

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

SAMANTHA REEDER,	:	APPEAL NO. C-220631
	:	TRIAL NO. DR-2102058
Plaintiff-Appellee,	:	
	:	<i>OPINION.</i>
vs.	:	
MICHAEL REEDER,	:	
	:	
Defendant-Appellant.	:	

Appeal From: Hamilton County Court of Common Pleas, Domestic Relations
Division

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: August 2, 2023

Katz, Teller, Brant & Hild, LPA and *Wijdan Jreisat*, for Defendant-Appellant,
Moskowitz & Moskowitz, LLC and *James H. Moskowitz*, for Plaintiff-Appellee.

KINSLEY, Judge.

{¶1} Defendant-appellant Michael Reeder appeals the decision of the Hamilton County Domestic Relations Court awarding plaintiff-appellee Samantha Reeder possession of the parties’ frozen embryo and the ability to use that embryo to achieve pregnancy without Michael’s express, written consent.¹ Because the cryopreservation contract prohibits use of the embryo by either party to achieve pregnancy without the other party’s consent, we reverse the judgment of the trial court and remand the cause for further proceedings.

Factual and Procedural Background

{¶2} Michael and Samantha were married on October 8, 2016. After a few years of trying to have children without assistance, they underwent in vitro fertilization (“IVF”) treatment at The Fertility Wellness Institute (“FWI”). The IVF treatment was successful and produced one child of the marriage in September 2021. Three months later, Samantha filed for divorce. The parties entered into a separation agreement and parenting plan that resolved all the marital disputes except the disposition of the parties’ singular embryo stored at FWI’s facility.

{¶3} FWI required the parties to sign several documents before they could commence IVF treatment. Relevant to this appeal, the couple were offered the option to freeze their embryos (“cryopreservation”). To engage in cryopreservation, the parties executed a document entitled “Consent to Cryopreservation (Freezing) and Storage of Embryo(s)” (“contract” or “cryopreservation contract”). The cryopreservation contract required the parties to read the document carefully, initial each page, check a box to indicate which option for disposition of the embryo they preferred in the event of death or divorce or discontinuation of treatment, and sign

¹ Because Samantha and Michael share a last name in these proceedings, we refer to them by their first names in this opinion.

the final page. The parties testified they each voluntarily read, checked, initialed, and signed the document.

a. The Contract

{¶4} The cryopreservation contract was structured in sections. It began by discussing the process of cryopreservation, its indications, and its risks. It then contained a section governing the disposition of embryos. This section of the contract outlined general terms that apply to all dispositions, followed by a series of choices the parties could make to direct what happens to the embryo should different life events occur in the future.

{¶5} Before the section containing the parties' choices, the contract set forth several prefatory terms regarding embryo disposition. First, the contract explained that the parties had three possible choices in the case of certain life events, including the death of the patient or partner, simultaneous death of patient and partner, divorce or dissolution of relationship, or discontinuation of IVF treatment: (1) destroying the embryo, (2) donating the embryo with additional testing from the genetic progenitors, or (3) using the embryo **“with the permission of the other [partner] to achieve pregnancy.”** (Emphasis added.)

{¶6} In a separate section, which came before the parties' choices for disposition of the embryo and after the warning to read carefully, the contract stated: “Embryos cannot be used to produce pregnancy against the wishes of one of the partners. For example, in the event of a separation or divorce, **embryos cannot be used to create a pregnancy without the express, written consent of both parties * * ***” (Emphasis added.)

{¶7} The contract further explained that by initialing and placing a check mark next to their choices, the parties “authorized [FWI] to act” on those choices, “so far as it is practical” and advised the parties to “read carefully.”

{¶8} The dispositional options available for “divorce or dissolution of

relationship” were:

- 1) A court decree and/or settlement agreement will be presented to the Fertility Wellness Institute directing them to achieve pregnancy in one of us.
- 2) Donate anonymously or to another couple or individual designated by us to receive the embryo(s) for reproductive purposes. An appropriate agreement must be signed by both patient and partner, notarized by a notary public or witness by the staff of the [FWI].
- 3) Destroy the embryo(s).

{¶9} The last page of the contract contained the parties’ electronic signatures under a paragraph stating:

Our signatures below certify the disposition selections we have made above. We understand that we can change our selections in the future, but need mutual and written agreement as outlined above. We also understand **that in the event that none of our elected choices is available, The Fertility Wellness Institute is authorized, without further notice from us, to destroy and discard our frozen embryo(s).** (Emphasis added.)

b. The Parties’ Choice

{¶10} Michael and Samantha acknowledge that they could not proceed with the cryopreservation process unless they chose the same option for each life event. Their choices were indicated by a checkbox and could only be changed with a subsequent written agreement signed by both parties in front of FWI staff or a notary public and submitted to FWI.

{¶11} With regard to the possibility of the couple’s divorce, Michael and Samantha “agree[d] that the embryo(s) should be disposed of in the following manner” and selected, “A court decree and/or settlement agreement will be

presented to The Fertility Wellness Institute directing them **to achieve pregnancy in one of us.**” (Emphasis added.)

{¶12} Both Michael and Samantha initialed the bottom of the page, but they now dispute whether they consented to each other’s use of the embryo when they selected the disposition of the embryo upon divorce in the cryopreservation agreement, or whether the “permission” and “express, written consent” provisions (together “consent provisions”) require an additional written document showing they consented to the other’s use of the embryo.

c. The Parties’ Positions

{¶13} Michael and Samantha agree that the contract was properly formed and is enforceable but disagree over the contract’s interpretation.

{¶14} Michael argues the contract does not permit the use of the embryo without the consent of both parties. He contends that his checkmark next to the “court decree” option is insufficient to represent his indefinite express, written consent to any future pregnancies and, further, that a plain reading of the contract does not allow one party to use the embryo to achieve pregnancy without the other party’s permission.

{¶15} Samantha argues that the contract demonstrates the express, written consent of both parties and because the parties selected the “court decree” option, the embryo should be awarded to one of the parties and that party should be allowed to use the embryo unilaterally to achieve pregnancy based solely on that award. Samantha argues that the consent provisions serve only as a preamble to the parties’ selections.

{¶16} At the magistrate’s hearing, Michael asked that the embryo be donated or destroyed, while Samantha asked for possession of the embryo to use to achieve pregnancy. Thus, Samantha was the only party to request a court order awarding possession of the embryo consistent with the parties’ contractual selection.

{¶17} The magistrate found the parties had the option to select donation or destruction but did not. The magistrate also determined that the selection of the parties in the event of divorce or dissolution was clear and unambiguous, and expressed the intent of the parties to receive a court decree to achieve pregnancy in one of them. Because only Samantha asked to use the embryo, the magistrate awarded possession of the embryo to Samantha. The magistrate further ordered that Samantha could use the awarded embryo immediately to achieve pregnancy if she so wished despite Michael's non-consent.

{¶18} Michael timely filed an objection to the magistrate's decision, arguing that the magistrate "rendered meaningless" the provisions of the contract that articulated the consent requirements. Michael argued the contractual language prevented Samantha from using the embryo to achieve a pregnancy without an additional document that articulated Michael's express, written consent. Michael asked the trial court to order that the embryo be donated instead of awarded to Samantha.

{¶19} On December 5, 2022, the trial court affirmed the magistrate's decision awarding the embryo to Samantha and granting her the immediate use of the embryo to achieve pregnancy. The trial court found that the parties had expressed their intent to rely on a court decree to achieve pregnancy in one of the parties in the event of a divorce rather than selecting donation or destruction. Because the parties had selected the option to use the embryo rather than donate or destroy it, the trial court concluded the parties had expressly consented to the other's use of the embryo if awarded by a court. Michael moved to stay the order granting Samantha immediate use of the embryo pending appeal, which was granted on January 20, 2022. This timely appeal followed.

Analysis

{¶20} Michael asserts two assignments of error for this court's review. First,

he argues that the trial court erred as a matter of law in interpreting the cryopreservation contract to allow Samantha to use the embryo to achieve pregnancy without his express, written consent. Second, Michael argues that the trial court abused its discretion when it awarded the embryo to Samantha and allowed her to use the embryo to achieve a pregnancy over Michael's objection. We review these arguments in order.

a. Contract Interpretation

{¶21} In his first assignment of error, Michael argues that the trial court erred as a matter of law when it interpreted the parties' contract to allow Samantha to use the frozen embryo to achieve pregnancy without his express, written consent.

{¶22} Contract interpretation is a matter of law we review de novo. *City of St. Marys v. Auglaize Cty. Bd. of Comm'rs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶ 38; *Eagle Realty Invest., Inc. v. Dumon*, 1st Dist. Hamilton Nos. C-22087, C-220109 and C-220111, 2022-Ohio-4106, ¶ 10.

{¶23} A fertility clinic's contract outlining the disposition or allocation of embryos is enforceable against the parties unless the contract is ambiguous and unclear. *Kotkowski-Paul v. Paul*, 2022-Ohio-4567, 204 N.E.3d 66, ¶ 25, 50, *appeal not accepted*, 169 Ohio St.3d 1490, 2023-Ohio-1149, 206 N.E.3d 741; *see Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 138 Ohio App.3d 57, 74, 740 N.E.2d 328 (4th Dist.2000) (noting that contract ambiguity is a question of fact that can only be reversed if supported by competent, credible evidence and terms are only ambiguous if their meaning cannot be understood from reading the whole contract or if there is more than one reasonable interpretation).

{¶24} Our review of embryo disputes is governed by the clear and unambiguous terms of the parties' contract. *Cwik v. Cwik*, 1st Dist. Hamilton No. C-0908843, 2011-Ohio-463, ¶ 64; *see Karmasu v. Karmasu*, 5th Dist. Stark No. 2008 CA 00231, 2009-Ohio-5252, ¶ 38.

{¶25} Language and terms are clear and unambiguous as a matter of law if they can be given “a definite legal meaning,” that is understood through “their plain, common, and ordinary meanings.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11; *McClore v. Hamilton Cty. Bd. of Elections*, 130 Ohio App.3d. 621, 625, 720 N.E.2d 954 (1998).

{¶26} Where the contract’s terms are unambiguous, we “cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties.” *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 246, 374 N.E.2d 146 (1978). To determine the parties’ intent, we consider “the language of a particular provision, the language of an entire agreement, or the subject matter of an agreement.” *Eagle Realty Invest.*, 1st Dist. Hamilton Nos. C-22087, C-220109 and C-220111, 2022-Ohio-4106, at ¶ 12, quoting *Campbell v. George J. Igel & Co.*, 4th Dist. Hocking No. 13CA4, 2013-Ohio-3584, ¶ 13. A written contract “will be read as a whole, and the intent of each part will be gathered from a consideration of the whole.” *McClore* at 625.

{¶27} A reviewing court should “harmonize provisions and words so that every word is given effect” and avoid “any interpretation of a contract that would render terms or provisions superfluous or meaningless.” *Eagle Realty Invest.* at ¶ 12; *Bates v. Bates*, 7th Dist. Noble No. 21NO0482, 2022-Ohio-1055, ¶ 38; *Kent State Univ. v. Bradley Univ.*, 11th Dist. Portage No. 2017-P-0056, 2019-Ohio-2088, ¶ 39 quoting *Christe v. GMS Mgt. Co.*, 124 Ohio App.3d 84, 88, 705 N.E.2d 691 (9th Dist.1997).

{¶28} Clearly, the contract of the parties is their express, written consent to engage in cryopreservation as part of their IVF treatment. The primary question in this case is whether the contract is the express, written consent of the parties to use the embryo should the other partner wish to achieve pregnancy in the case of divorce or whether the contract requires a showing of “express, written consent” separate

from the contract.

{¶29} When the contract provisions are read as a whole, we hold that the contract requires a separate writing expressing the consent of the parties to allow one partner to use the embryo to achieve pregnancy.

{¶30} Samantha argues that Michael’s selection of the court decree/settlement agreement option in the event of divorce represents his consent to pregnancy in the future. However, the parties’ checked box under the “Divorce or Dissolution of Relationship” section cannot be understood as their express, written consent to the use of the embryo to achieve pregnancy when read in conjunction with the other provisions of the contract.

{¶31} Checkboxes are “a material part of * * * contracts and the presence or absence of a checkbox can make a significant impact on the document.” *Home Loan Sav. Bank v. Jahweh LLC*, 5th Dist. Coshocton No. 2022CA0001, 2022-Ohio-1118, ¶ 22-23; *PNC Bank, N.A. v. May*, 8th Dist. Cuyahoga No. 98071, 2012-Ohio-3768, ¶ 16, 27. However, checked boxes, like all contract provisions, must still be read in the context of the entire contract. *See McClorey*, 130 Ohio App.3d. at 625, 720 N.E.2d 954; *Eagle Realty Invest., Inc.*, 1st Dist. Hamilton Nos. C-22087, C-220109 and C-220111, 2022-Ohio-4106, at ¶ 12.

{¶32} This contract notes in several places, all preceding the dispositional choices, that one party cannot use the embryo to achieve pregnancy without the other party’s consent. First, the contract noted that one of the current dispositional alternatives allows an embryo to be “use[d] by one partner **with the permission of the other** to achieve pregnancy.” (Emphasis added.) Next, the contract stated that FWI “is authorized to act on our [the parties’] choices indicated below, so far as it is practical.” However, before the parties’ choices, the contract again articulated:

Embryos cannot be used to produce pregnancy against the wishes of one of the partners. For example, in the event of a

separation or divorce, the **embryos cannot be used to create a pregnancy without the express, written consent of both parties**, even if donor gametes were used to create the embryo.

(Emphasis added.)

{¶33} This language is similar to contract language at issue in an Arizona Supreme Court case where one partner wanted to use the couple’s embryo to achieve a pregnancy while the other partner objected. *Terrell v. Torres*, 248 Ariz. 47, 48, 456 P.3d 13 (2020). In *Terrell*, the contract stated that the parties’ embryo could be “use[d] by one partner with the contemporaneous permission of the other” but also found that the contract “noted”:

Embryos cannot be used to produce pregnancy against the wishes of the partner. For example, in the event of a separation or divorce, embryos cannot be used to create a pregnancy without the express, written consent of both parties, even if donor gametes were used to create the embryos.

Id. at 50.

{¶34} The parties in *Terrell* agreed the embryo’s disposition would be determined through “[a] court decree and/or settlement agreement * * * presented to the Clinic directing use to achieve a pregnancy in one of [them] or donation to another couple for that purpose.” *Id.* at 48.

{¶35} Because the parties did not contemporaneously agree to unilaterally awarding the embryo to one of them to achieve pregnancy, the Arizona Supreme Court found that the parties were required to donate the embryo per the language of their contract. *Id.* at 52.

{¶36} While the *Terrell* contract is not equivalent to the contract before us, it is instructive on how we should interpret the consent provisions.

{¶37} Similar to the contract in *Terrell*, Michael and Samantha’s contract did

not contain language indicating their express consent to a pregnancy within the option for a court decree if the parties divorced. Rather, the parties' contract warned that each party would need the "permission" of the other to achieve pregnancy and that such permission must be granted through a written document showing both parties' express consent. Therefore, the parties' choice to seek a "court decree * * * directing use to achieve pregnancy" is best understood as merely excluding the other alternatives, which were immediate donation or destruction of the embryo.

{¶38} This conclusion is supported by the fact that the contract anticipated that the option of future pregnancy might not be available to the parties. For example, FWI recognized it could only act on the parties' choices "so far as it is practical" and placed this phrase between the consent provisions. This placement and the limitation of FWI's actions to that which is "practical" supports a reading of the contract to require "express, written consent" to be additional to the parties' cryopreservation contract.

{¶39} In addition, the contract contemplated what might occur should "a court decree * * * directing use to achieve pregnancy" not be an available option. To that end, the default disposition, to which Michael and Samantha agreed, allowed FWI to destroy the embryo should the parties' choice become unavailable. The existence of this provision demonstrates that the contract envisioned one party or the other withholding express, written consent to a pregnancy in the event of divorce and provides an alternative disposition in that scenario.²

{¶40} We therefore harmonize the contract, as the law requires us to do, and hold that the terms requiring the express, written consent of both parties as a condition of use of the embryo to achieve pregnancy apply to the parties'

² We express no opinion at this time as to the applicability of the default disposition. The parties have not raised that issue in this appeal, and we decline to address it. Thus, we do not resolve whether the embryo is subject to destruction if the parties' selection of a court decree or settlement agreement for use to achieve pregnancy is unavailable.

dispositional choice on divorce. *See Eagle Realty Invest., Inc.*, 1st Dist. Hamilton Nos. C-22087, C-220109 and C-220111, 2022-Ohio-4106, at ¶ 12. In so doing, we do not render that choice meaningless. The box checked by Michael and Samantha can still be understood as an agreement to exclude donation of the embryo as a disposition. Furthermore, consistent with principles of contract interpretation, this reading of the contract gives every word effect, including the prefatory provisions that require express, written consent of both parties before one of them can attempt to achieve pregnancy. *See McClorey*, 130 Ohio App. 3d. at 625, 720 N.E.2d 954.

{¶41} Because we hold that the trial court erred in interpreting the parties' cryopreservation contract, we sustain Michael's first assignment of error.

b. Awarding the Embryo under the Contract

{¶42} In his second assignment of error, Michael argues that the court abused its discretion when it awarded the couple's remaining embryo to Samantha and allowed her to immediately use it to achieve pregnancy. Because we have sustained Michael's first assignment of error, this challenge is moot, and we decline to address it.

Conclusion

{¶43} Because the trial court erroneously interpreted the checked box in the parties' contract as the parties' express, written consent to the other's use of the embryo to achieve pregnancy, we reverse the trial court's judgment and remand the cause for further proceedings consistent with this opinion and the law.

Judgment reversed and cause remanded.

CROUSE, P.J., and WINKLER, J., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.