability" as defined under R.C. 2901.01(B)(1)(c)(ii). The court observed:

> **{¶19}** What the Pennimans miss is that while an "unborn human individual" under Ohio law begins at the moment of conception, in order for an unborn human to constitute a "person" under the statute, the unborn human must be viable. Ohio law defines "viable" as "the stage of development of a human fetus at which there is realistic possibility of maintaining and nourishing of life outside the womb with or without temporary artificial life-sustaining support." R.C. 2901.01(B)(1)(c)(ii). An embryo does not fit within this definition. As the trial court in this case concluded: "If a nonviable fetus is not a distinct human entity, then certainly an embryo which has not been implanted into the uterus, and which accordingly is not even as yet a fetus, cannot be found to be more than that." *Penniman*, *supra*, at ¶12.

{¶20} The court therefore determined the trial court correctly concluded that an embryo that has not been implanted into a uterus of a woman does not constitute a "distinct human entity" and is therefore not entitled to the rights and protections of a person. *Id.* at ¶29.

{¶21} Although the Eighth District's majority engaged in a careful statutory review in affirming the trial court's dismissal, the dissenting judge determined the declaratory action should not have been dismissed pursuant to Civ.R. 12(B)(6). The dissenting judge pointed out that the dismissal involved a declaration of rights premised upon statutory interpretation, rather than a judgment premised simply on the complaint itself. Moreover, the dissenting judge pointed out that the statutes upon which the majority relied are criminal in nature. He then cogently noted:

> **{¶22}** Under the plain language of [R.C. 2901.01(B)], * * * the legislature unambiguously declared that the definition of "person" provided in R.C. 2901.01(B)(1) is limited in usage and only applies to any section contained in Title 29 of the Revised Code "that sets forth a criminal offense." That section is inapplicable to the current dispute. Applying the criminal definition of "person" to this civil matter contravenes the unambiguous language of the statute. We should not put words in the legislature's mouth." *Penniman*, *supra*, at ¶34 (Gallagher, J., dissenting).

{¶23} Moreover, in conjunction with the plain language of R.C. 2901.01(B)(1), limiting the definition of the term "person" to R.C. Chapter 29, Ohio's criminal code, the Supreme Court has noted that definitions of terms in a civil statute should not necessarily be interpreted to have the same meaning in a criminal statute. *Werling v. Sandy*, 17 Ohio St.3d 45, 49 (1985). The dissenting judge in *Penniman* observed that the converse of this principal should be equally true: Namely, that "[c]ourts should not rely on the definition of a word in a criminal statute to necessarily import the same meaning in the civil sense." *Penniman*, *supra*, ¶35 (Gallagher, J., dissenting). Given the dissenting judge's observations in *Penniman*, we decline to follow the statutory analysis employed by its majority. This, however, does not imply we disagree with the conclusion reached by the *Penniman* majority.

{¶24} While we think the *Penniman* majority erroneously relied upon definitions set forth in the Ohio criminal code to affirm the dismissal of the declaratory action, it underscores the conspicuous absence of any statutory provision that could somehow confer any rights upon a frozen embryo.

{¶25} Although we noted above that the factual distinctions of *Karmasu* and *Cwik* render them distinguishable from this matter, both cases ostensibly agree that a valid contract entered into between parties who are seeking IVF and an IVF clinic is enforceable. As such, the manner in which the contracting parties elect to dispose of or allocate any extant frozen embryos in the event of a divorce controls. Nevertheless, implicit in those holdings is the principle that the frozen embryos *are marital property* that are subject to contractual provisions regarding their ultimate destiny. As discussed

above, the parties failed to provide the trial court with the executed Cleveland Clinic contract that would have resolved their dispute.

{¶26} With the foregoing in mind, the trial court filed its judgment on divorce on July 21, 2021. In that entry, the court observed that the only remaining issue for disposition was the allocation of the subject embryos. The trial court further stated: "The parties agreed to present oral arguments, a joint exhibit consisting of their contract with the Cleveland Clinic, and briefs for the Court's consideration regarding the sole unresolved issued [sic.] of the disposition of the frozen embryos. The Court granted the parties leave of fourteen (14) days to submit the contract as a joint exhibit. The Court granted the parties fourteen (14) days thereafter to submit their respective briefs relating to the disposition of the disposition of the frozen embryos." Notably, the parties agreed to file a *joint* exhibit vis-à-vis the Cleveland Clinic contract and neither party sought to re-open the final hearing to present evidence on the issue.

{¶27} Later, on December 16, 2020, counsel for appellant filed a subpoena duces tecum to the Cleveland Clinic Medical Records Department to obtain "any and all documents, consent forms and contracts related to Embryo Cryopreservation between the parties and Cleveland Clinic," as well as any similar documents related to IVF and embryo transfer between the parties and Cleveland Clinic."

{¶28} Approximately one week later, the trial court filed a judgment entry noting, among other things, that counsel for both parties advised the court regarding the subpoena and they assured the court they would take "other legal measures necessary to secure a copy of the parties' contract."

{¶29} On February 8, 2021, however, the trial court filed a judgment wherein it stated that counsel for both parties advised the court that, despite their best efforts, they were unable to secure "the complete contract with the Cleveland Clinic relating to the parties' frozen embryos." In particular, counsel requested a copy of the contract from the fertility clinic associated with the Cleveland Clinic; requested a copy of the contract from legal counsel for the Cleveland Clinic; requested a copy of the contract from previous counsel representing the parties in litigation initiated against the Cleveland Clinic; and requested the contract through a subpoena to the Cleveland Clinic. The trial court noted that the parties acquired approximately 19 pages of a total 22-page contract.

{¶30} Counsel represented that it did not appear that they had any other measures by which the ostensibly relevant aspects of the contract could be obtained. Accordingly, counsel requested that they submit the documentation in their possession and their briefs in support of their relative positions. The court granted the request. Again, at no point did counsel for appellant or appellee seek to re-open the underlying case to submit additional evidence (whether in the form of testimony or sworn documentation) to supplement the record for the trial court's consideration.

{¶31} On February 18, 2021, the parties filed a joint motion for extension of time to file their post-trial briefs. In the joint motion, counsel for the parties asserted they had recently determined the 19 of 22 pages related to the UH IVF contract, not the Cleveland Clinic contract. In these "other medical records," counsel represented they were able "to obtain the exact date the parties signed the agreement with the Cleveland Clinic." As a result, counsel intended on contacting Cleveland Clinic's record keeper(s) with this information. The trial court granted the joint motion.

{¶32} On March 11, 2021, appellant filed her post-trial brief in which she argued the trial court should find that the embryos are hers for "disposal," a term which, she argued included implantation. Appellant, in support of her position, attached a blank IVF contract from the Cleveland Clinic Beachwood Fertility Center. She, in effect, attempted to analogize the blank contract to the contract into which she and appellee entered to assist the trial court in its decision. The blank contract included an informed consent provision. In that provision, the blank contract provided:

> **In the event that, prior to implantation of the frozen embryo(s), we terminate our marriage through divorce, dissolution, or annulment, we hereby agree that: (check one):**
>
> **___ The frozen embryos are the sole property of _____**
> **(Choose one: Wife or Husband), who may dispose of them as she/he sees fit.**
> **___ The frozen embryo(s) will be destroyed.**
> **___ The frozen embryo(s) may be donated to another person.**
> **___ The frozen embryo(s) may be donated to research.**

{¶33} In light of the limiting language of the blank contract, and regardless of appellant's interpretation of the term "disposal," the meaning of the term, as set forth in the contract to which appellant wished to analogize the executed contract, that she failed to produce, was quite narrow and would not contemplate implantation. In other words, the blank contract appeared to provide for three means of "disposal": destruction, donation to a third party, or donation for research.

{¶34} Further, as discussed above, for the first time, wife advanced her public-policy, "human-life" argument in her post-trial brief. In that portion of her brief, she cited to numerous articles and websites to support her position. Again, we emphasize, at no point did wife seek to re-open the final hearing to bring forth expert testimony to provide any evidence for the court's consideration of her argument.

{¶35} Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Hearsay is inadmissible unless it falls under an exception to the Rules of Evidence. Evid.R. 802. Evid.R. 803 sets forth the various exceptions to the hearsay bar.

{¶36} Evid R. 803(18), which permits the admission of statements from learned treatises, provides in relevant part:

{¶37} The following are not excluded by the hearsay rule, even though the declarant is available as a witness * * *[:] To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

{¶38} By its very language, Evid.R. 803(18) permits the admission of learned treatises during *the testimony* of expert witnesses. The exception is not a stand-alone provision which allows any article or website to be considered for the truth of the matter asserted. It is only triggered when an expert testifies.

{¶39} Appellant did not request a hearing on her "human-life" argument or move to re-open the final hearing to submit expert testimony (which may or may not have been sufficient) for the introduction of the articles and/or websites cited in her post-trial brief. In short, appellant advanced *no competent evidence* for the trial court to evaluate her "human-life" argument.

{¶40} Additionally, both parties jointly agreed they would submit the Cleveland-Clinic contract to the trial court and brief the issue of the allocation of the embryos based upon that contract. The contract was not produced; the *fact*, however, that both parties expressed their intention to address the allocation of the embryos pursuant to the terms of the contract demonstrates both parties, until the filing of appellant's post-trial brief, intended to treat the embryos as marital property.

{¶41} That appellant decided to make her public policy argument as an alternative to her contractual argument is of no moment. She did not submit any admissible, sworn evidence in support of the argument. Because it was incumbent upon appellant to properly submit admissible evidence to the trial court, and the record is devoid of any such evidence, we cannot consider the merits of appellant's "human-life" argument.

{¶42} It is the burden of an appealing party to demonstrate error on appeal. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199 (1980); App.R. 9(B). Further, App.R. 9(B)(1) imposed a duty on appellant "to ensure" the appellate record included that which was necessary for review of his assignments of error. And App.R. 16(A)(7) requires an appellant include in her brief an argument containing her contentions with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes*, and parts of the record on which appellant relies.* The current record does not include any evidence to support the "human-life" argument. We must therefore presume regularity in the proceedings below. We discern no abuse of discretion in the trial court's judgment.

{¶43} Because appellant submitted no competent evidence in support of her position *and* both parties agreed there was a controlling contract (although not submitted

to the court), we conclude the trial court did not err in concluding the subject embryos are marital property subject to allocation as part of the division of such property.

{¶44} Appellant's first assignment of error lacks merit.

{¶45} Appellant's second and third assignments of error provides:

{¶46} "[2.] The trial court committed reversible, prejudicial error by engaging in the 'balancing test' approach to dispose of the subject embryos, giving undue and prejudicial deference to father's wishes, while ignoring the wishes of mother, the best interest of the unborn children and the unborn children's siblings, and by focusing only on negative implications, all in violation of the rights of mother under the Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution and Article I, [Sections] 1 and 20 of the Ohio Constitution.

{¶47} "[3] The trial court committed reversible, prejudicial error when it balanced mother's and father's procreational rights and determined that 'imposing a forced procreation and involuntary parentage' on father violated public policy and ordered mother to donate or destroy the subject embryos in violation of the rights of mother under the Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution and Article I, [Sections] 1 and 20 of the Ohio Constitution."

{¶48} Appellant's second assignment of error asserts the trial court erred in employing the balancing test to determine the manner in which the frozen embryos should be allocated because it gave undue weight to appellee's interests over her interests. Similarly, appellant's third assignment of error argues the trial court committed error when it determined appellee's rights had primacy over her rights, especially in light Ohio's legal

framework that, appellant argues, gives preference of custody to a mother to that of a father.

{¶49} Initially, appellant's argument that the trial court erred in rendering its judgment because Ohio statutes give preference to a mother in matters of custody is without merit. "Legal custody" is defined as "a legal status that vests in the custodian the right to have physical care and control *of the child* and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities." R.C. 2151.011(B)(21). As determined above, Ohio law does not recognize the frozen embryos as children and thus, any arguable legal preference vis-à-vis custody does not apply to this case. As noted above and as established at oral argument, appellant did not include the parties' frozen embryos in their proposed agreement for the allocation of parental rights and responsibilities.

{¶50} Next, we shall address the trial court's use of the balancing test first. As noted previously, only two cases in Ohio have addressed divorce-oriented distribution of frozen embryos and they have determined the pre-IVF contract controlled the issue. *See Karmasu, supra,* and *Cwik, supra*. Hence, this case presents the first time an appellate court in Ohio has been called upon to address the various methods of determining frozen-embryo distribution. Other states considering the matter, including the trial court in this case, recognize three approaches when considering distribution: the contractual method (as employed by the two Ohio cases), contemporaneous-mutual-consent method, and the balancing method. *See Jessee v. Jessee*, 866 S.E.2d 46, 51-52 (Va. 2021).

{¶51} Under the contractual approach, a court considers a contract between the parties and the clinic with which they were treated during the IVF process. *Id.* If the contract is valid and enforceable, the inquiry ends and the contractual provisions govern. This approach is embraced by the majority of jurisdictions that have addressed the issue. See *Karmasu*, *supra*; *Cwik*, *supra*; *Jocelyn P. v. Joshua P.*, 250 A.3d 373, 381 (Md.2021); *Bilbao v. Goodwin*, 217 A.3d 977, 992 (Conn.2019); *Szafranski v. Dunston*, 34 N.E.3d 1132, 1147 (Ill.2015); *In re Marriage of Dahl & Angle*, 194 P.3d 834, 840 (Or.2008); *Roman v. Roman*, 193 S.W.3d 40, 48 (Tex.2006); *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y.1998); *Davis v. Davis,* 842 S.W.2d 588, 598 (Tenn.1992), *Cf. A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 (Mass.2000) (noting that it would not uphold an agreement between the parties if it "would compel one donor to become a parent against his or her will").

{¶52} Under the contemporaneous-mutual-consent approach, the frozen embryos must remain in storage until the parties reach an agreement regarding disposition. *Jessee*, *supra*, at 52, citing *Bilbao*, *supra*, at 985; *see, also*, *In re Marriage of Witten*, 672 N.W.2d 768, 777-78 (Iowa 2003). "If the parties cannot agree, then the status quo is maintained, and 'the pre-embryos remain in storage indefinitely.'" *Jessee*, *supra*, quoting *Bilbao*, *supra*, at 985. It would appear, particularly in light of the Massachusetts' appellate court's holding in *A.Z.*, *supra*, this approach may be an extension of the contractual approach.

{¶53} With the foregoing in mind, where no agreement exists or, in this case, deemed controlling, courts use the third approach, which balances the parties' competing interests. *See, e.g., Jocelyn P., supra*, at 380; *In re Marriage of Rooks*, 429 P.3d 579,

593-94 (Colo.2018); *Davis*, *supra*, at 603-04. "'Recognizing a couple's cryogenically preserved pre-embryos as marital property of a special character, the underlying principle that informs [the] balancing test is autonomy over decisions involving reproduction.'" *Jessee*, *supra*, at 53, citing *Rooks, supra*, at 593 (citation omitted). The balancing approach requires a trial court to weigh the parties' respective interests in the frozen embryos. *Jessee*, *supra*, at 52, citing *Bilbao*, *supra*, at 985; *see also McQueen v. Gadberry*, 507 S.W.3d 127, 145-47 (Mo.2016) (affirming award of joint ownership to both of the spouses using the balancing approach).

{¶54} In determining the best approach to resolving this case, it bears emphasis that the disposition of frozen embryos implicates both parties' constitutional rights. *See, e.g., Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.") If the trial court determined a viable and valid contract existed, which it did not, such an agreement would likely remove any constitutional concerns as it would have represented the parties knowing and voluntary intentions at the time of the IVF treatment. And, irrespective of how the frozen embryos are treated, "'[t]he law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation.'" (Citation omitted.) *Spercel v. Sterling Industries, Inc.*, 31 Ohio St.2d 36, 38 (1972). Absent a valid and enforceable contract, however, it stands to reason that a court should employ the balancing approach, which balances the parties' interests to best respect their opposing constitutional rights. *See Jessee*, *supra*, at 55; *see also McQueen*, *supra*, at 144-145.

{¶55} Both parties acknowledged there is an executed contract; because it was not produced, the court was unable to apply the instrument. Furthermore, neither party mutually consented to an agreed-upon allocation of the remaining embryos. In effect, therefore, the trial court had no alternative but to employ the balancing approach. Accordingly, we hold the trial court did not err in employing the balancing approach because, in doing so, it took into account and addressed the parties' competing constitutional concerns.

{¶56} Appellant asserts, however, that the trial court unfairly afforded greater deference to appellee's interest in not becoming a parent over her interest in preserving her right to procreate, as well as the frozen embryos interests. We do not agree.

{¶57} Initially, as discussed at length in appellant's first assignment of error, the frozen embryos were properly treated as marital property. The parties acknowledged the contract they entered into with Cleveland Clinic, and throughout the balance of the proceedings at issue, including trial and post-trial motions for extensions to file and supplement the briefing on the issue of allocation of the embryos, they intended the letter of the contract to control the allocation of the embryos. Although the parties could not produce the contract, this does not change the parties' recognition that the contract *would have* controlled the allocation. This demonstrates the parties, until appellant filed her post-trial brief, viewed the embryos as marital property. In this respect, we shall not hypothetically impute any legally or constitutionally protected interest to the frozen embryos.

{¶58} That said, in its judgment entry, the trial court explored the parties' specific interests and the potential impact its decision would have on the parties' existing two children. Specifically, the trial court observed:

> **{¶59}** In the instant case, plaintiff indicated an intent to use the frozen embryos to either impregnate herself or a surrogate to effectuate the birth of a child. Neither party presented any evidence of their respective ability, or inability, to become a genetic parent through means other than the use of the frozen embryos at issue or the reasons they undertook IVF in the first place. Defendant's brief articulated emotional, financial, and logistical hardships that would befall him in the event plaintiff's use of the frozen embryos resulted in the birth of his child. There was no direct evidence or argument that either party engaged in bad faith or attempted to use the frozen embryos as unfair leverage in the divorce process.
>
> **{¶60}** * * *
>
> **{¶61}** The decision to become a parent carries with it significant responsibility and legal ramifications. There are long lasting repercussions. At the least, the Court must consider the implications associated with custody, parenting time, child support, and inheritance. The Court must also consider the effect of a subsequently born child on [the parties' children].
>
> **{¶62}** Absent adoption or other legal termination of parental rights, both parents are entitled to enjoy parenting privileges and have an ongoing obligation of support. Prospective parents do not have the power to waive rights to or obligations for future children, nor can they divest the Court of its jurisdiction and duty to protect the best interest of a child. There is not legal remedy available to terminate parental rights to an embryo as it is not recognized in Ohio as a child. Thus, there is no legal mechanism to terminate the obligation of child support or eligibility to inherit.
>
> **{¶63}** The aforestated issues are just a select few of many legal controversies. The reality of the new family dynamics that would be created by a subsequently born child to plaintiff from the use of the frozen embryos should not be overlooked or minimized. In his brief, defendant hypothecates a situation wherein he picks up [the parties' children] to exercise parenting time and a younger child, born from the frozen embryos, is present. In his words, the situation would be

'untenable.' However awkward or painful it may be for defendant, the Court must also consider the situation as it relates to [the parties' children], and the subsequently born child.

{¶64} In the event [the parties' children] are told or learn that defendant is the subsequently born child's father, they are bound to be confused, at the least. They are likely to question the nature of defendant's relationship, or lack thereof, with the child. They are apt to question defendant's support, or lack thereof, of the child.

{¶65} In the event [the parties' children] are not told about the child's parentage, they may well realize the fact on their own if the child bears a natural resemblance to them and/or defendant. At that juncture, [the parties' children] could become confrontational, not only with defendant, but also with plaintiff, if they perceived they have been lied to. In the end, the birth of a child from the frozen embryos after the parties' divorce will impact [the parties' children's] best interest, the nature and extent of which cannot be predicted.

{¶66} The subsequently born child would also be impacted. Defendant unequivocally stated that he does not desire to have any other children. He is 'vehemently opposed to having embryos utilized by plaintiff, either by implantation in her own body or in the body of a surrogate.' In the absence of a legal mechanism to terminate his parental rights and responsibilities, the child could grow up possibly knowing defendant is the biological and legal father but having no relationship with him or support from him. The child could watch defendant pick up [the parties' children], interact with them, love them, and support them, yet enjoy none of those benefits personally. The situation would be emotionally damaging, at a minimum, and most probably not be in the child's best interest.

{¶67} * * *

{¶68} * * * [T]he Court cannot turn a blind eye to knowledge that the frozen embryos may, if successfully implanted and developed to maturity, result in the birth of a child. The law provides that a person has a constitutional right to procreate [*Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965)] and a constitutionally protected right not to procreate. [*Eisenstadt*, *supra*] 'These are "personal rights of such delicate and intimate character that direct enforcement of them by any process of the court should never be attempted." [*Doe v. Doe*, 365 Mass. 556, 559 (1974) citing *Kenyon v. Chicopee*, 302 Mass. 528, 534 (1946)].

> **{¶69}** The Court concurs with the determination in *A.Z. v. B.Z.*[, *supra*] that "[a]s a matter of public policy . . . forced procreation is not an area amenable to judicial enforcement." The Court finds that the resulting consequence of imposing a forced procreation and involuntary parentage upon Defendant would be violative of public policy.

{¶70} The trial court weighed the parties' constitutional interests and concerns. Even though the court determined that, in these circumstances, appellee's negative interests prevailed over appellant's affirmative interests, we cannot conclude the court exhibited bias or some iniquitous motive in rendering its decision. The court simply determined appellee's interests, in light of all surrounding factors, including the couple's two children's interests, were entitled to slightly more weight than those expressed by appellant. We do not, however, see how, in weighing the evidence and concerns, the court gave appellee's interests *undue* weight. Appellant can save her frozen embryos from destruction through donation to another infertile couple. She may also have the option to contract with the Cleveland Clinic for an embryo exchange that would allow her to have another child in the event that she is unable to become pregnant without IVF.

{¶71} We therefore conclude the court did not err in rendering its findings and concluding appellee should not be forced to procreate. In light of the evidence and the court's analysis, we hold the trial court's decision in this regard was equitable and within its sound discretion.

{¶72} Finally, appellant takes issue with the trial court's usage of the phrases "forced procreation" and "involuntary parentage." Appellant maintains appellee voluntarily procreated and became a parent upon agreeing to IVF treatment which

produced the subject frozen embryos. We perceive no meaningful problem, let alone error, in the court's terminology.

{¶73} Initially, we do not agree with the characterization that appellee procreated and became a parent upon the successful creation of the embryos. As we held under appellant's first assignment of error, appellant failed to provide evidence that the frozen embryos are legal persons under Ohio law. As such, the words "procreation" and "parentage" only make sense to the extent the embryos are implanted, they grow appropriately and mature in utero, towards the end of, at some developmental point, they obtain some legal standing under the law. Whatever that point might be, it is beyond the scope of this appeal. Appellee and appellant engaged in the IVF process. That process resulted in the subject embryos. There was simply no evidence offered to support the position that the resulting frozen embryos were offspring from reproduction, i.e., procreation in its common meaning. Hence, we need not reach, let alone conclude, the parties became "parents" of the embryos upon their creation.

{¶74} Regardless of the foregoing, in employing the phrases "forced procreation" and "involuntary parentage," the trial court did not ignore the obvious fact that appellee was one of the necessary progenitors of the frozen embryos. Instead, the court was noting that if appellant were permitted to implant the embryos into her or another's uterus and the embryos were ultimately born, he would be the actual father of one or more children. Appellee strongly objected to such an outcome and represented that he had a vasectomy. If appellant were afforded the ability to implant the embryos and she exercised the opportunity, her actions would *compel* appellee to be an *involuntary* father. We accordingly discern no issue in the trial court's characterizations.

{¶75} Appellant's second and third assignments of error lack merit.

{¶76} Appellant's fourth assignment of error asserts:

{¶77} "[4.] The trial court committed reversible, prejudicial error by ordering a government compelled abortion or adoption in violation of the rights of mother under the Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution and Article I, [Sections] 1 and 20 of the Ohio Constitution.

{¶78} Appellant contends that the trial court's decree constitutes a government compelled abortion or adoption.

{¶79} Statutorily, Ohio defines "abortion" as follows:

{¶80} "* * * the purposeful termination of *a human pregnancy* by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead fetus or embryo." R.C. 2919.11. (Emphasis added.)

{¶81} "Adoption is defined as a court action in which an adult assumes legal and other responsibilities for *another person*, usually a minor." Legal Almanac: The Law of Adoption, Section 1:1. (Emphasis added.)

{¶82} As the frozen embryos at issue have not been implanted in a woman's uterus, the destruction of the same would not involve the termination of a human pregnancy. The order would not compel an abortion.

{¶83} Appellant's fourth assignment of error lacks merit.

{¶84} Appellant's fifth assignment of error provides:

{¶85} "[5.] The trial court committed reversible, prejudicial error by ordering mother to 'donate or destroy' the subject embryos, which it had previously declared to be her property, in violation of mother's rights under the Fifth, Ninth, and Fourteenth

Amendments to the U.S. Constitution and Article I, [Sections] 1 and 20 of the Ohio Constitution."

{¶86} Appellant claims that the trial court's dispositional order requiring her to either donate or destroy the frozen embryos was an abuse of discretion. Specifically, appellant maintains the trial court, in ordering her to either donate or destroy the frozen embryos, violated her constitutional rights because, even if they are merely considered "reproductive tissue," they were, at least in part, a result of her reproductive tissue. Again, appellant offered no evidence to support her "human-life" argument and thus, her argument lacks merit.

{¶87} An appellate court will not disturb the trial court's distribution of marital property absent an abuse of discretion. *Sedivy v. Sedivy,* 11th Dist. Geauga Nos. 2006-G-2687 and 2006-G-2702, 2007-Ohio-2313, ¶19. An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler,* 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶88} As this court held above, the embryos represent, in the present case, marital property. Regardless of how the frozen embryos came into being, this does not change their status. Because they are marital property, they are subject to allocation. And, as we also previously determined, the trial court gave due weight to each party's interests, as well as the surrounding circumstances, in finding appellee's wish *not* to be a father again reasonable and equitable. Appellant's argument that the order violated her rights because the embryos are an extension of her reproductive tissue lacks merit.

{¶89} We shall next consider the substance of the dispositional order.

{¶90} R.C. 3105.171(J)(2) provides:

{¶91} (J) The court may issue any orders under this section that it determines equitable, including, but not limited to, either of the following types of orders:

{¶92} * * *

{¶93} (2) An order requiring the sale or encumbrancing of any real or personal property, with the proceeds from the sale and the funds from any loan secured by the encumbrance to be applied as determined by the court.

{¶94} Appellant acknowledges that a trial court may order the sale of property but asserts that such an order may only be issued if neither of the parties *wants* the property. R.C. 3105.171(J) does not support appellant's qualification. Indeed, it merely states that a court may order the sale of real or personal property if it deems the sale *equitable*.

{¶95} Moreover, the statute does not limit equitable orders to selling property. Rather, the statute provides that it may order a sale under subsection (J)(2), but it is not limited to such an option. Hence, even though the statute affords the domestic court latitude to sell property, it may also fashion, as equity demands, an order that comports with the potentially unusual nuances of the parties' unique circumstances.

{¶96} To say the least, the parties in this case presented the court with unique circumstances. As a result, to the extent the dispositional judgment was equitable, we discern nothing procedurally or technically problematic with the trial court's order to give appellant the discretion to either dispose of or donate the subject embryos.

{¶97} Moreover, we point out that the trial court's order, in substance, traces the language of the blank, Cleveland-Clinic contract *submitted by appellant* in her post-trial brief. That contract allowed for the "disposal" of remaining, un-used embryos by means

of destruction, donation to a third party, or donation for research. The trial court's judgment is, in effect, consistent with the blank Cleveland Clinic contract appended to appellant's brief.

{¶98} Also, it bears noting that there was a striking dearth of evidence regarding appellant's future ability to have additional children with another person. In its judgment, the court made the following uncontested findings:

> **{¶99}** Neither party provided the Court with any testimony or evidence detailing the complications they experienced in attempting to become pregnant, health issues which prevented them or may prevent either of them individually from conceiving naturally, or efforts to conceive through infertility treatments, including, but not limited to, *In Vitro* Fertilization ("IVF"). [Emphasis sic.]

{¶100} In short, it would not appear there was any evidence before the court that would indicate, at the time of the final hearing, appellant suffered from any essential reproductive issues that would prevent her from attempting to proceed, either naturally or through IVF with another partner, with pregnancy.

{¶101} With above points in mind, we conclude the trial court's determination that afforded appellant the discretion to destroy or donate the frozen embryos is equitable. Appellant may choose to donate the property with the recognition that she may elect to seek IVF with another partner. Or she may elect to destroy the property. Appellee does not desire to be a parent anew and there is nothing in the record showing that appellant fundamentally and necessarily requires appellee's donation to her eggs to actualize her possible desire to have children via natural or IVF methods in the future. R.C. 3105.171(J) contemplates orders regarding property in service of equity. As we have held above, the court's decision is equitable and thus it did not abuse its discretion in issuing its order.

{¶102} Appellant's fifth assignment of error is without merit.

{¶103} For the reasons discussed in this opinion, the judgment of the Portage County Court of Common Pleas, Domestic Relations Division, is affirmed.

MATT LYNCH, J., dissents with a Dissenting Opinion.

MARY JANE TRAPP, J., concurs with a Concurring Opinion.

MATT LYNCH, J., dissents with a Dissenting Opinion.

{¶104} It is a curious Decree of Divorce that divides purportedly marital "property" by awarding it to a party and then ordering that party to "donate or destroy" the property. It is a curious appellate decision that concludes that the implantation of this property into a uterus would render the "progenitor" of the property into "the actual father of one or more children." *Supra* at ¶ 74. It is curious that both the trial and appellate courts endeavor to support their conclusions by speculating upon what this property might feel when watching the father pick up the parties' other children, "interact with them, love them, and support them, yet enjoy none of those benefits personally," and sparing the "property" such disappointment by ordering it destroyed. *Supra* at ¶ 66. I respectfully dissent.

{¶105} The fundamental issue before this Court is the nature of the four cryogenically preserved embryos created from the father's sperm and the mother's eggs. The trial court claimed that "both parties argued that the frozen embryos are marital property subject to distribution" and so declined to "delve further into an analysis under the 'human life' or 'interim status' characterization of the frozen embryos." The majority acknowledges that, in fact, there was no stipulation by the parties that the embryos

constituted marital property. Nor, if it is established that the embryos do constitute human life, would the parties be able to alter that fact any more than the parties could stipulate that a house is a child for purposes of assigning parental rights and responsibilities.

{¶106} The parties below argued in the first instance that the embryos should be disposed of according to their contractual agreement. Such arguments do not necessarily presuppose that the embryos are property inasmuch as children are commonly the subjects of parenting and custody agreements. Just as the mother argued alternatively for the preservation of the embryos as life, the father argued below for the destruction of the embryos, in the absence of a binding contractual agreement, "on public policy grounds that no individual should be forced to become a parent against his or her will." The fundamental issue of the nature of the embryos was inherent in these proceedings regardless of the parties' and the lower court's desire to avoid the issue by appeal to contractual agreement.

{¶107} The majority, in turn, recognizes that the mother raised the issue but then avoids giving it any substantive consideration on the grounds that she "did not submit any admissible, sworn evidence in support of the argument." *Supra* at ¶ 41. In the absence of such evidence, the majority finds itself constrained to "presume regularity in the proceedings below" and unable to "consider the merits of appellant's 'human-life' argument." *Supra* at ¶ 42 and 41. Of course, there is an equal absence of admissible, sworn evidence to support the position that embryos constitute property and the majority never explains why, in the absence of any evidence on the issue, there should be a presumption in favor of the embryos being property rather than life. There is nothing uncertain or esoteric about the creation and nature of the embryos. Rather, the most

basic facts about the embryos are scientifically so well-established that they may be judicially noticed and, moreover, conclusively favor the position the embryos are human life. This will be discussed below. The majority eschews considering the "potentially ontological issues" regarding the nature of the embryos as entailing "esoteric analysis" and prefers, instead, to adopt a "much more narrow" focus on the "the lack of any competent evidence that would demonstrate that the trial court erred in entering its judgment." *Supra* at ¶ 1. The parties believed there was a contract governing the disposition of the embryos but there was not. The mother argued in the alternative "for our legal system to acknowledge what science has already proven," thereby invoking the Court's power to judicially notice that the embryos are human life. It would have been reasonable for the lower court to schedule a further hearing to address the issue. The lower court declined to "delve further" into the mother's argument for the life of the embryos while mistakenly claiming the parties "asserted that frozen embryos are property" – without acknowledging the mother's argument to the contrary and without any competent evidence that the embryos are property. Despite its claim not to delve into the issue, the court recognized that "the frozen embryos may, if successfully implanted and developed to maturity, result in the birth of a child" – again without evidentiary foundation. The court then proceeded to order the destruction or donation of the embryos based, in part, on public policy concerns about "forced procreation." Such is the record that the majority claims we are prohibited from considering on account of evidentiary and procedural rules.

{¶108} With all this I disagree. The lower court's failure to recognize the mother's argument was error and merits reversal. Since the issue was raised, the lower court had

an obligation to receive evidence if necessary to properly resolve the issue and its failure to do so was error and merits reversal. Lastly, the question of whether the embryos constitute human life cannot be waived as though the mother had failed to object to hearsay. It is not the sort of adjudicative factual issue that is particular to any given case, as though the embryos may be human life in one case but property in another depending on the quality of the witnesses and inclinations of the finder of fact. Rather, the question of whether the embryos are human life "presents one of those extremely rare situations in which the plain-error doctrine must be invoked in order to prevent a manifest miscarriage of justice." *Reichert v. Ingersoll*, 18 Ohio St.3d 220, 223, 480 N.E.2d 802 (1985). The disposition of human life as property, which admittedly has odious precedent in American jurisprudence, constitutes just such a manifest miscarriage of justice. Regardless of whether the argument was properly raised or supported with admissible, sworn evidence, the judgment before this Court rises to the level of plain error and so merits reversal.

{¶109} The essential evidence establishing the nature of an embryo as human life are established scientific facts and, therefore, susceptible of being judicially noticed. In Ohio, "courts will take judicial notice of scientific facts which are commonly recognized." *Schlenker v. Bd. of Health of Auglaize Cty. Gen. Health Dist.*, 171 Ohio St. 23, 24, 167 N.E.2d 920 (1960). "It is a rule of law, which has been declared by the federal courts, in which rule we concur, that courts may take judicial notice of any scientific fact which may be ascertained by reference to a standard dictionary." *Indus. Comm. of Ohio v. Carden*, 129 Ohio St. 344, 350, 195 N.E. 551 (1935), quoting *Thrailkill v. Smith*, 106 Ohio St. 1, 4 138 N.E. 532 (1922); 31A Corpus Juris Secundum, Evidence, Section 142 (2022)

("[j]udicial notice may be taken of generally known scientific facts, and of facts, although not matters of common knowledge, which are generally accepted as irrefutable by scientists").[2]

{¶110} Beginning with standard dictionary references, the common characteristic in the definitions is that an embryo represents life in an early stage of development. According to the Merriam-Webster Dictionary, an embryo is "an animal in the early stages of growth and differentiation that [is] characterized by cleavage, the laying down of fundamental tissues, and the formation of primitive organs and organ systems." Merriam-Webster, *embryo*, https://www.merriam-webster.com/dictionary/embryo[3]; compare "an animal that is developing either in its mother's womb or in an egg," Cambridge Dictionary, *embryo*, https://dictionary.cambridge.org/us/dictionary/english/embryo; "[a]n embryo is an unborn animal or human being in the very early stage of development," Collins, *embryo*, https://www.collinsdictionary.com/us/dictionary/english/embryo; "the young of a viviparous animal, especially of a mammal, in the early stages of development within the womb," Dictionary.com, *embryo*, https://www.dictionary.com/browse/embryo. TheFreeDictionary.com provides a collection of definitions for embryo from various

2. "Courts have taken judicial notice of the laws of physics, of the operation of the law of gravity and the tendency of water to seek its lowest level, and of the toxic properties of mercury, its conversion by natural processes into methyl mercury, and the deleterious effects of such substances on humans and on fish and other wildlife. In addition, courts have taken judicial notice that carbon monoxide gas is lighter than air; that horsepower relates to power to haul a load, which in turn relates to weight, momentum, and friction; that any liquid heated to 880 degrees Fahrenheit and coming into contact with any part of the human anatomy probably will cause injury; that gasoline and kerosene stored in large quantities are dangerously inflammable substances and that gasoline when confined and mixed with air will explode on contact with fire; that bacteria harmful to humans are found in raw milk and that pasteurization is an effective way to destroy the bacteria; that wells in a particular locality frequently produce water containing noticeable amounts of hydrogen sulfide, the removal of which was most commonly accomplished by aeration; that heroin is a narcotic drug and is habit-forming; and that ink can be manufactured from a great variety of substances." (Footnotes omitted.) 42 Ohio Jurisprudence 3d, Evidence and Witnesses, Section 57 (2022).

3. Unless otherwise indicated, all websites cited were accessed on December 8, 2022.

medical dictionaries. In virtually every instance the definition given is a variation on the idea that an embryo is an organism in the early stages of development. *See* The Free Dictionary by Farlex, *embryo*, https://medical-dictionary.thefreedictionary.com/Embryo. In light of these definitions, the supposition that the embryos are property by default cannot be seriously countenanced.

{¶111} It should be recognized that there is some variation in the scientific literature about the term embryo. Although it is generally used to refer to the single-cell organism produced by conception or fertilization and its subsequent development, as the parties and the lower court have done in the present case, there are a variety of more specific terms employed to describe the organism prior to implantation in the uterine wall. The term "zygote" is the common term used to describe the immediate product of conception before cell division occurs. The next stage is the "morula," formed after the cleaving of the zygote, and then the "blastocyst," a ball of cells prior to implantation.

> [T]here is no universal agreement about when the [embryonic] period begins. Some call the cleaving morula, or even the zygote, the *embryo*, so with this classification scheme, the period of the embryo begins as early as immediately after fertilization or as late as 3 days after fertilization. Others use the term *embryo* only after the conceptus starts implanting into the uterine wall at the end of the first week of gestation, or becomes fully implanted into the uterine wall at the end of the second week of gestation. Still others use the *embryo* only in the fourth week of gestation, after the embryonic disc becomes three dimensional and a typical tube-within-a-tube body plan is established.

Shoenwolf, Bleyl, Brauer, and Francis-West, *Larsen's Human Embryology*, Elsevier (6th Ed.2022), 3. The variation in terminology need not distract us inasmuch as there is no dispute regarding the nature of the organism created at fertilization regardless of whether it is denominated embryo, zygote, or conceptus. *Compare* Cleveland Clinic Fertility

Center, IVF Procedures, https://my.clevelandclinic.org/departments/fertility/lab/ivf-procedures ("To understand in vitro fertilization, it is necessary to understand the natural conception process. In the middle of a normal menstrual cycle, an egg is released from the ovary into the fallopian tube. Fertilization occurs in the fallopian tube, where the fertilized egg remains for several days while dividing and becoming an early embryo. A few days later, the embryo enters the uterus and implants in the uterine wall.").

{¶112} The following facts may also be judicially noticed as being generally accepted as irrefutable by scientists. An embryo or zygote constitutes a genetically distinct entity created from the father's sperm cells and the mother's egg cells. Those sperm and egg cells carry the father's and mother's genetic material respectively. The embryo does not. In fact, the embryo cannot be said to bear the genetic constitution of any other existing organism. Moreover, this genetic distinctiveness is fixed at conception. Nothing in the subsequent development of the organism, neither cleavage nor the creation of the blastocoel nor implantation, alters or contributes to the genetic character of the embryo. *See* Amended Brief of Amicus Curiae American Association of Pro Life Obstetricians & Gynecologists at 4 ("[e]ach embryo [has] a unique set of DNA marking them chromosomally male or female and governing all future development in the uterus and beyond"). Also, an embryo, unlike other cell tissues, is constituted so as to develop as a self-directed organism toward a more mature stage of development. This is fundamentally different from the way blood cells or other bodily tissues function. It is in the nature of the embryo to develop into the fetus. It is in the nature of blood cells to function as blood cells. *See* Amended Brief of Amicus Curiae American Association of Pro Life Obstetricians & Gynecologists at 6-7 ("an embryo behaves not as a cell

aggregate, or mere tissue, but as a developing human organism (a whole being) with the cells working in an organized manner for the development of the whole, not simply for that of the individual cell").

{¶113} This second point bears emphasizing. Regardless of the superficial similarities between an embryo and other human cells, the embryo or zygote is without question the first stage in human development. The definitions cited above establish this proposition as do more specialized or technical sources. The following is from a current textbook in embryology.

> Human development is a continuous process that begins when an **oocyte** (ovum) from a female is fertilized by a **sperm** (spermatozoon) from a male to form a single-celled **zygote** * * *. Cell division, cell migration, programmed cell death (apoptosis), differentiation, growth, and cell rearrangement transform the fertilized oocyte, a highly specialized, totipotent cell, the zygote, into a multicellular human being.

Moore, Persaud, and Torchia, *The Developing Human: Clinically Oriented Embryology*, Elsevier (11th Ed.2020), 1; Sadler, *Langman's Medical Embryology*, Wolters Kluwer (12th Ed.2012), xii ("[t]he process of progressing from a single cell through the period of establishing organ primordia * * * is called the period of **embryogenesis**").

{¶114} The preceding facts are beyond reasonable dispute and establish the character of the embryos as human life. Additional support for the proposition that life begins at conception and, therefore, that the embryos at issue herein are not property is found in the Brief of Biologists as *Amici Curiae* in Support of Neither Party, filed with the United States Supreme Court in the case of *Dobbs v. Jackson Women's Health Org.*, __ U.S. __, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022). This brief was submitted on behalf of a group of 70 scientists "committed to providing the [Supreme] Court with the best

available science in service of promoting science awareness and combatting science miscommunication on both the fertilization view and the broader discussion of when a human's life begins." Brief of Biologists at 1.

{¶115} The *amici curiae* demonstrate that "[a] review of recent discoveries and the development of scientific literature since *Roe* [*v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973),] reveals a strong consensus that agrees fertilization – a process which starts with sperm-egg binding and is completed by sperm-egg pronuclear fusion – is the starting period of the self-directed development and life cycle of a human organism and thus the life of a human." (Footnotes omitted). *Id.* at 12-13. The consensus is strong indeed. In a survey conducted between 2016 and 2018 of 5,577 biologists from 1,058 academic institutions, ninety-six percent of the participants affirmed that a human's life begins at conception. *Id.* at 24-28.[4] In addition to the survey, the *amici curiae* cite the following sources as authority: "the biological and life sciences literature, as peer-reviewed articles represent the fertilization view as a fact of biology that requires no explanation or citation"; "legislative testimony from scientists that suggests there is no alternative view in the scientific literature"; and "statements by prominent abortion doctors and abortion advocates who affirm the fertilization view." *Id.* at 4. The conclusion to be drawn from the evidence: "a human zygote is, from a biological perspective, a human organism classified as a member of the Homo sapiens in the same way as an infant, a

4. "Of the participants who provided analyzable data, 5,577 biologists from 1,058 institutions provided analyzable data on operative questions. Most of the biologists in the sample identified as male (63%), non-religious (63%) and the majority held a Ph.D. (95%). Ideologically, most of the sample identified as liberal (89%) and pro-choice (85%). The sample was comprised of biologists from 86 countries." *Id.* at 26, fn. 84. The survey was conducted as part of a doctoral dissertation for the University of Chicago: Steven A. Jacobs, *Balancing Abortion Rights and Fetal Rights: A Mixed Methods Mediation of the U.S. Abortion Debate*, available at https://perma.cc/GZT2-8JDN.

teenager, or an adult; a human zygote is simply a human being in the first stage of a human's development, whether fertilization be deemed a process or an event." (Footnotes omitted.) *Id.* at 14-15.

{¶116} The conclusion that an embryo represents human life is consistent with definitions from Ohio's Revised Code. For the purposes of Title XXIX, the criminal code defines an "unborn human" as "an individual organism of the species Homo sapiens from fertilization until live birth." R.C. 2901.01(B)(1)(c)(i). Similarly, an "unborn human individual" is defined as "an individual organism of the species homo sapiens from fertilization until live birth" with respect to sections 2919.19 to 2919.1910 of the Revised Code. R.C. 2919.19(A)(15). Admittedly, these definitions are not controlling inasmuch as their applicability is expressly limited to the provisions of Title XXIX. Nonetheless, the fact that the Ohio legislature has recognized and adopted the prevailing scientific view that life begins with fertilization in the criminal context should be given great weight in considering the nature of the embryo in the present context. This is particularly so given the absence of any statute in the Revised Code that is inconsistent with the proposition that human life begins at fertilization.

{¶117} The majority fails to acknowledge any of these facts of biology. The embryos are deemed to be marital property, because none of what is known about embryology and the origin of life is recognized by this Court and they are subject to equitable division in the same manner as the parties' GEM electric utility cart or New Holland Tractor. Indeed, in the majority's view the farm machinery is perhaps deserving of more protection than the embryos, since presumably the majority would never compel the destruction or transfer of valuable farm equipment as marital property. It does not

require “evidentiary quality material” to recognize the accepted scientific facts regarding the nature of an embryo.

{¶118} Once the nature of the four cryogenically preserved embryos as human life is recognized, the lower court’s decision to award them as property to the mother on the condition that she destroy or donate them must be reversed. Admittedly, there is no precedent as to the proper analysis in these precise circumstances. Nevertheless, the treatment of human life as property is both legally and morally unsound. While there may not be, as the majority notes, any statutory provision directly conferring rights upon a frozen embryo, there are a multitude of constitutional and statutory provisions to support the proposition that human beings possess an unalienable right to life.

{¶119} As human beings, the embryos would be entitled to the right to life guaranteed by the Fourteenth Amendment to the United States Constitution (“nor shall any State deprive any person of life * * * without due process of law”) and Article I, Section 1 of the Ohio Constitution (“[a]ll men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty”). Both of these provisions reflect the self-evident truth on which our country was founded, that “all men are created equal [and] are endowed by their Creator with certain unalienable Rights, that among these are Life.” An honest and coherent application of this truth is that men are endowed with these inalienable rights from the time of their creation, that is, according to the science, at the moment of their conception. It is equally honest and disheartening to recognize that neither the Fourteenth Amendment nor Article I, Section 1 have been applied in this manner.

{¶120} Any consideration of the application of the Fourteenth Amendment to the unborn must necessarily consider the now discredited case of *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147. In addressing this issue, Justice Blackmun observed that, if the personhood of the fetus could be established, the case for abortion "collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." *Id.* at 156-157. Blackmun's denial of personhood to the unborn did not rest on a clearly defined notion of who or what constitutes a person under the Fourteenth Amendment. Rather, he noted that other uses of the word "person" in the Constitution only had postnatal application and that there was legal abortion in the nineteenth century. On this basis, he concluded that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158. It is interesting to contrast the reluctance of the Supreme Court to directly address personhood with the position of the author of the Fourteenth Amendment's due process clause, Ohio Congressman John Bingham: "the only question to be asked of the creature claiming [Fourteenth Amendment] protection is this: 'Is he a man?'" Hollowell, *Defining a Person Under the Fourteenth Amendment: A Constitutionally and Scientifically Based Analysis*, 14 Regent U.L. Rev. 67, 68 (2001-2002). Bingham's position was echoed by the Supreme Court itself a few years prior to *Roe*. In *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968), the Court addressed the issue of whether illegitimate children were "persons" within the meaning of the Fourteenth Amendment. The Court's conclusion was succinct and, notably, equally applicable to the embryos at issue herein: "They are humans, live, and have their being," and, therefore, "[t]hey are clearly 'persons' within the meaning of the * * * Fourteenth Amendment." *Id.* at 70.

{¶121} Even more dubiously, Justice Blackmun in *Roe* dissociated the concept of personhood from human life itself. When the Court addressed the argument that "life begins at conception and is present throughout pregnancy," it did so "apart from the Fourteenth Amendment." *Id.* at 159. That is, the fact that life might be present at conception and throughout pregnancy did not merit consideration under the Due Process Clause. Rather, the possible existence of life within the womb raised the issue of whether the State possessed an interest in protecting that life, not whether that life had any interest in its own existence. Blackmun responded to the argument by claiming ignorance: "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus [as to when life begins], the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Id.* Whatever merit there was in the judiciary's claim to ignorance in 1973, such a claim is no longer viable fifty years later. The basic facts regarding the nature of an embryo set forth above, that from the moment the zygote comes into being it begins a process of self-directed division by which it develops into an increasingly complex multicellular organism, are not subject to dispute. Nor do they rely on a consensus of philosophers or theologians and require no speculation. In the present day, they are established scientific facts.

{¶122} Section 1, Article I, of the Ohio Constitution guarantees the right to the enjoyment of life to all men. This constitutional provision has been recognized as "broader in that it appears to recognize so-called 'natural law,' which is not expressly recognized by the Bill of Rights or any other provision of the United States Constitution, although it is recognized in the Declaration of Independence." *Preterm Cleveland v. Voinovich*, 89 Ohio App.3d 684, 691, 627 N.E.2d 570 (10th Dist.1993). "In that sense, the Ohio

Constitution confers greater rights than are conferred by the United States Constitution, although that Constitution has been construed very broadly so as to maximize the nature of the individual rights guaranteed by it." *Id.* Indeed, the Ohio Constitution would confer greater rights inasmuch as it applies to human beings without regard for the legal status of personhood.[5] Section 1, Article I, however, does not afford express constitutional protection to the unborn regardless of the fact that they are humans, live, and have their being. The Ohio Supreme Court has held that this provision is without legal force in the absence of enabling legislation.

> Similar to the language in the Declaration of Independence and other state constitutions, the language in Section 1, Article I of the Ohio Constitution is not an independent source of self-executing protections. Rather, it is a statement of fundamental ideals upon which a limited government is created. But it requires other provisions of the Ohio Constitution or legislative definition to give it practical effect. This is so because its language lacks the completeness required to offer meaningful guidance for judicial enforcement.

State v. Williams, 88 Ohio St.3d 513, 523, 728 N.E.2d 342 (2000).

{¶123} Ohio statutory law is inconsistent in guaranteeing the right to enjoy life with respect to the unborn. On balance, however, Ohio statutory law clearly favors the position that life begins at conception and that embryos are unborn humans. As noted above, the criminal code recognizes the principle that life begins at conception (fertilization) and that an embryo represents human life. R.C. 2901.01(B)(1)(c)(i) (unborn human); R.C. 2919.19(A)(15) (unborn human individual). While not controlling in the civil context, these definitions are persuasive inasmuch as they are consistent with the current scientific

5. "The word 'men' as used in this section and as used in the Declaration of Independence is used in its generic sense and includes all people." *Preterm* at 690, fn. 3.

understanding of when life begins and are not contradicted by or inconsistent with other provisions of the Revised Code. While recognizing the humanity of embryonic life, Ohio law (at least the criminal law) disassociates life from personhood in a manner reminiscent of *Roe v. Wade*. Within the criminal code, a "person" includes "[a]n unborn human who is viable," i.e., "the stage of development of a human fetus at which there is a realistic possibility of maintaining and nourishing of a life outside the womb with or without temporary artificial life-sustaining support." R.C. 2901.01(B)(1)(a)(ii) and (c)(ii). Were these statutes applied to the present situation, the lower court's classification of the embryos as property would still be erroneous regardless of whether the embryos are accorded the status of legal personhood.

{¶124} A final statutory consideration weighing heavily in favor of the preservation of the embryos is the fact that "[i]t is the public policy of the state of Ohio to prefer childbirth over abortion to the extent that is constitutionally permissible." R.C. 9.041; *compare also* R.C. 5101.55(A) ("[n]o person shall be ordered by a public agency or any person to submit to an abortion"). Unlike the other provisions discussed, the stated preference for childbirth is not limited to the criminal code. While it is possible to object that the destruction of the embryos would not constitute an abortion inasmuch as it would not involve the termination of a pregnancy, R.C. 2919.11 (abortion defined as the "termination of a human pregnancy"), their destruction equally frustrates the goal of childbirth.

{¶125} The foregoing statements of law all favor the recognition of the embryos as human life and undermine their treatment as property. While it may be correct, as the majority suggests, that legislation is required to establish the rights of an embryo before implantation, no legislation, from the bench or otherwise, is needed to recognize the

scientific fact that a human embryo is human life and not property. As noted above, life does not necessarily entail personhood. Conversely, a lack of rights attaching to persons does not preclude the existence of life.

{¶126} The majority argues that "[t]he trial court weighed the parties' constitutional interests and concerns" but fails to note that it also considered the feelings and emotional damage to the unborn children currently in the embryonic stage of development. *Supra* at ¶ 70. After finding such emotional trauma is "most probably not in the [unborn] child's best interest," *supra* at ¶ 66, the trial court nonetheless found that the "child" is mere property subject to transfer or destruction. The majority agrees and so suggests that "Appellant can save her frozen embryos from destruction through donation." *Supra* at ¶ 70. Thus, the majority offers the mother a Solomon-like choice, either give up your (unborn) child or it will be destroyed. Unlike Solomon, however, the majority offers no relief from its edict.

{¶127} It is readily acknowledged that recognizing the embryos as human life entitled to protections would entail pragmatic problems and difficulties. Such issues do not excuse the courts from making that recognition. Nor is it necessary for this Court to resolve all such issues. The question before this Court is whether the lower court's decision to treat the embryos as marital property and dispose of them accordingly is error. It is error. And given the foregoing facts and law, the only imperative is that the lower court rule in such a way as to preserve life.

{¶128} It is fitting to conclude by considering how the issue has been treated in another jurisdiction. The current law and the prior history of the Federal Republic of Germany provides both a model to be followed and an example to be avoided. Germany

passed the "Embryo Protection Act" in 1990. It provides that only three embryos may be transferred during in vitro fertilization, more eggs may not be fertilized than can be transferred in one treatment cycle, and, under the Act, "cryopreservation of human embryos is forbidden."[6] Federal Embryo Protection Act, available at https://www.rki.de/SharedDocs/Gesetzestexte/Embryonenschutzgesetz_englisch.pdf?__blob=publicationFile (accessed Dec. 8, 2022); Shields, *Which Came First the Cost or the Embryo? An Economic Argument for Disallowing Cryopreservation of Human Embryos*, 9 J.L. Econ. & Policy 685, 709 (2013).

{¶129} It has been widely recognized that Germany's history with eugenic abuses committed by Nazis paved the way for the passage of this law. The atrocities that gave rise to this point of view during Nazi rule in Germany have been well-documented. It serves as an example of how exposure to such traumatizing circumstances impacts society's willingness to stand up for those who cannot protect themselves.

{¶130} Thus, while concerns may be expressed that treating embryos as more than mere property will create legal difficulties, Germany's law has proven that this is not the

6. Although it does not have laws that rise to the same level of protection as Germany, the state of Louisiana also affords additional protections beyond those typically provided to embryos in the United States. In Louisiana, "[a]n in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb * * *." Louisiana Revised Statutes 9:123. Since "[a] viable in vitro fertilized human ovum is a juridical person," it "shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person." Louisiana Revised Statutes 9:129. Thus, unused, frozen embryos may not be discarded.

case.[7] Establishing or interpreting laws to prohibit the treatment of embryos as property actually creates fewer difficulties in application of the law. In Germany, there are few cases dealing with custody disputes of embryos since such embryos are implanted quickly, typically within a matter of weeks, according to Mayo Clinic. *See* Barak-Erez, *IVF Battles: Legal Categories and Comparative Tales*, 28 Duke J. Comp. & Intl. L. 247, 256, fn. 27 (2018) (there are a "scarcity of cases from Germany" on IVF disputes due to the limitation on the number of fertilized eggs). Not unexpectedly, implantation occurs long before the parents are contemplating divorce proceedings.

{¶131} For the foregoing reasons, I respectfully dissent.

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MARY JANE TRAPP, J., concurs with a Concurring Opinion.

{¶132} While I agree with the entirety of the lead opinion's well-reasoned analysis, I write separately to address the problematic polemic from the dissent and to underscore the foundational principles of appellate review and judicial restraint guiding our disposition.

{¶133} Judicial opinions are not academic exercises; this is especially true in family law where judges are frequently presented with a dialectic. Litigants, not judges, set the

7. The approach adopted by Germany also does not diminish the opportunity for successful childbirth. A ten-year study of assisted reproductive technology success in Germany demonstrated that, "[e]ven with the restrictions in place as a result of the German Embryo Protection Law, CLBR [Cumulative Live Birth Rates] reach internationally comparable levels." (Citation omitted.) Shields at 712. Germany's IVF success rates are equal to or exceed many other European nations such as Italy, Greece, and Switzerland. Wyns, et al., *ART in Europe, 2018: results generated from European registries by ESHRE*, Human Reproduction Open, https://academic.oup.com/hropen/article/2022/3/hoac022/6628623. It is also significant that the prohibition against freezing embryos increases the success of a live pregnancy. *See* Shields at 714 ("the success rate of a live pregnancy decreases from a 36.7% chance when implanting a 'fresh' embryo, to a 30% chance when implanting a frozen embryo").

parameters of the litigation. They bring their unresolved disputes to the trial court; they frame the issues to be resolved; and they determine what evidence they will offer to support their respective arguments. The parties, the trial court, and this court are all constrained by the law as it exists rather than law we may want to exist. We are constrained by procedural and evidentiary rules that proscribe the conduct of a trial and the content of a record that may be considered upon appellate review.

{¶134} Quite simply, the law in the state of Ohio currently does not recognize a frozen embryo as having the same status as a human life born as issue of a marriage. To advocate that we may elevate the status via "judicial notice" would be the height of judicial activism.

{¶135} The public policy arguments Ms. Kotkowski-Paul advances to this court were belatedly advanced in post-trial briefs, and then only when both parties realized they inexplicably failed to produce the contract they both signed at the inception of their IVF procedure.

{¶136} Ms. Kotkowski-Paul failed to move to reopen her case to present further evidence. Ms. Kotkowski-Paul's appellate counsel admitted during oral argument that he is "not a domestic lawyer" but conceded that the rules of evidence also apply in a divorce case.

{¶137} The real issue before this court is whether Ms. Kotkowski-Paul met her burden of advancing evidentiary quality material, under the governing rules of procedure, for the trial court, as well as this court, to properly consider her "human-life" arguments. She did not.

{¶138} Ms. Kotkowski-Paul is both the movant of the "human-life" argument as well as the appellant. She failed, as a matter of evidentiary and procedural law, to place her argument properly before the trial court and, by implication, did not create an appellate record for this court to consider the same.

{¶139} The dissent wishes to appeal to politically pejorative references (analogizing the matter to Nazi-era genocide) and red-herring arguments, based upon apparent evidence dehors the record that have no bearing on the issue before the court (the self-proclaimed definitive scientific evidence that was offered via academic papers without the foundational support required under our rules of evidence).

{¶140} Judges are expected to set the tone of legal discourse. We are expected to rise above derisive political rhetoric, rise above partisan polarization, and decide cases, all cases, even those cases that present personal, religious, or moral dilemmas, on the facts and the law as it exists today and not what we would like it to be someday. Legislation is left to those in our General Assembly.

{¶141} At the final hearing, the parties were asked by the trial judge whether they wished the domestic relations court to allocate the subject frozen embryos as part of its property division. Both parties agreed they wanted the trial court to do so. The parties briefed the issue, but Ms. Kotkowski-Paul (who wished to be awarded the embryos) did not seek to reopen the final hearing to submit evidence and testimony to support her previously unraised argument that the frozen embryos are "human life."

{¶142} The dissent observes that the parties "believed there was a contract governing the disposition of the embryos but there was not." This statement is incorrect. The parties *acknowledged* the existence of an executed contract, but they simply failed

to submit it to the court to consider, despite repeated opportunities to employ court process to produce the document and/or testimony from the Cleveland Clinic via extensions of time afforded by the trial court.

{¶143} The dissent further declares "[i]t would have been reasonable for the lower court to schedule a further hearing to address [Ms. Kotkowski-Paul's 'human-life' argument]. The lower court declined to 'delve further' into [Ms. Kotkowski-Paul's] argument * * *." While the lower court *could* have requested the parties to present evidence at a formal hearing, Ms. Kotkowski-Paul was the proponent of the "human-life" argument. As such, it is not the court's responsibility to make sure her argument was legally and procedurally sufficient. It is not the trial court's duty to spoon-feed litigants the rules of proper procedure or assist them in making a record. Attorneys for parties try cases, and courts rule upon the issues submitted as the attorneys, in their judgment as advocates, deem appropriate for the court's consideration. The court did nothing wrong in adjudicating the matter on the materials submitted by counsel for both parties.

{¶144} The dissent also contends that the trial court "mistakenly claim[ed] the parties 'asserted that frozen embryos are property' – without acknowledging [Ms. Kotkowski-Paul's] argument to the contrary and without any competent evidence that the embryos are property." I take issue with this principally because the matter at issue was submitted to the domestic court in a divorce proceeding. The domestic court asked the parties if they wished to have it, in the context of the divorce proceeding, address the issue. The parties acceded. The only way in which the domestic court in a divorce proceeding *could* address the issue is by way of an allocation of marital property. Even if Ms. Kotkowski-Paul later raised her "human-life" argument as an adjunct to her original

concession that the frozen embryos were property, this does not change the jurisdictional nature of the domestic court in a divorce proceeding: When the parties agreed to have the domestic court address the issue of allocation of the frozen embryos, they also agreed, by implication, that the frozen embryos were marital property subject to division in the context of the divorce.

{¶145} We are only legally permitted to consider the record, created by the parties, which is before us. We are a court of error, not one of policy. To decide this case on issues not properly raised *or* upon evidence not properly advanced *or* upon materials dehors the record would be inconsistent with our judicial duty.

{¶146} Whether one agrees or not, frozen embryos have gained no recognition above the status of "marital property" in Ohio. Informed consent contracts relating to the disposal of frozen embryos (one of which, a blank contract, Ms. Kotkowski-Paul sought to introduce as governing in this case) have been upheld. *See Kormasu*, *supra*; *see*, *also, Cwik*, *supra.* As emphasized by the lead opinion, we do not have an executed contract in this matter. This does not change the legal reality that Ohio law does not vouchsafe frozen embryos any greater status than that of property capable of being disposed of (i.e., destroyed or donated), by way of a contract. If the General Assembly at some point decides to afford frozen embryos a higher status, this opinion would change. The legislature has not yet acted.

{¶147} In the domestic court, the trial judge was asked to allocate the subject frozen embryos as an aspect of "marital property." Because of the unique character of the embryos, it might be proper to discuss them in terms of "special property." Still, in the legal lexicon of Ohio, they are nevertheless property, and the trial court conducted a

thorough review of the law in this state and beyond, considered each and every factor demanded by Ohio law, and resolved the dispute the parties chose to leave to her discretion in a thoughtful and legally supported decision.

{¶148} With this in mind, the dissenting opinion attempts to create the false equivalency of embryos with tractors. To be sure, as a court of error, we accept the parties' wishes relating to the trial court addressing the allocation of the frozen embryos as marital property. The dissent, however, mistakenly contends that property "objects" are always the same. Of course, frozen embryos and tractors are not the same. As noted, our statutory lexicon is limited. The parties wished to have their embryos treated as property by the domestic relations court. Although the embryos may not fit within the traditional notions of "statutory property," the trial court, at the parties' request, addressed them as part of the parties' marital estate.

{¶149} Additionally, to assert the subject embryos are tantamount to tractors or vehicles is to trip on one's logical shoestrings: Just as a cat and a dolphin are not the same merely because they are designated as mammals, a frozen embryo is assuredly not equivalent to a tractor merely because it is legally understood as property.

{¶150} The dissent maintains the trial court and this court could take judicial notice of certain alleged basic "facts of biology"; namely, that the *frozen* embryos are "human life" (which the dissent apparently conflates with the phrase "legal persons"). This is, in the dissent's view, a matter of common science.

{¶151} As discussed throughout, there was *no evidence* submitted to support the conclusions contained in the academic articles. Neither the trial court nor this court are

biologists (and even if the relative courts possessed some expertise in that discipline, there was no expert testimony submitted to substantiate the proffered learned treatises).

{¶152} Finally, we only fumble down slippery slopes when we do not allow ourselves to have a clear-headed and balanced foothold. Nothing about the lead opinion's analysis, perception of the issue, or resolution of this case indicates our path would lead to genocide, eugenics, or governmental extermination squads. Put simply, had the court accepted the blank contract (as Ms. Kotkowski-Paul initially advocated), she would have been required to "dispose" of the embryos in exactly the manner the trial court ordered. It would appear such contracts have existed since the inception of IVF. Yet, there is nothing to suggest the IVF industry has attempted to commence Nazi-like experimentation on "disposed of" frozen embryos.

{¶153} The human-life argument was not preserved because Ms. Kotkowski-Paul failed to support the position with competent evidence. Ms. Kotkowski-Paul's failure to follow established procedure does not entitle her to a "do over." She was the party advancing the argument. She did not support the argument with any evidentiary quality material. The trial court adjudicated the issue, as the parties requested. Ms. Kotkowski-Paul appealed. She had the burden to *establish error*. With no record evidence to support her argument, she could not. Mr. Paul, as a non-appealing party, had no burden in these proceedings. Ms. Kotkowski-Paul did, and she failed to meet it. That is the essence of the lead opinion's disposition.

{¶154} I accordingly concur with the lead opinion.