

OPINION SUMMARY

MISSOURI COURT OF APPEALS EASTERN DISTRICT

DIVISION THREE

JALESIA MCQUEEN,)	No. ED103138
)	
Appellant,)	Appeal from the Circuit Court
)	of St. Louis County
vs.)	13SL-DR06185
)	
JUSTIN GADBERRY,)	Honorable Douglas R. Beach
)	
Respondent.)	Filed: November 15, 2016

Jalesia McQueen appeals the portion of the trial court's judgment dissolving her marriage to Justin Gadberry, following a bench trial, pertaining to the disposition of two pre-embryos which were frozen after McQueen and Gadberry began the process of *in vitro* fertilization. The trial court's judgment found the frozen pre-embryos are marital property of a *special character*, awarded the frozen pre-embryos to Gadberry and McQueen jointly, and ordered that "no transfer, release, or use of the frozen [pre-]embryos shall occur without the signed authorization of both [Gadberry] and [McQueen]." The trial court also found "[Gadberry's] and [McQueen's] fundamental constitutional rights to privacy and equal protection under the 14th Amendment to the U.S. Constitution will be violated if either is forced to procreate against his or her wishes."

On appeal, McQueen argues, (1) the trial court erred in classifying the frozen pre-embryos as marital property of a *special character* instead of children under Missouri's dissolution statutes (Chapter 452); (2) the trial court erred in failing to require the guardian ad litem ("GAL") to advocate for the "best interests" of the frozen pre-embryos; and (3) assuming the frozen pre-embryos were appropriately characterized as property of a *special character*, the trial court erred in awarding the frozen pre-embryos to the parties jointly.

AFFIRMED.

Division Three holds:

- (1) The trial court did not err in classifying the frozen pre-embryos as marital property of a *special character* instead of children under Chapter 452 because:
 - (a) When weighed against the interests of McQueen and Gadberry and the responsibilities inherent in parenthood, the General Assembly's declarations in section 1.205 RSMo 2000¹ relating to the potential life of the frozen pre-embryos are not sufficient to justify any infringement upon the freedom and privacy of Gadberry and McQueen to make their own intimate decisions;

¹ Unless otherwise indicated, all further statutory references are to RSMo 2000.

- (b) Gadberry and McQueen alone should decide whether to allow a process to continue that may result in such a dramatic change in their lives as becoming parents;
 - (c) An application of section 1.205, including declarations that life begins at conception/fertilization, to the frozen pre-embryos and to Missouri's dissolution statutes under the circumstances of this case, (i) would be contrary to U.S. Supreme Court decisions interpreting the U.S. Constitution; and (ii) would violate Gadberry's constitutional right to privacy, right to be free from governmental interference, and right not to procreate; and
 - (d) The trial court's judgment is consistent with broad definitions of "marital property" and "property" and is consistent with the principle that frozen pre-embryos are entitled to a special respect.
- (2) The trial court did not have the authority under section 452.423.1 RSMo Supp. 2010 to appoint a GAL for the frozen pre-embryos because custody, visitation, or support of *children* were not contested issues in this case. Therefore, McQueen's argument that the trial court erred in failing to require the GAL to advocate for the "best interests" of the frozen pre-embryos has no merit.
- (3) The trial court did not err in awarding the frozen pre-embryos to the parties jointly because:
- (a) McQueen has not proven by clear and convincing evidence that the Fairfax Cryobank Directive Regarding the Disposition of Embryos completed by the parties is a valid and enforceable agreement under section 452.330.2(4) which renders the frozen pre-embryos separate property to be awarded to McQueen under the circumstances of this case;
 - (b) The circumstances of this case are unusual because frozen pre-embryos are unlike traditional forms of property, and the frozen pre-embryos in this case are not easily susceptible to a just division; and
 - (c) The trial court's judgment – awarding the frozen pre-embryos to Gadberry and McQueen jointly, and ordering that "no transfer, release, or use of the frozen [pre-]embryos shall occur without the signed authorization of both [Gadberry] and [McQueen]" – subjects neither party to any unwarranted governmental intrusion but rather leaves the intimate decision of whether to potentially have more children to the parties alone.

Opinion by: Robert M. Clayton III, J.
Lisa S. Van Amburg, P.J., concurs.
James M. Dowd, J., dissents in a separate opinion.

Attorney for Appellant: Stephen R. Clark, Adam S. Hochschild, John M. Faust
Attorney for Respondent: Tim R. Schlesinger, Alan E. Freed, Terri J. Johnson

THIS SUMMARY IS NOT PART OF THE OPINION OF THE COURT. IT HAS BEEN PREPARED FOR THE CONVENIENCE OF THE READER AND SHOULD NOT BE QUOTED OR CITED.